LEGAL HORIZONS

scientific and practical law journal

2024

3

ISSN: 2519-2353

ISSN: 2519-2353

Ministry of Education and Science of Ukraine
Scientific Institution «Legal Horizons»

LEGAL HORIZONS

Research-to-Practice Journal on Legal Science

Founded in 2008
Published four times per year

Vol. 22, No. 3

Kyiv – 2024

ISSN: 2519-2353

Certificate of state registrationof the print media
Series: KV No. 24828-14768 PR dated 21.04.2021

Collection of scientific works included in List of professional publications of Ukraine (Category "B")
in Law Sciences (Order of the Ministry of Education and Science of Ukraine No. 996 of July 11, 2017)

The collection is presentedin the following scientometric databases:
Index Copernicus, Google Scholar, Crossref, DOAJ,
VNLU, Sumy State University Repository

Legal Horizons: Research-to-Practice Journal on Legal Science / Ed. col.:
Yurii V. Harust (Ed.) et al.
Sumy: Academic and Research Institute of Law
of the Sumy State University
Vol. 22. No. 3. 89 p.
2024.

Founder and publisher:
Scientific Institution «Legal Horizons»
Kyiv, Ukraine
E-mail: info@legalhorizons.com.ua
www: https://legalhorizons.com.ua/en

FOREWORD

It is with great pleasure that we present Volume 22, Issue 3 of Legal Horizons, a compilation of thought-provoking and timely legal scholarship that addresses a wide array of contemporary legal challenges. This edition features insightful contributions from distinguished scholars across various jurisdictions, offering critical analyses and comparative perspectives on pressing legal issues.

The issue begins with **G. Sobko**'s article "**MENTAL COERCION AS A CIRCUMSTANCE EXCLUDING THE CRIMINALITY OF AN ACT IN THE COMMISSION OF A CRIME THAT INFRINGES ON LIFE"** examination of mental coercion as a circumstance excluding the criminality of an act in the commission of a crime that infringes on life. This article provides an in-depth exploration of how mental coercion may serve as a legal defense and its implications within criminal law doctrine.

Building on the theme of criminal justice, **F.A. Pascawati, P. Djatmika,** and **M. Istiqomah** analyze the urgency of exclusionary rules regulation in the Indonesian criminal justice system. Their study **"URGENCY OF EXCLUSIONARY RULES REGULATION IN INDONESIAN CRIMINAL JUSTICE SYSTEM"** evaluates the necessity of clear legal frameworks governing the admissibility of evidence obtained through unlawful means, a crucial issue in ensuring due process and the protection of fundamental rights.

V. Hudz in **"EXPERT CONCLUSION AS A KEY SOURCE OF EVIDENCE IN CASES OF CORRUPTION OFFENSES BY OFFICIALS"** delves into expert conclusions as key sources of evidence in cases of corruption offenses by officials, highlighting the essential role expert testimony plays in securing convictions and ensuring judicial integrity in corruption-related cases.

The issue also addresses juvenile justice concerns, with **F.F. Yan Putri, P. Djatmika,** and Y. Cholil discussing in their article **"MINIMUM AGE LIMIT OF CRIMINAL RESPONSIBILITY FOR CHILD DRUG COURIERS BASED ON THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD"** the minimum age limit of criminal responsibility for child drug couriers based on the principle of the best interest of the child. Their research underscores the complexities of balancing legal accountability with the protection of children from criminal exploitation.

From a civil law perspective, **P.R. Permatasari, R. Sulistyarini,** and **Y.E. Widyanti** conduct in research **"RATIO DECIDENDI ANALYSIS IN THE SETTLEMENT OF MARITAL PROPERTY DISPUTES: IMPLICATIONS FOR LEGAL PRACTICE IN INDONESIA"** a ratio decidendi analysis in the settlement of marital property disputes, exploring how judicial reasoning shapes outcomes and implications for legal practice in Indonesia.

Shifting focus to administrative law, **I. Zhukova** in **"PROPOSALS FOR TRANSFORMING THE STAGES OF REGISTRATION IN PUBLIC ADMINISTRATION GENERAL SECONDARY EDUCATION"** proposes transformative measures for the registration stages in public administration within general secondary education, advocating for improved efficiency and legal clarity in regulatory frameworks.

Lastly, **V. Shcherbyna** presents in **"ALIGNING UKRAINIAN LABOR LEGISLATION WITH EU STANDARDS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND PREDICTABILITY IN EMPLOYMENT CONDITIONS"** a comparative analysis of aligning Ukrainian labor legislation with EU standards, particularly regarding transparency and predictability in employment conditions. This study offers valuable insights into Ukraine's legal harmonization efforts within the European legal landscape.

We hope that this issue of Legal Horizons will contribute to meaningful legal discourse and inspire further aademic and practical developments. We extend our sincere gratitude to the authors, peer reviewers, and editorial board members for their invaluable contributions.

Yurii Harust,
Editor-in-Chief
Legal Horizons

CONTENTS

Sobko, G. (2024). Mental coercion as a circumstance excluding the criminality of an act in the commission of a crime that infringes on life. *Legal Horizons, 22*(3), 9-19. https://doi.org/10.54477/LH.25192353.2024.3.pp.9-19

MENTAL COERCION AS A CIRCUMSTANCE EXCLUDING THE CRIMINALITY OF AN ACT IN THE COMMISSION OF A CRIME THAT INFRINGES ON LIFE

Ganna Sobko

Department of Criminal Law and Criminology

Odesa State University of Internal Affairs

65000, 1 Uspenska Str., Odesa, Ukraine

e-mail: g-sobko@edu.cn.ua

https://orcid.org/0000-0002-5938-3400

Abstract

The article is devoted to the existence of the criminal law institute "Circumstances excluding the criminality of an act" at the legislative level, which was enshrined in the new Criminal Code adopted by the Verkhovna Rada of Ukraine on April 5, 2001. This institute has undergone the largest update and amendments in the Criminal Code of Ukraine, so some of the circumstances provided for in it require further development, analysis and clarification. In its turn, the Criminal Code of 1960 provided for three circumstances that exclude the criminality of an act: extreme necessity, necessary defense and apprehension of the offender. However, criminal law has also studied other circumstances that exclude the criminality of an act that were not directly enshrined in the Criminal Code. Understanding and defining the circumstances excluding the criminality of an act is of great practical and scientific importance. The main function of such a definition is to reflect the objectively real circumstances that characterize these circumstances. The concept of these circumstances, based on the generic properties (features, attributes) of individual species, promotes differences and disagreements and emphasizes what they have in common. Thus, the basis of this concept is the defining and essential properties of the circumstances under consideration. The author examines violence as a circumstance which excludes the criminality of an act, and analyzes its significance in the context of behavior of a person who committed a certain act due to the relevant influence which he/she was unable to resist. An example is the case when a person pushed the victim, and as a result, the latter's health was harmed. The model of this article is specified in Part 1 of Article 40 of the Criminal Code of Ukraine, and such an act of a perpetrator in the theory of criminal law is called irresistible physical coercion. First of all, we note that there is a feature which unites all the circumstances excluding the criminality of an act, which includes the legitimacy of causing harm to the interests protected by criminal law, which is the functional purpose of criminal law. The author proves that in order to exclude subjectivity of a judge as much as possible, it is necessary to legislatively regulate the concepts of physical and non-physical violence, and also to identify the general features which will characterize non-physical violence and exclude liability of a person for actions committed under its influence. Another pressing issue that requires special attention is the clear regulation of a person's liability for an act or omission committed under the influence of non-physical violence. The author believes that such a person is not subject to criminal liability for a committed criminal offense, since when a person is subjected to non-physical violence, he or she cannot control his or her actions. Therefore, in our opinion, it would be quite logical to legislate the exemption of a person from liability for acts committed under the influence of non-physical violence. The author proposes a new version of Article 40 of the Criminal Code of Ukraine.

Key words: coercion; crimes that infringe on life; strong emotional distress; circumstances excluding the criminality of an act

1. Introduction

The status of a state governed by the rule of law obliges Ukraine to provide equal protection to both the rights of the victim of mental violence and the rights of the perpetrator of such violence. The phenomenon of psychological violence is closely related to human security and peace of mind (Kvasha, 2015). The changes made to the current Criminal Code of Ukraine (amendments to the articles of the Special Part of the Criminal Code of Ukraine, direct enshrining of mental coercion as a circumstance excluding the criminality of an act) have significantly affected the criminal law support in this area. However, the Code has significant shortcomings in the regulation of mental violence, in particular, in terms of terminology. For example, the Code does not contain a definition of mental violence. This is a consequence of the incomplete and superficial reflection of psychological categories in criminal law (Hurtovenko, 2008).

There is also considerable controversy regarding Article 40 of the Criminal Code of Ukraine "Physical or mental coercion", which, in turn, requires a thorough study. According to Part 1 of Art. 40 of the Criminal Code of Ukraine, an act or omission that harms law enforcement interests and is committed under the pressure of physical coercion, as a result of which a person is unable to control his or her actions, is not recognized as a criminal offense. Part 2 of this Article specifies another type of coercion - mental coercion.

In a state governed by the rule of law, it is essential to balance the protection of individual rights equitably—ensuring that both victims and perpetrators of offenses receive fair consideration. This principle is particularly pertinent in the context of psychological violence, which significantly impacts human security and mental well-being. Recent amendments to the Criminal Code of Ukraine have introduced notable changes aimed at addressing mental coercion, such as recognizing it as a circumstance that can exclude the criminality of an act. Despite these advancements, significant gaps remain, particularly concerning the legal definitions and terminologies related to mental violence (Hurtovenko, 2012).

The Criminal Code of Ukraine's current provisions reveal a substantial shortfall in adequately defining and regulating mental violence. For instance, the Code lacks a precise definition of mental violence, reflecting a broader issue of insufficient integration of psychological concepts within criminal law (Lisova, 2007). This inadequacy complicates the legal assessment of acts committed under mental coercion, as articulated in Article 40 of the Criminal Code, which distinguishes between physical and mental coercion but remains ambiguous in application.

Scholarly contributions have been pivotal in exploring the theoretical underpinnings of circumstances excluding the criminality of an act. Notable researchers like Anchukova (2004), Baulin (2014) , Iushchyk (2003) and others have extensively analyzed these concepts, but the specific role and regulation of mental coercion remain underexplored. The theoretical framework suggests that while mental coercion is recognized as an independent circumstance excluding criminal liability, the practical application of this concept is fraught with challenges (Omar, 2003).

The legal distinction between physical and mental coercion is critical. Physical coercion involves actions that completely override a person's control, while mental coercion, although severe, does not entirely eliminate a person's volition. This distinction is crucial for understanding how mental coercion should be treated under criminal law, especially when the coercion does not fully incapacitate the individual's ability to act according to their own will.

This introduction sets the stage for a detailed examination of the Criminal Code's current provisions, the gaps in the legal definitions of mental violence, and the practical challenges faced in applying these concepts in judicial proceedings. The proposed reforms aim to address these shortcomings by clarifying the definitions and criteria associated with mental coercion, ensuring that the law adequately protects both victims and perpetrators in a manner consistent with modern legal and psychological understanding.

2. Literature review

The examination of circumstances excluding the criminality of an act within Ukrainian criminal law has garnered considerable scholarly attention. Central to this field are works by notable scholars who have explored various theoretical and practical aspects of these legal circumstances. This review synthesizes key contributions from the literature, focusing on the treatment of mental coercion and mental violence as circumstances excluding criminal liability.

The foundational works of Anchukova (2004), Baulin (2014), Bodnaruk (2012), Iakimets (2008) and others provide critical insights into how these circumstances are integrated into the legal system. They collectively contribute to our understanding of various factors that might exclude criminal liability, including self-defense, necessity, and lawful acts.

Scholars like Burdin (2013) and Iarmysh (2002) have made notable contributions in this area, but their studies do not fully address the complexities and legal implications of these factors. Mental coercion, in particular, poses unique challenges in its conceptualization and application within the criminal justice system.

While the literature provides a robust theoretical foundation, comprehensive studies specifically addressing mental coercion and mental violence as circumstances excluding criminal liability are limited. Notably, Burdin have partially explored these issues: touches on the role of mental coercion but lacks a thorough exploration of its legal ramifications and provides some insights into mental violence but does not offer a comprehensive analysis of its role in excluding criminal liability.

Scientific research has focused on understanding the essence of circumstances excluding the criminality of an act and their criminal law characterization.

Today, the role of mental coercion and mental violence as circumstances excluding the criminality of an act has not been fundamentally and comprehensively studied. Only partially this issue was considered in the works of Burdin (2013) and Iarmysh (2002).

The literature on circumstances excluding criminality in Ukrainian criminal law reveals a foundational understanding provided by key scholars. However, the specific treatment of mental coercion and mental violence remains underexplored. There is a need for more detailed and comprehensive research to address these gaps and refine legal definitions and applications related to mental coercion. Future research should focus on developing clearer legal standards and improving the practical application of these circumstances in criminal cases.

3. Circumstances excluding criminality

Thus, the Criminal Code of Ukraine of 2001 for the first time provided for seven

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.9-19

circumstances that exclude the criminality of an act, instead of three. Such circumstances are enshrined in Section VIII of the CC of Ukraine (Circumstances that exclude the criminality of an act), and certain types are regulated by the Resolution of the Plenum of the SCU of December 23, 2005 No. 14 "On the practice of application of legislation by the courts of Ukraine in cases of certain crimes against road safety and transport operation, as well as administrative offenses on transport", Resolution of the Plenum of the Supreme Court of Ukraine No. 7 'On judicial practice in cases of necessary defense', Resolution of the Plenum of the Supreme Court of Ukraine No. 8 'On application by the courts of legislation providing for liability for encroachment on life, health, dignity and property of judges and law enforcement officers' of April 26, 1992.

We support the position of Baulin (2014), who divides them into lawful acts that exclude criminality, acts that are the exercise by a person of his subjective right (necessary defense, harm to the person who committed a criminal offense during his detention, extreme necessity, reasonable risk), or the performance of legal duties (execution of an order or instruction, performance of professional, official, military and other duties), or the performance of official duty (professional risk, use of official authority to use physical force, special means of restraint, etc.).

It is generally accepted that circumstances excluding the criminality of an act are divided into two groups: socially useful (necessary defense and apprehension of the offender) and all other circumstances that are proposed to be recognized as lawful, non-criminal, but socially unhelpful (imaginary defense, physical and mental coercion, and all others).

Given that the scientific literature contains many concepts of circumstances excluding the criminality of an act, it makes sense to propose to consolidate a single definition in section 13 "Circumstances excluding the criminality of an act". Circumstances excluding the criminality of an act traditionally include lawful acts that, although enshrined in criminal law (administrative law), are not aimed at causing harm to protected rights, but, on the contrary, at protecting or preventing an attack or harm that could be caused as a result of a criminal offense.

Mental coercion is also recognized as an independent circumstance that excludes the criminality of an act. On the one hand, the legislator's opinion is quite reasonable and is conditioned by the modern development of society, science, peculiarities of law enforcement, etc. On the other hand, the legislator has not sufficiently developed the relevant criminal law provisions. This causes difficulties in qualifying misconduct and resolving the issue of bringing or releasing a person from criminal liability. Such difficulties also arise in the legal assessment of a person's behavior committed under mental duress (Zhdanova, 2011).

Mental coercion violates social relations protected by the current legislation and causes or may cause harm to a legal or natural person, the state or society. Part 2 of Art. 40 of the CC provides for objective signs of mental coercion, which are similar to the objective signs of irresistible physical coercion. However, the signs of mental coercion and signs of physical coercion differ significantly in the context of a socially dangerous act: a person commits this act due to the impact on the bodily integrity or freedom of another person, and therefore cannot control his or her actions (inaction) (Sobko et al., 2024).

However, in this case, the damage caused must be assessed taking into account the extreme necessity (Article 39 of the Criminal Code), i.e. the damage caused must be less than the damage prevented. And the impossibility of eliminating this physical coercion by another person(s) by other means is a prerequisite for the circumstance.

The subject of overcome mental coercion is a physical sane person who has committed a socially dangerous act under the influence of physical or mental coercion, at the age of tort capacity. The subjects of physical or mental coercion may not be insane persons, as well as persons who have not reached the age of legal capacity. Such persons may be subjected to compulsory medical or educational measures.

The subjective signs of overwhelming mental coercion regulated by Part 2 of Article 40 of the CC include the following (Plysiuk, 2011). The intellectual aspect characterizes the person's awareness of the social danger of the act that he or she must perform under the influence of overwhelming mental coercion and his or her ability to foresee the onset of socially dangerous consequences. Volitional moment: the person does not want the socially dangerous consequences to occur, but is forced to allow them due to overwhelming mental coercion. There is no motive or purpose to commit these acts. Under the influence of overwhelming mental pressure, a person may experience severe emotional distress.

Therefore, the circumstance will exclude the criminality of the act only if objective and subjective signs of mental coercion are established, which will indicate its presence.

4. Mental coercion in the Criminal Law of Ukraine

Both the grammatical and semantic meaning of the word "coercion" is that it is "the necessity to act in a certain way, regardless of desire, caused by someone or something". This definition indicates that the person being coerced maintains conscious and volitional control over his or her behavior. It should be noted that, distinguishing between the concepts of "violence" and "coercion," it can be stated that coercion is an influence exercised only against the will of a person. Violence, on the other hand, is not only against the will, but also beyond the will, i.e. in its absence. Coercion, by affecting freedom of will, restricts it, while violence restricts or removes it (Prymachenko, 2008). That is, under coercion, a person has the opportunity to choose a certain course of action. However, being subjected to violence, a person may either retain the ability to choose behavior or not be able to act at his/her own discretion (an example is part 1 of Article 40 of the CC, when "a person cannot control his/her actions").

However, this reflects a situation where violence is taking place, not coercion. Proponents of this position argue that coercion can only occur when a person does what is required of him or her, i.e., is able to express his or her will. Instead, under the influence of insurmountable physical coercion, a person, as a person, does not show his or her will at all. The person who caused harm to the health of another because he or she was pushed was not forced to do so. In this situation, the person who caused the harm is only an instrument of a criminal offense: he or she was aware of the criminality of the act, but was unable to comply with the requirements of the law or prevent their violation (Nakonechna, 2015).

Given the concept of mental coercion, it should be emphasized that in most cases mental coercion is committed by threatening. The threat is most often made verbally and is aimed at the mental state of the person, namely: threats of a physical nature, threats of destruction of property, threats aimed at disclosure of information, the disclosure of which will affect the victim.

The peculiarity of mental coercion is that it never completely suppresses a person's will, despite the fact that such coercion still limits the person's ability to control his or her behavior. That is, a person still has the opportunity to choose certain actions, as in the case of insurmountable physical coercion (Bazhanov et al., 2011).

Having analyzed the points of view of various authors, it should be noted that, in our opinion, we should abandon the division of coercion into overcome and insurmountable, because in practice it is very difficult to distinguish these concepts on objective grounds, and therefore they are distinguished solely on subjective grounds. However, the internal

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.9-19

state of a person is very difficult to assess, especially when a person is in a state of anxiety due to a criminal offense committed against him or her, or when he or she is under pressure (Kharytonov, 2000).

We agree with A.O. Kasyan, who in his dissertation study "Physical and Mental Coercion in the Criminal Law of Ukraine" categorically disagrees with the division of coercion into insurmountable and overcome, which is approved at the legislative level. He determines that "if due to coercion a person was unable to control his or her behavior, it is impossible to assess the criminality or non-criminality of such actions or omissions that caused damage to law enforcement interests in the context of circumstances that exclude the criminality of the act" (Kasian, 2015). The author also argued that "a person who cannot control his or her actions should be recognized either as insane due to the presence of such a medical criterion as a temporary disorder of mental activity (Article 19 of the Criminal Code of Ukraine), or on the basis of the general provisions of criminal law. In this case, there is no guilt for failure to perform certain actions (inaction), since the victim was supposed to, but in fact could not (for reasons beyond his control) perform them. In this case, the point should be that the condition for the legitimacy of causing harm by a person who has been coerced is the actual inability of the person to freely control his or her actions. It is because of the restriction of a person's freedom of will and its manifestation in the management of his/her behavior, caused by the unlawful (criminal) actions of the perpetrator, that the criminality of causing harm to the law-protected interests by the person who is being coerced is excluded" (Mantuliak, 2006).

Despite the substantial development of the concept of coercion and its types, there are general comments on the separation of physical coercion from mental coercion (Husar, 2009). The author believes that coercion can only be mental. It can be supported by physical violence. But if it is only violence, it is physical violence, not physical coercion.

There is a widespread view that the threat of physical violence is the only possible form of mental violence. However, based on the subsection analyzed above, it is clear that there are a large number of manifestations of mental violence in our criminal law (Khramtsov, 2013). In addition, the manifestations of mental violence can also include the threat of harm to human rights, influence on the senses, communication of unpleasant information, etc. Coercion has a purpose, and therefore can only be committed with direct intent, since the purpose is a sign of the subjective side of a criminal offense committed with direct intent.

If we consider mental coercion in the system of circumstances that exclude the criminality of an act, it should be noted that such coercion is a separate independent circumstance, as it is a similar criminal offense provided for by the Criminal Code of Ukraine, socially acceptable lawful actions or omissions of a person committed in the presence of certain conditions that exclude the unlawfulness of the act, and therefore the criminal liability of a person for damage caused to the interests of law enforcement.

There are certain features that should be characteristic of "coercion" as a circumstance that excludes the criminality of an act:

1) these circumstances are committed in the form of an act (action or inaction);

2) the conditions of legality under the law must be met;

3) acts (actions or omissions) may be similar to criminal offenses;

4) these acts committed under duress are admissible, but cannot be classified as beneficial, because the person cannot control his/her actions (acts under duress).

At the same time, the conditions of legality are objective and subjective.

5. Challenges in legal practice and proposed amendments to Article 40 of the Criminal Code of Ukraine

The objective ones usually include: an act that falls under the provisions of Article 40 of the CCU and is socially dangerous; harm is caused to the rights protected by the law on criminal liability; the presence of signs of coercion in the offender's actions. At the same time, subjective signs (internal factors) include: the person's perception of the proportionality of the act to the threatened; lack of ability to control their actions; at the time of the harm, in the person's opinion, there was no other way to prevent the harm (Diachuk, 2000).

Unfortunately, practice shows that due to the lack of clear regulation of the concept of "mental coercion" in Ukrainian legislation and specific conditions under which a person will be released from liability for criminal offenses committed under its influence, judges sometimes find it difficult to consider cases of criminal offenses committed under the influence of mental coercion.

For example, there is a relevant court practice on bringing to criminal liability a person who committed a criminal offense under the influence of mental coercion. Thus, the ruling of the Supreme Court of Ukraine of 09.12.2011 in case No. 5-1021к09 established the following: "...The arguments of the cassation appeals in defense of PERSON_3 that he acted under the influence of mental coercion by PERSON_1 cannot be taken into account, since the existence of such coercion is not confirmed by anything other than the testimony of PERSON_3, and, moreover, according to Article 40 of the Criminal Code of Ukraine, only irresistible physical coercion can be the basis for exemption from liability for a crime. Since the court found that no such coercion was applied to PERSON_3, it should be noted that when he participated in the deprivation of PERSON_8's life, he acted at his own discretion. The fact that at the time of the crime PERSON_3 was in a state of intoxication is confirmed by the testimony of the convicts PERSON_1 and PERSON_2, as well as the witness PERSON_9 about their joint consumption of alcoholic beverages, so the arguments of the cassation appeal of the lawyer PERSON_7 in this part are unfounded" (Legal portal Protocol, 2004).

In addition, there is a practice when, when bringing a person to criminal liability, mental coercion is always recognized by the court as a circumstance mitigating the punishment (clause 6, part 1, Article 66 of the Criminal Code of Ukraine) (Shevchenko et al., 2011).

If a person retains the ability to resist mental coercion, his or her actions do not exclude criminal liability and are only circumstances that can be assessed as mitigating.

For this purpose, the following requirements must be met:

1) the inability to act otherwise to prevent the threatened harm;

2) according to the judicial assessment, the harm that was caused is less than the harm that was prevented (Criminal Code of France, 2002).

When carrying out a legal assessment of the behavior of a person who acted under the influence of non-physical violence, it is mandatory to appoint a mental examination that would provide answers to the above questions.

In view of the above, specific signs of non-physical violence should be formulated jointly by legal professionals, psychotherapists and psychologists. In turn, the author of the paper below proposes his version of the list of signs that may be considered by the legislator.

The author proposes to change the wording of Article 40 of the Criminal Code of Ukraine to the following:

"Article 40. Physical and non-physical violence

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.9-19

1. Physical violence shall be defined as a violation of the physical integrity of another person with the purpose of humiliation and causing pain and suffering; beating or mockery, the purpose of which is to cause permanent mental disorders in the victim.

Physical violence is manifested in: pulling hair, hitting, - beating, strangulation, scratching, poisoning, arson and causing physical suffering in other ways, as well as aggressive physical contact (pushing, kicking, throwing objects at the person) or restriction of movement, harassment, physical restraint with or without the use of weapons.

2. An action or inaction of a person that caused damage to law enforcement interests committed under the direct influence of physical violence, as a result of which the person could not control his/her actions, shall not be a criminal offense.

3. Non-physical violence shall be recognized as all other ways of encroachment not covered by the concept of "physical violence". Non-physical violence is an intentional unlawful violent attack on human health that has the following characteristics

- the object of impact is human health;

- unlawfulness;

- the use of psychological methods that can be verbal or non-verbal;

- intentional nature of action or inaction;

- violent nature of the impact.

Non-physical violence is manifested in: threats of violence, violent acts, coercion, compulsion, threats, intimidation, physical and mental violence, obstruction, terrorization, criticism, contempt (despotism, humiliation, verbal intimidation, boasting, demand for admiration, surveillance, constant presence, limiting contact with the outside world, jealousy, control, ignoring, isolation).

4. An action or inaction of a person that caused damage to law enforcement interests committed under the direct influence of non-physical violence is not a criminal offense if at least one of the listed criteria is present:

- a person recognized as insane in accordance with Article 20 of the Criminal Code of Ukraine;

- a person recognized as partially sane in accordance with Article 21 of the Criminal Code of Ukraine;

- the person, who was under the influence of non-physical violence, tried to take all necessary measures to prevent harmful consequences of his/her action or inaction;

- the person was unable to resist non-physical violence or take all necessary measures to prevent harmful consequences of his/her action or inaction;

- the person was not aware of the impact of non-physical violence on them;

- the person could not control his/her actions;

- the person was aware of his/her actions, but preventing the non-physical impact would have led to even greater harm to the interests protected".

The author also proposes to list the following corpus delicti of criminal offenses with signs of non-physical violence in the notes to Article 40 of the Criminal Code of Ukraine, namely: Article 126^1 of the Criminal Code, Article 127 of the Criminal Code, Article 134 of the Criminal Code, Article 151^2 of the Criminal Code, Article 152 of the Criminal Code, Article 153, Article 154 of the Criminal Code, Article 173 of the Criminal Code, Article 180, Part 2 of the Criminal Code, and Article 266, Part 1 of the Criminal Code.

Therefore, it should be noted that mental coercion is a threat that has signs of reality, is provided for by various laws (constitutional, administrative, criminal), and is associated with the use of intimidation and coercion to perform certain actions that a person does not want to perform, but is deprived of the opportunity to choose his or her behavior. It is the inability of a person to control his or her actions (to make a choice) that excludes guilt and criminal liability.

Conclusions

The status of Ukraine as a state governed by the rule of law mandates the balanced protection of both victims and perpetrators of mental violence. This obligation extends to ensuring that the legal system comprehensively addresses the nuances of psychological abuse and coercion. The recent amendments to the Criminal Code of Ukraine, which include provisions for mental coercion as circumstances excluding the criminality of an act, represent a significant step forward in criminal law. However, these changes also highlight critical gaps, particularly in the area of mental violence.

The current Criminal Code, despite its advancements, lacks a precise definition of mental violence, reflecting a broader issue of insufficient integration of psychological concepts into criminal law. This gap complicates the legal evaluation of cases involving mental coercion, which remains inadequately addressed. Article 40 of the Criminal Code, while distinguishing between physical and mental coercion, still falls short in its practical application and clarity. The division into «overcome» and «irresistible» coercion, for instance, has proven problematic, leading to difficulties in legal interpretation and enforcement.

The theoretical framework established by scholars such as M.V. Anchukova, Y.V. Baulin, and others provides a solid foundation for understanding these circumstances. However, the need for further research into mental coercion is evident. The partial treatments by V.M. Burdin and N.M. Yarmysh underscore the necessity for a more thorough and comprehensive analysis. The current legal provisions and judicial practices often struggle with the assessment of mental coercion, leading to inconsistent applications and challenges in ensuring justice.

To enhance the effectiveness of the legal system in addressing mental coercion, it is crucial to refine the definitions and criteria related to this concept. A unified definition and a clearer framework for assessing mental coercion, as proposed in the revised Article 40, would provide much-needed clarity. This would also facilitate more accurate judicial assessments and ensure that the rights of both victims and perpetrators are appropriately balanced.

In conclusion, while the Ukrainian Criminal Code has made notable strides in incorporating mental coercion as a factor excluding criminal liability, there remains significant room for improvement. Addressing the definitional and procedural gaps in the regulation of mental violence will strengthen the legal system's ability to deliver fair and just outcomes. Collaborative efforts between legal professionals, psychologists, and lawmakers are essential to develop a more comprehensive and practical approach to mental coercion, ultimately enhancing the protection of individual rights and the integrity of the legal system.

References

Anchukova, M.V. (2004). *Justifiable risk as a circumstance excluding criminal action: thesis of candidate of legal law*. Kharkiv: National Law Academy of Ukraine named after Yaroslav Mudrii.

Baulin, Yu.V. (2014) Circumstances that lead to criminal activity. *Visnyk Asotsiatsii Kryminalnoho Prava Ukrainy, 1*(2), 133–149.

Bazhanov, M.I., Stashys, V.V., & Zinchenko, I.O. (2011). *Criminal law of Ukraine. General*

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.9-19

part. Kharkiv: Yurinkom-Inter Pravo, 416 p.

Bodnaruk, O.M. (2012). *Necessary defense in case of encroachment on property: thesis of candidate of legal law.* Kyiv: V. M. Koretskyi Institute of State and Law.

Burdin, V.M. (2013). The Finished Crime: Contentious Issues of Understanding. *Naukovyi Visnyk Lvivskoho Derzhavnoho Universytetu Vnutrishnikh Sprav. Seriia Yurydychna, 3,* 292–303. http://nbuv.gov.ua/UJRN/Nvlduvs_2013_3_37

Criminal Code of France. (2002). Retrieved from: https://www.legislation.act.gov.au/a/2023-45/

Diachuk, S. I. (2000). *Legal nature of order execution; criminal assessment of the act of the person who gave or executed the illegal order:* thesis of candidate of legal science. Kyiv: Kyiv National University named after Taras Shevchenko.

Hurtovenko, O.L. (2008). *Mental violence in criminal law of Ukraine: thesis of candidate of legal science*. Odesa: Odesa National Law Academy.

Husar, L.V. (2009). *Necessary defense: criminological and criminal law aspects: thesis of candidate of legal science*. Odesa: Odesa National Law Academy.

Iarmysh, N.M. (2002). Regarding the issue of criminal responsibility of a person who has suffered physical or mental violence. *Visnyk Kharkivskoho natsionalnoho universytetu vnutrishnikh sprav, 20,* 373–378. http://nbuv.gov.ua/UJRN/VKhnuvs_2002_20_79

Iushchyk, O. I. (2003). *Criminal and legal rehabilitation of risk-related activity according to the legislation of Ukraine*. Odesa: Odesa National Law Academy, 20 p.

Kasian, A.O. (2015). *Physical and mental coercion in the criminal law of Ukraine*. Kharkiv: KhNUVS, 16 s.

Kharytonov, S.O. (2000). *Criminal law assessment of the use of firearms by a police officer.* Kharkiv: KhNUVS.

Khramtsov, O.M. (2013). Physical or mental coercion as a circumstance that excludes criminal activity (national and international aspects). *Visnyk Kharkivskoho natsionalnoho universytetu imeni V. N. Karazina. Seriia: Pravo, 1062*(14), 162-165. http://nbuv.gov.ua/UJRN/VKhIPR_2013_1062_14_42

Kvasha, O.O. (2015). Circumstances excluding the criminality of the act in the context of the constitutional right of a person to self-defense. *Chasopys Kyivskoho Universytetu Prava, 2,* 284–287. http://nbuv.gov.ua/UJRN/Chkup_2015_2_69.

Legal portal Protocol. Legal discussion. Articles. Absence of the composition of the crime in the person's actions and acquittal. (2024). https://protocol.ua/ua/vidsutnist_skladu_zlochinu_v_diyah_ osobi_i_vipravduvalni_viroki/

Lisova, N.V. (2007). *Extreme necessity as a situation that excludes the criminality of an action*. Kyiv: Academy of Advocacy of Ukraine

Mantuliak, Yu.V. (2006). *Carrying out a special task to prevent or uncover the criminal activity of an organized group or criminal organization as a situation that excludes the criminality of the activity.* Kyiv: Academy of Advocacy of Ukraine

Nakonechna, L.A. (2015). The role of violence in the articles of the Western part of the Criminal Code of Ukraine. *Visnyk Natsionalnoho Universytetu «Lvivska politekhnika». Yurydychni nauky, 813*, 277–280.

Omar, M.M.Y. (2003) *Circumstances excluding the criminality of an act in the criminal law of Ukraine and Jordan*. Kyiv: National Academy of internal affairs.

Plysiuk, N.M. (2011). *Intentional killing when exceeding the limits of necessary defense or in case of exceeding the measures necessary to detain a criminal under the criminal law of Ukraine.* Lviv: Lviv State University of Internal Affairs.

Prymachenko, V.F. (2008). *Detention of a person who has committed a crime as a situation that excludes the criminality of the act.* Dnipropetrovsk: Dnipropetrov State University. Internal Affairs

Shevchenko A.Ie., Soloviova V.V., & Strelnyk O.L. (2011). *Circumstances excluding legal liability.* Donetsk: Yuho-Vostok, 178 s.

Sobko, G., Fomenko, A., Nalyvaiko, L., Pryputen, D., & Verba, I. (2024) The impact of the Istanbul Convention on legislative and legal practices regarding the appointment of responsibility for domestic violence: gaps and inconsistencies. *Observatorio(OBS*), 18(*2), 219-224.

Zhdanova, I.Ie. (2011). *Physical or mental coercion as a circumstance that excludes the criminality of an act:* thesis of candidate of legal science. Kyiv: National Academy of internal affairs.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

URGENCY OF EXCLUSIONARY RULES REGULATION IN INDONESIAN CRIMINAL JUSTICE SYSTEM

Fadhilah Anugrah Pascawati
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: fadhilanugrah@student.ub.ac.id
https://orcid.org/0009-0003-9232-5987

Prija Djatmika
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: prija.djatmika@ub.ac.id
https://orcid.org/0000-0002-5259-1522

Milda Istiqomah
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: milda.istiqomah@ub.ac.id
https://orcid.org/0009-0002-4824-8614

Abstract
This research departs from the legal gap related to the application of the Exclusionary Rules of Evidence principle in Indonesia. Currently, there is no explicit regulation that prohibits the use of evidence obtained unlawfully, such as through torture, threats, or pressure on suspects. This kind of practice is often carried out by law enforcement officials to obtain a confession from a suspect and continue the case to trial. Without a clear legal mechanism, illegal evidence is often used, which not only harms the rights of suspects, but also undermines the principles of justice, weakens legal protection, and damages the image of the judiciary in the eyes of the public. This legal vacuum results in human rights violations continuing to occur without strict sanctions against the perpetrators of violations. This research uses normative juridical method with statutory, conceptual, case, and comparative approaches. Analysis is conducted through systematic and grammatical interpretation of primary, secondary, and tertiary legal materials. The results show the urgency of regulating the Exclusionary Rules principle in KUHAP to ensure that only legally obtained evidence can be used in court. As a regulatory model, Indonesia can adopt the provisions of Article 359a paragraph (1) letter b of the Dutch Wetboek van Strafvordering (WvSv), which provides an explicit mechanism to exclude illegal evidence. The implementation of this principle will strengthen the protection of human rights, ensure a fair trial process, and increase the accountability and professionalism of law enforcement officers in carrying out their duties.

Keywords: Exclusionary rules of evidence; legal protection; suspects..

1. Introduction

The investigation process in the Indonesian criminal justice system often raises serious issues related to the protection of human rights. Suspects arrested by the police have the right to be examined in accordance with Article 50 of the Criminal Procedure Code (KUHAP), which stipulates that the suspect has the right to be immediately examined by the investigator, forwarded to the public prosecutor, and the case immediately submitted to the court. However, the implementation of this provision is often characterized by unfair practices, including physical or psychological violence against suspects, in order to accelerate the confession of alleged criminal acts that are not necessarily legally proven. This is contrary to the principle of presumption of innocence, as stated in Article 8 paragraph (1) of Law No. 48/2009 on Judicial Power, which states that every person suspected or charged with a criminal offense shall be presumed innocent until a court decision is legally binding.

Furthermore, KUHAP is designed based on the principle of due process of law to ensure the fairness of the legal process. This principle includes the suspect's right not to be coerced into providing testimony as stipulated in Article 52 of KUHAP, which states that suspects must be treated humanely. The police, as law enforcement officers, have a responsibility to protect the rights of suspects. Law No. 2 of 2002 on the Indonesian National Police, Article 5 paragraph (1), emphasizes that the police function is to provide protection and protection to the community, including suspects. However, in practice, torture of suspects often occurs during the investigation stage. (Tiara et al. 2017, p. 38). However, reality shows that this right is often ignored. The LBH Jakarta survey (2013-2016) recorded 37 cases of torture against suspects, while the Kontras report (2023-2024) identified 15 cases of wrongful arrest with 23 victims, of which nine experienced physical violence (Wiryono & Rastika, 2017). (Wiryono & Rastika, 2024). reflect systematic violations of human rights.

Human rights and protection of suspects, from a human rights perspective, suspects who are undergoing legal proceedings still have inherent human rights. According to Jan Materson, human rights are rights inherent in humans, without which humans cannot live in dignity. This is in line with Article 2 of Law No. 39/1999 on Human Rights, which affirms that the Indonesian state recognizes, respects and protects the human rights of every citizen, including those who are facing legal proceedings. Acts of torture by law enforcement officers not only violate the rights of suspects, but also violate the principle of due process of law, which is a fair legal process. The human rights attached to suspects include fundamental rights such as the right not to be tortured, the right to a fair trial, and the right to defend oneself before the law. This is affirmed in Article 5 paragraph (1) and Article 6 of Law No. 39/1999, which stipulates that everyone, including those who are suspects or accused, is entitled to recognition, guarantees, protection, and fair legal certainty. This principle is also reflected in various international instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which Indonesia has ratified through Law Number 12 of 2005. However, although the guarantee of human rights protection has been explicitly regulated in the law, its implementation in the field still faces various challenges. One of them is the high number of violations against suspects during the investigation process. Data from LBH Jakarta (2013-2016) shows that violence against suspects, including physical and psychological torture, still occurs frequently, especially in closed environments such as police stations. In this context, suspects often do not have access to lawyers or legal counsel who can protect their rights, even though Article 56 of KUHAP stipulates that suspects are entitled to legal assistance from the investigation stage.

Furthermore, acts of torture by law enforcement officials are contrary to the Indonesian constitution, specifically Article 28G paragraph (2) of the 1945 Constitution, which states that everyone has the right to protection from the threat of torture. In addition, Article 33 paragraph (1) of Law Number 39 Year 1999 expressly prohibits acts

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

of torture or inhumane treatment by anyone, including state apparatus. In the case of violations, the officials involved should be subject to criminal sanctions based on applicable legal provisions, as stipulated in Article 351 of the Criminal Code (KUHP) on persecution.

This situation suggests the need for a more effective mechanism to protect the human rights of suspects during the legal process. One solution that can be implemented is to increase oversight of the actions of law enforcement officials, both through independent institutions such as Komnas HAM and through strengthening internal police mechanisms. In addition, preventive measures such as special training for police officers on the principles of human rights and due process of law are needed.

Protecting the rights of suspects should also include easier access to legal aid. In many cases, limited access to lawyers means that suspects cannot optimally defend themselves, increasing their vulnerability to torture or unfair treatment. For this reason, the implementation of free legal aid services as stipulated in Law No. 16/2011 on Legal Aid needs to be optimized, especially for suspects from poor communities who cannot afford a lawyer.

Ultimately, protecting the human rights of suspects is not only important to maintain the integrity of the legal process, but also to ensure that substantive justice is achieved. A criminal justice system that ignores human rights not only undermines the principle of the rule of law (rechtstaat), but can also undermine public confidence in law enforcement institutions.

Another issue that arises is the acquisition of evidence unlawfully. According to R. Atang R in his book Criminal Procedure Law: An Introduction, valid evidence is evidence that is relevant to the criminal act and can lead to the judge's belief in the truth of a criminal act. (Ranoemihardja, 1980, p. 32).. KUHAP, through Article 184, regulates the types of valid evidence, including witness testimony, expert testimony, letters, instructions, and testimony of the defendant. However, the definition of 'valid' in the collection of evidence is not specifically outlined, giving rise to ambiguity.

Judges, based on Article 183 of the Criminal Procedure Code, cannot impose punishment if there are not at least two valid pieces of evidence. However, in practice, evidence is often obtained by unlawful means, such as torture or intimidation of suspects. This action is contrary to the principle of the right of due process, namely that investigations and inquiries must be carried out in accordance with the applicable procedural law. (Republic of Indonesia, 1981).

The Exclusionary Rules Principle and its Urgency in Indonesia, first introduced through the Mapp v. Ohio decision in the United States, states that evidence obtained unconstitutionally or unlawfully cannot be used in court.(Leckie, 1997, p. 264).. This principle is based on the Fourth Amendment of the US Constitution, which protects the public from unlawful searches and seizures. This principle is also reinforced by the fruit of the poisonous tree doctrine, which states that evidence derived from illegal sources is considered tainted and inadmissible in court. Thus, exclusionary rules not only serve as a tool to protect the rights of individuals, but also to encourage compliance by law enforcement officials with the applicable rule of law.

The application of exclusionary rules has a strong basis in legal theory. One of the justifications is to prevent deterrence rationale. By excluding unlawfully obtained evidence, this principle ensures that law enforcement officers do not benefit from unlawful acts. In addition, exclusionary rules also reflect the principle of procedural fairness, where a fair legal process is considered as important as the final outcome of the process.

Some civil law countries, such as the Netherlands, have adopted the principle of exclusionary rules to exclude unlawfully obtained evidence. In the Dutch legal system, Article 359a paragraph (1) letter b of the Wetboek van Strafvordering regulates the mechanism to exclude unlawfully obtained evidence. Dutch courts consider several factors before excluding evidence, including the extent of the offense committed by the law enforcement officer and its effect on the fairness of the case. For example, if the offense was committed intentionally or resulted in serious harm to individual rights, then the evidence will almost certainly be excluded.

Other countries have similar approaches. In Germany, the principle of Beweisverwertungsverbot (prohibition on the use of evidence) allows courts to exclude evidence obtained in violation of the law. This approach not only protects the rights of the suspect but also maintains the integrity of the legal system itself. In Canada, a similar arrangement is contained in Article 24(2) of the Canadian Charter of Rights and Freedoms, which authorizes courts to exclude evidence obtained in violation of an individual's constitutional rights.

Indonesia, as a state of law, can learn from the experience of these countries. Currently, KUHAP has not explicitly regulated the principle of exclusionary rules. In fact, this regulation is very important to protect the rights of suspects, prevent violations of the law by law enforcement officials, and ensure that the legal process runs in accordance with the principle of due process of law. Without this principle, evidence obtained through torture, threats, or other unlawful acts can still be used in court, which not only harms the suspect but also weakens public confidence in the criminal justice system.

In the Indonesian context, this principle is relevant to apply given the high number of reports of violations committed by law enforcement officials in the investigation process. Data from the Commission for the Disappeared and Victims of Violence (Kontras) shows that during 2023-2024, there were 15 cases of wrongful arrest accompanied by torture. In this situation, the application of exclusionary rules will be an important step to encourage accountability of the authorities and strengthen legal protection for suspects.

In addition, the application of exclusionary rules will also have a positive impact on the justice system as a whole. By excluding unlawfully obtained evidence, the Indonesian justice system can establish clearer and more transparent legal standards. This will also force law enforcement officials to improve their professionalism and adhere to the rule of law.

However, the application of the exclusionary rules principle in Indonesia needs to be accompanied by systemic changes in the KUHAP. One of the first steps that can be taken is to introduce a judicial review mechanism for the evidence in question. This mechanism allows judges to assess the validity of evidence before it is used in court. In addition, there needs to be intensive training for law enforcement officials on human rights principles and legal procedures. This approach will not only improve the quality of investigations but also ensure that the rights of suspects are maximally protected. Until now, KUHAP has not explicitly regulated the principle of exclusionary rules, although this regulation is very important to protect the rights of suspects and prevent violations of the law by law enforcement officials. By adopting the exclusionary rules principle, Indonesia can ensure that evidence used in court is actually obtained legally and according to procedures, thus ensuring justice for all parties involved in the criminal justice system.

The purpose of this article is to analyze the protection of human rights of suspects in the Indonesian criminal justice system, with a specific focus on the principle of exclusionary rules. The study aims to highlight existing shortcomings in the legal framework, address the challenges in the practical implementation of human rights protections during investigations, and propose reforms to the Criminal Procedure Code (KUHAP) to ensure compliance with international human rights standards. The author recommends reforming the KUHAP by incorporating the exclusionary rules principle as an integral part of the Indonesian criminal procedure law system. This step will not only increase the accountability of law enforcement officials, but also strengthen the protection of human rights in the criminal justice process.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

2. Materials and Methods

TThe type of research that researchers use is in the form of normative juridical research, which is research that focuses on examining the application of positive legal rules or norms. (Suyanto, 2023, p. 2). The research approach used includes several relevant types (Rifa'i et al., 2023, p. 9).. A statutory approach was taken to examine laws and regulations relating to the criminal justice system in Indonesia, such as the Criminal Procedure Code (KUHAP), Law No. 48/2009 on Judicial Power, and Law No. 39/1999 on Human Rights. A conceptual approach is applied to understand legal theories and concepts, such as due process of law and exclusionary rules, in the context of criminal law. In addition, a case approach is used to analyze related jurisprudence, both domestically and internationally, including the case of Mapp v. Ohio which became the foundation of the fruit of the poisonous tree doctrine. This approach is also strengthened by a comparative approach, which aims to compare the regulation and implementation of exclusionary rules in other countries, such as the United States, the Netherlands, and Germany, in order to find a model that suits the needs of the Indonesian legal system.

The types of legal materials used in this research are divided into three main categories (Benuf & Azhar, 2020, p. 23). First, primary legal materials include legislation and jurisprudence as authoritative sources of law, as explained by Peter Mahmud. These sources include KUHAP, Law No. 48/2009, Law No. 39/1999, and other relevant regulations. Second, secondary legal materials consisting of literature, including books, journal articles, theses, and dissertations that discuss the topic of criminal procedure law, human rights, and exclusionary rules. Supporting data from the internet is also used to complete this study. Third, tertiary legal materials used as additional references, such as legal dictionaries, the Big Indonesian Dictionary (KBBI), and Black's Law Dictionary, to provide definitions and strengthen legal arguments.

By using this method, this research is expected to identify gaps in Indonesia's legal arrangements related to exclusionary rules, as well as provide applicable recommendations to strengthen the protection of human rights in the criminal justice process.

3. Result and Discussion

3.1. Analysis of the application of exclusionary rules of evidence in the Indonesian legal system

The principle of exclusionary rules of evidence aims to prohibit the use of evidence obtained illegally in the criminal justice process. (Fadhli, 2024, p. 85). This principle has its roots in the protection of human rights, ensuring that the legal process runs in accordance with the principles of due process of law and substantive justice. In the context of the Indonesian legal system, this principle has not been explicitly regulated in the Criminal Procedure Code (KUHAP), although its urgency is increasingly felt to close legal loopholes that allow illegal evidence to be used in court.

KUHAP, as the main legal framework in Indonesian criminal procedure, only regulates the types of valid evidence in Article 184, such as witness testimony, expert testimony, letters, instructions, and testimony of the defendant. However, this regulation does not explain in detail the process of obtaining evidence and does not provide strict limits on the use of evidence obtained through unlawful means, such as torture, threats, or intimidation. This lack of regulation opens up opportunities for abuse of authority by law enforcement officials, which in turn can undermine the principles of justice and harm the rights of suspects.

In practice, illegally obtained evidence is often used in Indonesian courts. This is contrary to internationally recognized principles, such as those applied in civil and common law countries, where illegal evidence is generally excluded from trials to preserve the integrity of the judicial process. For example, cases of torture of suspects to extract confessions are often not accompanied by strict sanctions against officers who violate the law. As a result, evidence resulting from such acts continues to be used as the basis for court decisions. (Prasetyo & Herawati, 2022, p. 408)..

Although Indonesia has ratified the Convention Against Torture (CAT) through Law Number 5 Year 1998, the application of the principles of protection against torture has not been fully integrated into the national legal system. (Ardya, 2023, p. 11). One significant gap is the absence of a clear mechanism to evaluate the validity of evidence in relation to the way it was obtained. This is in contrast to countries such as the Netherlands, which explicitly regulates the exclusionary rules principle in the Wetboek van Strafvordering (WvSv), where judges have the authority to reject evidence that has been unlawfully obtained (Ramadhina et al., 2015). (Ramadhina et al., 2022, p. 841).

To address this issue, the application of exclusionary rules in Indonesia could be an important solution to ensure that only legally obtained evidence can be used in the judicial process. This principle could also encourage law enforcement officials to better respect the rights of suspects during the investigation process. In addition, the integration of this principle into KUHAP could provide a clearer legal framework for judges in evaluating the validity of evidence. Thus, the application of the exclusionary rules principle will not only strengthen the protection of human rights, but also improve the integrity and public confidence in the Indonesian criminal justice system.

1. Regulation of Exclusionary Rules in Indonesia: The principle of exclusionary rules of evidence is a doctrine that aims to prohibit the use of unlawfully obtained evidence in the judicial process. This doctrine has developed in various international legal systems, such as the United States and European countries, as part of the protection of human rights and the application of the principle of due process of law. In Indonesia, although this principle has not been explicitly regulated in the criminal procedure law, the urgency of its application is increasingly felt to close the legal loopholes that allow the use of illegal evidence in the court process. (Djiwandono et al., 2024, p. 12068). Indonesian legal regulation, as stipulated in the Criminal Procedure Code (KUHAP), has not provided a clear definition of the validity of evidence in the context of how it was obtained. As a result, evidence obtained through torture, intimidation, or other unlawful acts still has the potential to be used in court. This condition not only violates the principle of justice, but also harms parties facing legal proceedings, especially suspects who are vulnerable to human rights violations. In that context, this analysis aims to review the deficiencies in the Indonesian legal system regarding the regulation of evidence, as well as provide recommendations to strengthen the application of the exclusionary rules principle. Using statutory, conceptual, case law and comparative approaches, this analysis seeks to illustrate how this principle can be integrated into the Indonesian legal system.

The integration of the exclusionary rules principle will not only improve the integrity of the Indonesian criminal justice system, but also provide stronger protection of individual rights in the legal process, in accordance with the values contained in national law and international instruments that Indonesia has ratified. (Rai & Salsabila, 2020, p. 5).

The Criminal Procedure Code (KUHAP) is the main guideline in the implementation of the criminal justice process in Indonesia. However, KUHAP does not explicitly regulate illegally obtained evidence, including statements given by suspects under duress, torture, or other unlawful acts. Article 184 of KUHAP only mentions the types of valid evidence, namely witness testimony, expert testimony, letters, instructions, and testimony of the defendant. (Fahlevy, 2022). However, a more detailed explanation of how such evidence should be obtained, including limitations on the validity of collection procedures, is not explicitly spelled out in this article or elsewhere in KUHAP.

This lack of regulation regarding evidence obtained illegally opens up opportunities for abuse of authority by law enforcement officials. In some cases, evidence obtained through unauthorized methods, such as torture of suspects or intimidation of witnesses,

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

could be a solution to close this legal gap, while strengthening the protection of the rights of suspects in the criminal justice process.

Law Number 7 of 2020 provides more specific arrangements regarding the validity of evidence used in the Constitutional Court (MK) trial by emphasizing that evidence must be obtained legally and in accordance with legal provisions. (Republic of Indonesia, 2020). This provision aims to maintain the integrity of the judicial process and ensure justice for all parties involved. Article 36 emphasizes that the evidence used must be legally accountable for its acquisition. If evidence is obtained through unlawful means, it cannot be considered valid and cannot be used in the trial process. In addition, Article 36 also gives the Constitutional Court the authority to determine whether or not the evidence presented in the trial is valid. This provision provides clearer direction on the need to uphold standards of validity of evidence in the judicial process. The regulation not only highlights the importance of the substantial validity of evidence, but also emphasizes that the means of obtaining evidence must comply with the principles of due process of law and uphold human rights. This is relevant given the various reports of abuse of authority by law enforcement officials in obtaining evidence, such as torture of suspects or manipulation of electronic data. (Zubairy, 2021, p. 275). This provision in the Constitutional Court Law reflects the early adoption of the exclusionary rules principle in the Indonesian legal system, although its scope is still limited to trials at the Constitutional Court. This provision shows a progressive step in overcoming the legal vacuum regarding illegally obtained evidence. However, the implementation of this provision only applies within the scope of the Constitutional Court and has not yet penetrated into the realm of criminal justice in general. This poses a serious challenge, especially in criminal cases, where evidence obtained in violation of the law is often still used in trials in general courts.

The existence of Article 36 in the Constitutional Court Law could set an important precedent for wider application throughout the Indonesian judicial system. By extending the scope of this rule to the general courts, the Indonesian legal system can better protect the rights of individuals while ensuring that legal proceedings are conducted in accordance with the principles of legality and substantive justice. This move is also in line with efforts to improve the integrity of the justice system through strengthening evidence evaluation mechanisms at all levels of court.

The Draft Law on Criminal Procedure, which was submitted by the government on March 6, 2013, pays greater attention to the regulation of valid evidence. In Article 175 paragraph (2), it is emphasized that valid evidence must be obtained unlawfully. (Situmorang, 2018, p. 433).. The types of evidence regulated include evidence, letters, electronic evidence, expert testimony, witness testimony, defendant's testimony, and judge's observation. (Adhirajasa & Diningrat, 2024, p. 44).. Although this provision is more complete than the KUHAP, the limitations on unlawful acts in the process of obtaining evidence still need to be formulated more clearly. Without such limitations, the risk of abuse of authority by law enforcement officials remains high, thus threatening the protection of human rights in the criminal justice system.

3.2. Analysis of problems that prejudice the rights of suspects due to the unregulated exclusionary rules

The process of examining suspects in the investigation stage has an important role in determining the continuation of a criminal case. The rights of the suspect during the examination process have been guaranteed by the Criminal Procedure Code (KUHAP). Article 52 of KUHAP states that in the process of investigation and trial, the suspect or defendant has the right to provide information freely to the investigator or judge. In addition, Article 66 of KUHAP emphasizes that the suspect or defendant is not burdened with the obligation of proof. These two provisions emphasize that the suspect cannot be forced to give a confession or prove his guilt. This means that investigators do not have the authority to carry out coercive actions in order to obtain information or confessions from suspects.

However, in practice, this provision is often violated. One of the important components in the investigation stage is the Berita Acara Pemeriksaan (BAP), as stipulated in Article 117 paragraph (2) of KUHAP. This article states that the suspect's statement must be given freely and in accordance with the reality he/she experienced, and the investigator is obliged to record the statement accurately and without manipulation. However, irregularities often occur in its implementation. Law enforcement officials, especially the police, often use pressure, violence, or threats to force suspects to confess or hand over evidence. This is done to speed up the investigation process and complete the case file so that it can be immediately submitted to the prosecutor's office. In fact, the BAP is an important document that is the basis for making an indictment by the prosecutor and a reference for judges in deciding cases. Therefore, if the BAP is obtained through unlawful means, the validity of the indictment and court decision can be questioned.

In this case, M. Yahya Harahap, in his book Discussion of Problems and Application of KUHAP Investigation and Prosecution, explains that BAP obtained through violence, pressure, threats, or extortion is an invalid document. The invalidity of this BAP will have an impact on the subsequent legal process, so that it can interfere with substantive justice in handling criminal cases.(Harahap, 2009, p. 137).

In addition, Indonesia has actually ratified the Optional Protocol to the Convention Against Torture (OPCAT) through Law Number 5 of 1998 on the Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This convention obliges states to prevent torture and inhumane treatment of anyone, including suspects. However, despite this ratification, the practice of torture by police officers during questioning continues. This violence is often aimed at unlawfully obtaining evidence or confessions, to the detriment of the suspect's rights that should be protected by law.

The absence of exclusionary rules in the Indonesian legal system is one of the main causes of this problem. Without an explicit regulation, evidence obtained through unlawful acts can still be used in court. This not only harms the suspect, but also undermines the principles of due process of law and substantive justice that should be the cornerstone of the criminal justice system.

3.3. Legal comparison of exclusionary rules of evidence between the Netherlands and Indonesia

The regulation of exclusionary rules of evidence in the Netherlands and Indonesia has some similarities and differences that reflect the characteristics of each legal system. The following are the main points of comparison:

First, both the Netherlands and Indonesia follow an inquisitorial criminal justice system, which is non-adversarial. In this system, the judge has an active role in examining the facts presented during the trial, analyzing the relevance of the applicable laws, and providing a verdict based on an objective assessment of all the evidence presented. This characteristic places the judge as the main controller of the trial process, in contrast to the adversarial system which bases proof on the competition between the litigating parties.

Secondly, there are significant differences in the stages of the investigation and the documentation of the process. In the Netherlands, under the inquisitorial system, prosecutors are required to carefully document each stage of the investigation. This document serves as an official record containing details of the investigation process, including the reasons and methods used during the investigation. The file has a dual function: it serves as a supporting document for the prosecutor in formulating charges and as a map of the investigation for interested judicial officials. As such, transparency and accountability at every stage of the investigation is a key focus.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

On the other hand, Indonesia has different arrangements in the investigation stage and coordination between the public prosecutor and the investigator. Under Article 92 of the Regulation of the Attorney General of the Republic of Indonesia PER-036/1/JA/09/2011, public prosecutors are appointed to monitor the progress of a case through coordination with investigators. The role of the prosecutor in this context includes the preparation of a case matrix, expressing a legal opinion on the completeness of the case file, and drafting an indictment plan. In practice, the prosecutor will only forward a case to trial if the case file has been declared complete (P-21). Unlike the Netherlands, the primary responsibility for documenting the investigation process in Indonesia lies with the investigator, not the prosecutor.

From this comparison, it can be seen that the Netherlands pays greater attention to the documentation of the investigation process as an integral part of its inquisitorial system. In contrast, Indonesia places more emphasis on coordination between prosecutors and investigators to ensure the completeness of the file before the case is submitted to the court. (Republik Indonesia, 2011). These differences reflect the distinctive legal approaches in balancing the principles of fairness with the efficiency of the judicial process in each country.

According to Romli, the criminal justice system in the Netherlands is based on the constitution which stipulates that general criminal law, military criminal law, the administration of justice, and the judicial system must be subject to statutory provisions. One of the main characteristics of the Dutch legal system is the application of the principle of legality, which is a fundamental principle in the European Civil Law legal tradition. The Netherlands also uses an inquisitorial justice system, where the criminal justice process is seen as a mechanism that must be conducted legitimately to achieve rational and impartial truth and justice.

In the Dutch legal system, law is seen as a rational instrument based on scientific methods to find the truth and realize justice. Thus, law is considered a science because it is based on rational decisions that use logic and balanced analysis to produce justice. Therefore, the entire judicial process, from investigation to prosecution, must follow predetermined legal rules.

As a consequence of the inquisitorial system, the public prosecutor has a central and dominant role in every stage of the criminal justice process in the Netherlands. (Zunaidi & Najih, 2020, p. 12).. The public prosecutor is not only in charge of giving orders to the police regarding investigative steps, but also has the authority to decide whether a case will be forwarded to court or terminated. In exercising its authority, the public prosecutor is based on the principle of expediency, which allows the prosecution of a case to be stopped if the criminal offense is considered minor or if continuing the legal process does not meet the public interest. In addition to the principle of expediency, the public prosecutor is also guided by the principle of opportuniteitsbeginsel, which gives the public prosecutor the freedom not to bring a case to court or to resolve it in another way at his or her discretion.

This discretion of the public prosecutor is regulated in both material criminal law (Wetboek van Strafrecht or Sr) and formal criminal law (Wetboek van Strafvordering or Sv). These provisions reflect the flexibility of the Dutch legal system in balancing the interests of substantive justice and the efficiency of the criminal justice system.

The Netherlands, as a country that adheres to the Civil Law legal system, has a major influence on the development of law in Indonesia. In the context of the application of the exclusionary rules principle, the Netherlands regulates the treatment of illegally obtained evidence through a special provision stipulated in Article 359a paragraph (1) letter b of the Wetboek van Strafvordering (WvSv), part of the Dutch criminal procedure law. (Ramadhina et al., 2022, p. 387).. Unlike the United States, which largely bases this principle on court precedent, the Netherlands regulates it in detail in law. Provisions related to the acquisition of evidence are also contained in the WvSv, which includes is still submitted to the court and even used as a basis for decision making. This practice contradicts the principle of due process of law, which demands that every step in the legal process is carried out in accordance with the applicable legal rules. This indecisiveness creates legal loopholes that can result in human rights violations, especially the right of suspects to be treated fairly and humanely.

In addition, KUHAP also does not provide an operational definition of the term «legal» in Article 184 paragraph (1). This lack of clarity has led to various interpretations among law enforcement officials and courts. For example, although Article 52 of KUHAP stipulates that suspects may not be coerced into giving testimony, there is no mechanism in KUHAP that regulates sanctions for officers who violate this provision. As a result, there are many cases where confessions obtained through physical or psychological pressure are still used in trials, even becoming the main evidence for sentencing.

Another weakness found in KUHAP is the absence of a clear mechanism to evaluate the validity of evidence during the trial process. Unlike legal systems in several other countries that apply the exclusionary rules principle, KUHAP does not have a regulation that explicitly prohibits the use of evidence obtained through illegal means. This is contrary to the principle of substantive justice, which demands that only legitimate and legally obtained evidence can be used to enforce the law.

This highlights the need for reforms in KUHAP to close these legal loopholes. For example, the draft law on criminal procedure (RUU HAP) proposed by the government in 2013 provides more detailed arrangements regarding the validity of evidence. The bill emphasizes that valid evidence must be obtained without violating the law. However, the implementation of this principle requires further elaboration, especially regarding the limits of actions that are considered unlawful in obtaining evidence. Clearer regulation of legally obtained evidence is essential to maintain the integrity of the criminal justice process. Without strict regulation, the risk of human rights violations, abuse of authority by officials, and court decisions that undermine justice will continue. Thus, the reform of KUHAP to incorporate the principle of exclusionary rules as part of the Indonesian criminal law system is an urgent step that cannot be delayed.

In contrast to the Criminal Procedure Code, Law No. 48/2009 on Judicial Power provides that the evidence used in the trial must meet the legal criteria. Article 6 paragraph (2) states that «no one shall be sentenced to punishment except on the basis of valid evidence according to law.» This provision is in line with the principle of due process of law, which emphasizes the importance of gathering evidence in accordance with legal procedures to ensure justice for the parties involved in the judicial process. This provision demonstrates an effort to ensure that criminal trials focus not only on the final outcome of the verdict, but also on the validity of the evidentiary process underlying the verdict. This principle reinforces that the evidence used must be generated through legal means and not violate the rights of the suspect, such as freedom from pressure or torture that often occurs during the investigation stage. However, this arrangement still has weaknesses because it does not explicitly explain the mechanism for evaluating the validity of evidence obtained through unlawful means. In practice, valid evidence is often only assessed by its type, not the way it was obtained. This can lead to legal loopholes, where evidence obtained in violation of human rights is still used in the trial process because there are no rules governing the testing mechanism. (Eddyono & Napitupulu, 2014, p. 87). In addition, Law No. 48/2009 does not give judges direct authority to reject evidence obtained illegally. Judges are only tasked with ensuring that evidence is in accordance with the law, but the interpretation of the validity of the acquisition process is not regulated in detail. This lacuna provides room for practices of abuse of authority by law enforcement officials, which is contrary to the principle of due process of law.

To address these weaknesses, more specific arrangements are needed to ensure that evidence used in court is not only valid in type, but also obtained through unlawful means. The adoption of the exclusionary rules principle in the Indonesian legal system

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

several chapters such as Chapter IV on Information Gathering, Chapter V on Searches, Chapter VI on Recording of Conversations, Chapter VII on ITE-Based Investigations, and Chapter VIII on Data Requests.

Article 36e of the Wetboek van Strafrecht (WvS), which is the Dutch material criminal law, explains that evidence is considered illegal if law enforcement officers violate the provisions of the criminal procedure, act without a warrant, or ignore legal principles such as not using force and maintaining fairness in the process of collecting evidence. In addition, evidence obtained by violating investigative procedures is also considered invalid. However, the exclusionary rule in the Netherlands is not automatically applied to all illegal evidence. Judges have the discretion to determine the appropriate course of action based on the violations found. The choice of action includes (Borgers & Stevens, 2010, p. 46):

1) Giving the prosecutor the opportunity to correct administrative errors, as provided for in Article 199 WvSv.

2) Stating that there were irregularities in the collection of evidence but without serious consequences to the evidence, as provided for in Article 349 paragraph (1) WvSv.

3) Provides for a reduction of sentence to the accused if the offense is deemed serious but does not completely nullify the validity of the evidence. If there is a causal link between the offense and the evidence, the evidence may be excluded, as provided for in Article 349a paragraph (1) WvSv.

4) Dismiss the charges if the seriousness of the offense is deemed to threaten the principle of a fair trial, as set out in Article 359a (3) WvSv.

5) The application of this principle in the Netherlands is highly dependent on the judgment of the judge in charge. This shows that the exclusionary rules in the Netherlands are flexible and adapted to the context of each case. Judges have a central role in ensuring that evidence used in court meets standards of fairness, including protecting defendants from unlawful treatment during the legal process.

The principle of exclusionary rules in Dutch criminal procedure law aims to eliminate evidence obtained through violence or other unlawful methods. (Sriwidodo, 2020, p. 71). This principle also provides protection for the human rights of the accused by ensuring that the judicial process is fair and in accordance with the law. In addition, the application of this principle is a preventive measure to prevent the recurrence of unlawful practices by law enforcement officials. By granting discretion to judges, the Dutch judiciary avoids the role of legitimizing the practice of illegally obtaining evidence, thereby strengthening public confidence in the judicial system.

3.4. Implementation of the exclusionary rules of evidence principle in Indonesia

This could be an important step in strengthening the protection of human rights and improving the integrity of the criminal justice system. This principle aims to prohibit the use of evidence obtained unlawfully, including through torture, threats, intimidation or other unlawful acts. To adopt this principle, an implementation model that is tailored to the characteristics of the Indonesian legal system, which adheres to the civil law tradition with an inquisitorial approach, is required. (Baehaki, 2024, p. 5)..

1). Adjustments in the Legislative Framework

The first step in implementing this principle is to explicitly include exclusionary rules in the revised Criminal Procedure Code (KUHAP). This regulation can adopt the provisions as stipulated in the Wetboek van Strafvordering (WvSv) in the Netherlands, where evidence obtained illegally is excluded from the trial. (Agustini & Hadjar, 2024, p. 1316).. The revision of the KUHAP could include a provision stipulating that:

1) Evidence obtained unlawfully cannot be used in court.

2) Judges are authorized to assess the validity of evidence based on the process

of obtaining it.

3) The mechanism for evaluating the validity of evidence is accompanied by sanctions for officers who violate legal procedures.

2). Strengthening the Role of Judges in Assessing the Validity of Evidence

As part of the inquisitorial system, judges in Indonesia have the authority to examine and assess evidence presented at trial. In the new model, this role should be expanded by giving judges the authority to actively evaluate whether evidence was obtained through legal or unlawful means. This is in line with the concept of judicial control applied in other countries, such as the Netherlands, where judges act as the main watchdog in maintaining the fairness of the judicial process.

3). Establishment of Grievance and Oversight Mechanism

To ensure effective implementation of the exclusionary rules, a grievance mechanism is needed that allows suspects or legal counsel to report allegations of torture or other violations during the investigation process. This mechanism can involve independent institutions such as Komnas HAM or the Ombudsman to investigate alleged violations. In addition, internal supervision in the police and prosecutor's office needs to be strengthened to prevent unlawful practices.

4). Training and Education for Law Enforcement Officials

The application of the exclusionary rules principle must be supported by a strong understanding among law enforcement officials, including police, prosecutors, and judges. (Mertens & Wasserstrom, 1981, p. 365). Therefore, intensive training on the principles of due process of law, protection of human rights, and procedures for obtaining valid evidence is needed. This training not only improves the professionalism of law enforcement officers, but also prevents abuse of power.

5). Sanctions to Improve Accountability

As part of the new model, the application of this principle must be accompanied by strict sanctions against officials who are proven to have violated legal procedures in obtaining evidence. Such sanctions should not only be administrative but also criminal, so as to provide a deterrent effect and increase accountability in the law enforcement process.

5. Conclusions

Until now, Indonesia has no explicit regulation regarding the application of the Exclusionary Rules principle, which has an impact on the weak protection of the rights of suspects in the criminal justice process. Without a clear legal mechanism to exclude evidence obtained unlawfully, law enforcement officials can easily utilize a suspect's confession obtained through pressure or violation of the law as a basis for proof. This practice not only harms the suspect, but also undermines the principles of justice and damages the image of the judiciary. For this reason, concrete steps are needed by regulating the Exclusionary Rules principle in the KUHAP, taking inspiration from the provisions of Article 359a paragraph (1) letter b of the Wetboek van Strafvordering (WvSv) in the Netherlands which expressly excludes evidence obtained illegally. In addition to providing a clear legal basis, this regulation can reduce the number of human rights violations in the investigation process, prevent the practice of torture, and create a deterrent effect for law enforcement officials who violate the rules. Thus, the Indonesian legal system will be able to guarantee the protection of human rights, ensure a judicial process that is in accordance with the principle of due process of law, and increase public confidence in judicial institutions.

Recommendations for a New Model Implementing Exclusionary Rules of Evidence in Indonesia:

The application of exclusionary rules of evidence in Indonesia could be a strategic step to improve the criminal justice system, particularly in protecting human rights and enhancing substantive justice. This principle aims to prohibit the use of evidence obtained through unlawful means, such as torture, threats, or violations of investigative

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.20-33

procedures. Although it has not been explicitly regulated in the Criminal Procedure Code (KUHAP), the application of this principle is very relevant to fill the legal gap that allows abuse of authority by law enforcement officials. (Lutfian, 2018, p. 89).

The model for applying the exclusionary rules principle must consider the characteristics of the Indonesian legal system which is based on civil law and uses an inquisitorial approach. Therefore, it is necessary to develop a comprehensive regulatory framework in KUHAP that includes mechanisms for assessing the validity of evidence by judges, sanctions for violations of the law by officials, and supervisory procedures to ensure compliance with the principle of due process of law. By adopting regulatory elements from countries such as the Netherlands, which has implemented this principle through the Wetboek van Strafvordering (WvSv), Indonesia can build a more fair, transparent and accountable legal system.

References

Adhirajasa, A., & Diningrat, H. (2024). Competence of Electronic Evidence in Proving Criminal Acts in Indonesia. *Causa: Journal of Law and Citizenship, 5*(1), article number 1. https://doi.org/10.3783/causa.v5i1.4017

Agustini, A.P., & Hadjar, A. F. (2024). Comparison of Examination and sanctioning of murder committed by children according to the Indonesian and Netherlands Judicial systems: Comparison of examination and sanctioning of murder committed by children according to the indonesian and netherlands judicial systems. T*risakti Law Reform, 6*(3), Article 3. https://doi.org/10.25105/refor.v6i3.21126

Ardya, N. (2023). Legal consequences of ratification of optional protocol on the convention against torture (opcat) and its effect on the protection of the right to security from torture in Indonesia. *To-Ra Law Journal: Law to Regulate and Protect Society, 9*(1), article number 1. https://doi.org/10.55809/tora.v9i1.167

Baehaki, K. (2024). Comparison of the application of jurisprudence in civil law and cammon law legal systems between Indonesia and Australia: Comparison of the Application of jurisprudence in civil law and cammon law legal systems between Indonesia and Australia. *Journal of Legal Media, 12*(1), article number 1. https://doi.org/10.59414/jmh.v12i1.635

Benuf, K., & Azhar, M. (2020). Legal research methodology as an instrument to unravel contemporary legal issues. *Gema Keadilan, 7(*1), 20-33.

Borgers, M. J., & Stevens, L. (2010). The Use of illegally gathered evidence in the Deutsch Criminal trial. Retrieved from: https://ssrn.com/abstract=1640487

Djiwandono, D.A., Ylma, F.T., & Sella, D.Q.A.N. (2024). The Principle of exclusionary rules of evidence in the evidence of narcotics crimes. *UNES Law Review, 6(*4), article number 4. https://doi.org/10.31933/unesrev.v6i4.2064

Eddyono, S.W., & Napitupulu, E. (2014). *Prospects for preliminary examining judges in detention supervision in the draft criminal procedure code*. Oakland: Institute for Criminal Justice Reform.

Fadhli, M. S. (2024). *The position of Uu Ite in the Provision of electronic evidence as Additional evidence of cyber crime*. Causa: Journal of Law and Citizenship, 5(2), article number 2. https://doi.org/10.3783/causa.v5i2.4112

Fahlevy, M. (2022). Evidence in Criminal cases according to the criminal procedure code (KUHAP). Jantho District Court. Retrieved from: https://www.pn-jantho.go.id/index.php/2022/07/05/alat-bukti-dalam-perkara-pidana-menurut-kitab-undang-undang-hukum-acara-pidana-kuhap/

Harahap, M. Y. (2009). *Discussion of problems and application of KUHAP: Investigation and prosecution*. Jakarta: Sinar Grafika.

Leckie, S. (1997). Exclusionary rules in Canada and the United States. *Dalhousie Journal of Legal Studies,* 6(1), 263-285. https://digitalcommons.schulichlaw.dal.ca/djls/vol6/

iss1/8

Lutfian, D. M. (2018). Obligations of Public prosecutors in fulfilling victims' rights at the prosecution stage. Retrieved from: https://dspace.uii.ac.id/handle/123456789/5842

Mertens, W. J., & Wasserstrom, S. (1981). The good faith Exception to the exclusionary rule: Deregulating the Police and derailing the law. *Georgetown Law Journal, 70*, article number 365. https://heinonline.org/HOL/Page?handle=hein.journals/glj70&id=375&div=&collection=

Prasetyo, D., & Herawati, R. (2022). Review of the Criminal justice system in the context of law enforcement and protection of human rights of suspects in Indonesia. *Journal of Indonesian Legal Development, 4*(3), 402-417. https://doi.org/10.14710/jphi.v4i3.402-417

Rai, I.G.A.I., & Salsabila, S.N. (2020). The Exclusion of ne bis in idem at the international criminal court: An unbalanced concept of justice. *Juris Gentium Law Review, 6*(2), article number 2. https://journal.ugm.ac.id/jurisgentiumlaw/article/view/57111

Ramadhina, R.Y.A., Haryanti, D., & Efritadewi, A. (2022). Exclusionary Rules in the evidentiary stage in court in order to obtain valid evidence. *Student Online Journal (SOJ) UMRAH - Social and Political Sciences, 3(*1), article number 1. https://soj.umrah.ac.id/index.php/SOJFISIP/article/view/1763

Ranoemihardja, R. A. (1980). *Criminal Procedure Law*. Jorong: Tarsito.

Republic of Indonesia. (1981). Law of the Republic of Indonesia No. 8 Concerning Criminal Procedure (Article 1 Paragraph (2). https://www.icj.org/wp-content/uploads/2013/01/Indonesia-Code-of-Criminal-Procedure-1981-eng.pdf

Republic of Indonesia. (2011). Regulation of the Attorney General No PER-036/1/JA/09/2011 «On Standard operating procedures for handling general crimes». Retrieved from: https://www.scribd.com/document/651078233/sihono-pelimpahan-berkas-plkh

Republic of Indonesia. (2020). Law of the Republic of Indonesia No 7 «On concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court». https://jdih.komisiyudisial.go.id/frontend/detail/4/322

Rifa'i, I.J., Purwoto, A., Ramadhani, M., Muksalmina, Rusydi, M.T., Harahap, N.K., Mardiyanto, I., Churniawan, E., Junaedi, M., Agustiwi, A., Saragih, G. M., Bariah, C., & Surasa, A. (2023). *Legal research methodology*. Serang-Banten: Sada Kurnia Pustaka.

Situmorang, M. (2018). The Position of commissioner judges in the Criminal Procedure Bill. *Journal of Legal Research De Jure, 18*(4), article number 433. https://doi.org/10.30641/dejure.2018.V18.433-444

Sriwidodo, J. (2020). *The development of the Criminal Justice system in Indonesia*. Yogyakarta: Kepel Press.

Suyanto, S. (2023). *Legal Research methods introduction to normative, empirical and combined research*. Jawa Timur: Unigres Press.

Tiara, A.E., Maulana, A., & Billiansya, M.R. (2017). Police in the shadow of torture (Torture Case Notes Throughout 2013 to 2016). Jakarta Legal Aid Institute (LBH).

Wiryono, S., & Rastika, I. (2024). Contrast: Police Wrongly arrested 15 Times in the Last year, 23 Victims. KOMPAS.com. https://nasional.kompas.com/read/2024/07/01/19001741/kontras-polisi-15-kali-salah-tangkap-dalam-setahun-terakhir-korbannya-23

Zubairy, A. (2021). Recollection as Evidence by the public prosecutor in criminal cases based on the principles of due process of law. *Indonesian Journal of Law Enforcement, 2*(2), article number 2. https://doi.org/10.51749/jphi.v2i2.34

Zunaidi, A. H., & Najih, M. (2020). Comparative Analysis of criminal case settlement policies outside of trial in the Netherlands, the United Kingdom, and Indonesia. *Audito Comparative Law Journal (ACLJ), 1*(1), art number 1. https://doi.org/10.22219/audito.v1i1.12781

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

EXPERT CONCLUSION AS A KEY SOURCE OF EVIDENCE IN CASES OF CORRUPTION OFFENSES BY OFFICIALS

Vasyl Hudz
Department of Criminal Procedure
National Academy of Internal Affairs
03035, 1 Solomianska Sq., Kyiv, Ukraine
E-mail: hudzvm@gmail.com
https://orcid.org/0009-0007-4212-0720

Abstract

The article examines the issue of using an expert's opinion as a procedural source of evidence of receipt of funds in the form of an unlawful benefit by an official. The relevance of the topic is evidenced by the need to update the current legislation in the field of forensic examinations for the purpose of high-quality pre-trial investigation and trial, in particular, through the prism of the Ukrainian society's requirement to cleanse the state apparatus from corruption, effectively combat criminal offenses, and improve the current crime situation. Another factor is the rapid development of all spheres of public life. This is manifested on the one hand in the improvement and complication of the processes of proving the parties' positions in court and, on the other hand, in the massive introduction of computer information technologies into everyday life, the automation of many types of work processes, the spread of artificial intelligence technology, and its obvious potential. In the case of forensic examination and obtaining an expert opinion based on its results, the development of social relations and technology has a negative impact if ignored, but at the same time offers great potential for improving the process of proof. The purpose of the article is to study the specific aspects of using an expert's opinion when proving the receipt of funds in the form of an unlawful benefit by an official. As a result of achieving the objective, a method for addressing the identified negative factors has been proposed, which involves amending existing legislation or introducing new regulations in areas requiring legal oversight. In general, the study contributes to the study of the use of an expert opinion in proving the receipt of funds in the form of an unlawful benefit by an official. Outlining the legal characteristics of an expert opinion and examining the practice of its use in proving a corruption crime.

Keywords: expert conclusion; forensic examination; criminal proceedings; receipt of monetary funds as an unlawful benefit by an official.

1. Introduction

All evidence holds significance in proving a criminal offense, serving as primary in some cases and supplementary in others. Participants in criminal proceedings must maintain a comprehensive understanding of evidence collection sources. The expert conclusion occupies a pivotal role in substantiating a significant portion of criminal offenses, necessitating its creation through a properly regulated legislative procedure. This source of evidence plays a particularly critical role in proving the receipt of monetary funds as an unlawful benefit by an official, a criminal offense punishable under Art. 368 of the Criminal Code of Ukraine.

According to the lawmaker, an expert opinion is a thorough explanation of the expert's study, conclusions based on those findings, and rational responses to the expert's questions (Criminal Procedure Code of Ukraine, 2024, Art. 101).

In order for the expert conclusion to be recognized as admissible in proving the receipt of monetary funds as an unlawful benefit by an official, it must contain the following information: who conducted the examination, at what location, when, and on what grounds; a list of individuals present during the examination; a list of questions to which the expert was to provide answers; a detailed description of all materials obtained by the expert, as well as those used by them; a thorough description of the research conducted, including the methods applied, results, and expert evaluations; and substantiated answers to each question (Criminal Procedure Code of Ukraine, 2024, Art. 102).

The idea and process for getting an expert opinion in criminal proceedings have also been heavily regulated by the lawmaker. The term makes clear that it is prepared following the completion of a forensic expert examination.

The Law of Ukraine "On Forensic Expertise" is the normative document that establishes the process for carrying out forensic investigations and formulating expert opinions. In order to reach the necessary conclusion on matters that are currently or will be the subject of judicial consideration in the future, it defines forensic examination as an investigation based on pertinent specialized knowledge in the fields of science, art, technology, and crafts regarding specific phenomena, objects, and processes (On Forensic Expertise, 2024, Art. 1).

Other legislative acts regulating the issues of forensic examination and expert opinions are the Instruction on the appointment and conduct of forensic examinations and expert studies and the scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies (hereinafter - the instruction and scientific and methodological recommendations). The instruction classifies the main types of forensic examinations, which include: "forensic, commodity, psychological, engineering, art, economic, military, intellectual property, forensic veterinary, historical, archaeological, gemmological." Another classification provides for the division of forensic examinations into primary, commission, repeated, comprehensive, and additional" (On Approval of the Instruction on Appointment and Conduct of Forensic Examinations, 2024, clause 1.2, sub-cl. 1.2.13.). In the course of proving the criminal offense under investigation, the following subtypes of forensic examinations are mostly carried out: portrait examination; linguistic examination of speech; examination of video and sound recordings; handwriting examination; technical examination of documents.

The aim of this article is to examine the specific aspects of utilizing an expert opinion in proving the receipt of funds as an unlawful benefit by an official. To achieve this objective, it is essential to address the research task, which involves studying the legal characteristics of an expert opinion, analysing the practice of its use as evidence in proving the commission or non-commission of the corruption offense under consideration, and its influence on relevant judicial decisions. Based on the outcomes of this analysis, the author identifies several aspects that require attention during forensic examinations and the formulation of expert opinions based on their results. These factors significantly impact both the standards of criminal justice administration and the proof of an official's receipt of funds as an illegal advantage.

2. Materials and Methods

The study of the expert's opinion as a procedural source of evidence for the receipt of funds in the form of an unlawful benefit by an official was conducted in several stages. In the preparatory stage, the research topic was chosen, the objectives and goals of the study were formulated, and the methods of scientific inquiry were selected. The informational stage involved searching for and reviewing literature, examining the opinions of scholars, and analysing court practices. Additionally, a synthesis of personal practical experience was undertaken. The purpose of the narrative stage was to write the paper and formulate conclusions.

The main material was presented in a structured sequence. Initially, the legal

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

characterization of the expert's opinion as a procedural source of evidence in the corruption offense under examination was discussed. The author then analysed the primary types of forensic examinations appointed to obtain an expert opinion during the process of proving the receipt of funds as an unlawful benefit by an official. Based on the findings of the study, the author proposes improvements to the use of expert opinions as evidence in criminal cases.

Researching any issue is impossible without the application of scientific cognition methods. The system of scientific cognition methods is intricate and multifaceted, providing researchers with a broad array of methodological tools to address specific issues. Given its diversity, each scientific work utilizes a unique set of methods. The selection of these methods is influenced by various factors and directly affects the quality and outcome of the research. In the study of the expert's opinion as a procedural source of evidence for the receipt of funds in the form of an unlawful benefit by an official, the following methods were employed:

- the dialectical method enabled the analysis of the use of expert opinion in the examined criminal proceedings through its development. This procedure was made easier by the dialectical method's categories, which helped to identify the traits and attributes of objective reality. The quality category gave researchers a way to describe the full topic of the study. The content category aided in the investigation of the shape that emerged in the expert's view as the ultimate result of the pertinent formulation process. The category of negation was utilized to support the need for legislative framework enhancements, particularly the development of new laws that conform to modern standards while maintaining those that are still pertinent;
- the comparative legal method was employed to examine the regulatory framework pertaining to the issue under investigation. The author presents the key principles from the legislation and analyzes the process of formulating an expert opinion through the lens of its properties and underlying patterns;
- the methods of analysis and synthesis were utilized in the study. The analysis allowed for the examination of contemporary practical approaches to using an expert opinion in proving the receipt of funds as an unlawful benefit by an official. Specifically, the author reviewed court practices regarding the use of expert opinions and their evaluation by the judiciary in relevant cases. The synthesis facilitated the identification of strategies to enhance the effectiveness of using expert opinions as evidence;
- the systemic and structural method contributed to the consideration of the concept of expert opinion as an independent procedural source of evidence. There are structured stages from making a decision on the need to obtain an expert opinion to its use along with other sources of evidence;
- the forecasting method was employed to model the potential impact of the proposed changes on the effectiveness of using an expert opinion in proving the receipt of funds as an unlawful benefit by an official.

The application of these methods enabled a comprehensive analysis of the topic under study and led to the formulation of conclusions aimed at enhancing the efficiency and accessibility of expert opinions for all parties involved, ultimately contributing to the achievement of the objectives of criminal proceedings.

3. Results and Discussion

The examination of the legal characteristics of an expert opinion in proving the receipt of funds as an unlawful benefit by an official holds significant practical value in understanding its role as a procedural source of evidence. Analysing the practice of its use will help assess its current state and importance in the process of proving the criminal offense under investigation. A systematic approach to the topic will facilitate the identification of legislative gaps and practical issues. This, in turn, will enable the proposal of solutions to address these gaps and mitigate their negative impact on the quality of criminal proceedings

3.1. Legal characteristics of an expert opinion as a legal source of evidence

An expert opinion, alongside testimony, material evidence, and documents, constitutes a procedural source of evidence (Criminal Procedure Code of Ukraine, 2024, Art.84). The classification of the expert opinion as a distinct source of evidence underscores, on one hand, its differentiation from other forms of evidence, and on the other, its critical significance in the process of establishing the facts of a criminal offense.

An expert opinion can only be produced by a qualified expert. Ukraine has established a Register of Certified Forensic Experts. According to the Law of Ukraine «On Forensic Expertise,» a person or entity requesting a forensic examination may only entrust the examination to those forensic experts whose details are included in the State Register of Certified Forensic Experts. Furthermore, the law permits the assignment of the examination to other specialists in relevant fields of knowledge, but only where explicitly provided by law (The Law of Ukraine No. 4038-XII on Forensic Examination, 2024, Art. 9).

Furthermore, if more than one expert is involved in the examination, they have the right to draw up one joint conclusion or separate conclusions (Criminal Procedure Code of Ukraine, 2024, Art.101). However, as practice demonstrates, even complex forensic examinations performed by experts in different fields of knowledge can be executed in one document. This approach is the most common in practice.

An expert examination can be initiated by an investigator, prosecutor, or the accused or their legal representative. The expert provides their conclusions based on an objective examination that is free from bias (Sugianto, Amiruddin & Wagian, 2024, p. 203).

Upon completion of the forensic examination, the expert's opinion is submitted in writing to the party that ordered the examination (Criminal Procedure Code of Ukraine, 2024, Art. 101). If the expert opinion is to be used as evidence in court, the party that received it must ensure that the other party is familiarized with it, following the procedure established by criminal law.

The Criminal procedure code of Ukraine, the instructions and the scientific and methodological recommendations provide for mandatory details of the expert's opinion in addition to the list of data required to be indicated in the expert's opinion. It must include the title of the document; the date of its preparation and the relevant registration number; the category of expertise; and the type of expertise. Furthermore, it should be structured in the following parts: Introduction; Research; Conclusion (On Approval of the Instruction on Appointment and Conduct of Forensic Examinations , 2024, cl. 4.12).

The expert's opinion, like other types of evidence, does not have a predetermined force. Moreover, it is not binding on the person conducting the proceedings. However, disagreement with it must be motivated in the relevant document (Criminal Procedure Code of Ukraine, 2024, Art. 101). An expert opinion in proving criminal proceedings can be used at all levels of investigation: during the pre-trial investigation, as well as during the trial (Ismawati, 2023, p. 33).

The examination of an expert's opinion is frequently one of the most contentious stages in criminal proceedings, particularly in cases involving the unlawful receipt of money or benefits by public officials. Several factors contribute to this. First, an expert opinion often serves as a key piece of evidence upon which the positions of either the prosecution or defense are primarily based. Second, conducting an expert examination and formulating an expert opinion requires specialized knowledge, which the court typically lacks. As a result, judges generally rely on the conclusions of the expert, whose findings they are unable to independently verify.

Given these circumstances, parties in criminal proceedings often exercise their

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

right to request the court to summon an expert for further questioning, with the aim of obtaining clarification or additional information regarding the expert's opinion. In this context, it is essential that a forensic expert, when preparing an expert opinion, strives to present the results of their research in a manner that is comprehensible to individuals without specialized knowledge (Tymchyshyn, 2021, p. 133).

According to the legislation, forensic examinations may be initiated on the following grounds: a court decision, a decision by a pre-trial investigation body, or an agreement with the expert (Law of Ukraine No. 4038-XII on Forensic Examination, 2024, Art. 7-1). It is during the forensic examination process that the expert produces the expert opinion document.

To facilitate the conduct of a forensic examination, the expert must be granted access to materials that are necessary to address the relevant questions and prepare an expert opinion. These materials may be provided to the expert either concurrently with the decision to appoint the forensic examination or at a later stage. If required, experts have the right to submit requests for additional materials or to review case files pertinent to the forensic examination (Law of Ukraine No. 4038-XII on Forensic Examination, 2024, Art. 13).

In certain instances, conducting an expert examination may necessitate the expert's physical presence at a specific location. This is typically arranged by involving the expert in a particular investigative action. The expert has the right to attend court or investigative proceedings and may also submit motions related to the scope of the examination. However, this right can only be exercised with the permission of the person or body that appointed the examination (Law of Ukraine No. 4038-XII on Forensic Examination, 2024, Art. 13).

Moreover, there is a specific procedure for conducting a forensic examination at the scene of an event or at the location of the object of study. In such cases, the party commissioning the examination must ensure that the expert is provided with appropriate working conditions and unimpeded access to the object of study (Law of Ukraine No. 4038-XII on Forensic Examination, 2024, Art.6). In practice, most forensic examinations related to proving the unlawful receipt of funds by an official do not necessitate the expert's physical presence at the scene, as all relevant materials can typically be reviewed within the facilities of expert institutions. However, the process of proving can require various investigative approaches, and thus, situations may arise where an on-site examination becomes necessary.

Upon receiving the necessary documentation from the client requesting the examination, along with relevant materials and arrangements for access to the site of the event or the location of the object under investigation, the expert may proceed with conducting the expert study. Based on the findings of the study, the expert prepares a formal procedural document – the expert's opinion. This document should rely exclusively on information directly observed or obtained during the examination of the materials provided for the study (Criminal Procedure Code of Ukraine, 2024, Art.101). Upon completing the examination, the expert submits the opinion, along with all materials received for the study, to the client.

In criminal proceedings involving the receipt of unlawful financial benefits by an official, it is advisable to distinguish and outline the conditional stages of creating and utilizing an expert opinion:

- the first stage involves making a determination regarding the necessity of obtaining an expert opinion;
- the second stage is the appointment of an appropriate forensic examination (which may coincide with the first stage);
- the third stage is the expert's receipt of relevant materials, and, if necessary, physical access to the object of study;
- the fourth stage is the expert's expert study;

• the fifth stage is the preparation of an expert opinion based on the results of the forensic examination and its submission to the customer;

• the sixth stage is the customer's assessment of the expert's opinion and decision to agree or disagree with it;

• the seventh stage is the use of an expert opinion in proving criminal proceedings.

Obtaining an expert opinion is often a longer and more complicated process than other evidence. Sometimes an expert examination is appointed at the stage of pre-trial investigation, and the expert opinion is obtained at the stage of trial. This may occur when the expert's opinion is intended to establish circumstances that are not decisive for the submission of an indictment to the court. An instance is the valuation of expensive items that may be confiscated by the court. This refers to the confiscation of property as a form of punishment. If in the above example the subject of proof waited for an expert opinion at the pre-trial investigation stage, this could harm the objectives of criminal proceedings, such as prompt pre-trial investigation and trial.

A mandatory condition for conducting a forensic examination to prove the receipt of funds in the form of an unlawful benefit by an official is the existence of a relevant criminal proceeding under Art. 368 of the Criminal Code of Ukraine. There are also cases when an expert examination is ordered or an expert opinion is prepared in criminal proceedings under another article, although the criminal offence is subsequently reclassified.

It is important to emphasize that the primary purpose of any expert study is to obtain accurate and reliable data, which will subsequently be documented in the expert's opinion. To achieve this objective, it is essential to adhere to the established procedural requirements. Only by following these procedures can the expert's opinion be considered credible and admissible for evaluation by the relevant decision-maker.

3.2. Analysis of the practice of using an expert's opinion in proving the receipt of funds in the form of an unlawful benefit by an official

The purpose of the forensic examination of corruption-related crimes is to assist the anti-corruption authorities of Ukraine in answering the following questions: 'Who?', "What?", "Where?", "Why?", "When?", "How?" It is the expert's opinion that contributes to a comprehensive, complete and objective investigation of the circumstances of cases and the adoption of lawful and reasonable court decisions (Geller & Martynenko, 2023, p. 60).

In proving the receipt of funds as an unlawful benefit by an official, the subject of proof has discretion in selecting the type and sequence of investigative actions to be conducted. Moreover, each criminal proceeding is inherently unique and requires an individualized approach to documentation. Consequently, there are no established restrictions or specific guidelines regarding the appointment of a particular type of forensic examination, the results of which form the basis for the expert's opinion. However, as judicial practice demonstrates, expert opinions in such cases are often obtained through the following types of forensic examinations: video and audio recording analysis, linguistic speech analysis, portrait analysis, handwriting analysis, and technical document analysis.

An expert opinion based on the results of a forensic examination of video and audio recordings holds significant evidentiary value. As practice demonstrates, it is uncommon to document the receipt of funds as an unlawful benefit by an official without conducting covert investigative (detective) actions, such as audio or video surveillance of the individual. This involves interference with a person's private communications, carried out without their knowledge, and only in cases where sufficient grounds exist to believe that the individual's activities or related information may provide critical evidence for the pre-trial investigation. Such investigative actions are conducted exclusively under the authorization of an investigating judge (Criminal Procedure Code of Ukraine, 2024,

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

Art. 260) and involve audio or audio-visual recording facilitated by specialized technical equipment.

When initiating a forensic examination of video or audio recordings, the parties to criminal proceedings seek to obtain an expert opinion with answers to the questions posed. When proving the receipt of money in the form of an unlawful benefit by an official, such questions are often the following: whether the relevant audio or audio and video files contain signs of editing or other artefacts; whether the content of the recorded conversation coincides with the text set out in the relevant protocol; whether the words and statements set out in the protocol and recorded in the relevant file were said by a particular person.

The above is confirmed by the verdict of the High Anti-Corruption Court delivered on 30 May 2023. The court found two people guilty of committing crimes under Part 4 of Art. 368, Part 3 of Art. 369-2 of the Criminal Code of Ukraine. The forensic expert was asked the above questions and provided answers to them in the relevant conclusion (Judgment, High Anti-Corruption Court, 2023, No. 127/13972/17).

An expert opinion derived from a linguistic examination of speech is a critical element in proving the receipt of money as an unlawful benefit by an official. In such cases, a specific subtype of linguistic analysis is conducted—the semantic and textual examination of oral speech. An expert in the field of semantic and textual analysis is tasked with determining, within the scope of their specialized knowledge, the presence or absence of statements that contain directives or calls for specific actions. This examination provides essential insight into the content and intent of the speech, contributing to the overall evidentiary process.

The High Anti-Corruption Court's decision from August 10, 2022, provides an example of an expert's opinion during a subspecies of linguistic speech examination, which is a semantic and textual study of oral speech. According to Part 3 of Art. 368 of the Ukrainian Criminal Code, the individual was found guilty of a crime. In the expert opinion, the expert said: «Considering the question's context, the statements made by the individual in the dialogue's text reveal statements that can be interpreted as a person's offer» (where «offer» refers to guidance, instructions on how to act, what to do, etc.) to provide funds in the amount of at least twenty-five per cent (in context, of the amount of the claim) for a quick positive result in his claim (Judgment, High Anti-Corruption Court, 2022, No. 550/101/18).

A professional assessment based on the findings of a portrait analysis is required. Expert opinion is sought to identify the individual involved in the provision or receipt of an unlawful benefit, with a focus on demonstrating the acceptance of monetary funds by an official as an illicit advantage. Conducting a portrait examination is both expedient and essential in criminal proceedings where the applicant's identity remains unknown. In such cases, the expert's analysis must address the following question: whether the individual depicted in the relevant video recording corresponds to the person shown in the comparative samples.

A comparable expert opinion, derived from the results of a portrait examination, contributed to the conviction of an individual for an offense under Part 3 of Art. 368 of the Criminal Code of Ukraine. The High Anti-Corruption Court issued the verdict on August 10, 2022. In this case, the expert concluded that the investigative materials and comparative samples provided depicted the same individual (Judgment, High Anti-Corruption Court, 2022, No. 550/101/18).

Similarly, expert opinions based on handwriting examination results play a crucial role in identifying the author of handwritten texts or signatures through comparative analysis. To ensure the accuracy of such analyses, it is essential to provide the expert with the original manuscripts.

In cases where an official receives money as an undue advantage, the parties involved may convey certain information to applicants through handwritten notes.

Occasionally, the receipt of an undue advantage is framed as the repayment or issuance of a loan, accompanied by the drafting of corresponding documents. These actions are typically initiated by the perpetrators of the crime to obscure the illegality of their activities.

On February 15, 2023, the High Anti-Corruption Court convicted two individuals of committing a crime under Part 4 of Art. 368 of the Criminal Code of Ukraine. The expert's conclusion, based on handwriting examination results, verified the signature of one of the offenders on an A4 document, positioned next to the word "debtor." This signature was employed to conceal the receipt of funds purportedly issued as a loan for the construction of cottages and penthouses (Judgment, High Anti-Corruption Court, 2023, No. 362/4895/16-к).

An expert opinion derived from the results of a technical examination of documents is also significant in such cases. When substantiating the receipt of funds as an unlawful benefit by an official, a technical examination of documents particularly the examination of printing forms is frequently conducted to confirm or refute the authenticity of banknotes transferred as the illicit benefit. This analysis is critical for determining the legal qualification of the offense, as the severity of the crime often depends on the verified value of the unlawful benefit received. Furthermore, it plays a vital role in assessing the extent of an individual's involvement in the criminal activity.

The decision of the High Anti-Corruption Court, issued on 27 March 2023, contains information on the expert opinion based on the results of the technical examination of documents. According to it, the $100 banknotes submitted for examination with the relevant series and numbers, based on the method of printing their details and the security features they contain, are the relevant $100 banknotes issued by the issuer of the United States of America.

It is noteworthy that after providing information about the expert opinion, the court stated in the judgement that the person directly received the money for himself for performing certain actions. Subsequently, the money requested and received by the person found guilty was called an unlawful benefit (Judgment, High Anti-Corruption Court, 2023, No. 729/1248/18).

3.3. Strategies for enhancing the utilization of expert opinions in proving the criminal offense under investigation

Ukraine's reforms in many areas of society, the establishment of new anti-corruption bodies, and its commitment to democratisation and human rights have significantly intensified the activities of the law enforcement system. This has resulted in an increase in the number of exposures of public officials attempting to obtain undue advantage. Consequently, there has been a significant increase in attention to the quality and completeness of pre-trial investigations and court proceedings, which is impossible without establishing the truth in cases where circumstances require it.

The quintessence, the result of any expert research within the framework of an expert examination is an expert opinion. The use of expert conclusions is of particular importance during the pre-trial investigation and trial of criminal proceedings. Indeed, the procedures for appointing, conducting research and drawing up a forensic expert's opinion are worthless if, for various reasons, the expert's opinion cannot be used in the process of proof - if it is rejected or disregarded by an authorised person or body (Mieshkov, 2021, p. 155). It is even worse when the expert's opinion was considered, however, for whatever reason, it was incorrect. This can lead to significant further negative consequences. Such consequences are especially significant when proving the receipt of money in the form of an unlawful benefit by an official, given the high public demand for eradicating corruption in Ukraine.

The importance of resolving problematic issues is also underlined by the fact that in some cases, the court's decision in cases of bringing or not bringing an official to

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

criminal liability for the corruption offence under investigation is largely based on expert opinions. Otherwise, without an expert examination and an opinion, the objectives of criminal proceedings would not be achieved.

Both problems are: the impossibility of using an expert opinion and its incorrectness in proving the receipt of funds in the form of an unlawful benefit by an official have certain reasons that are worth investigating.

Today, there is a need to update and improve the regulatory legislation governing forensic examinations. The very fact of the adoption of the Law of Ukraine 'On Forensic Expertise' had a significant positive impact on the development of the forensic science institution, as it became the first law in the history of independent Ukraine to combine the basic principles of expert activity (Loza, 2023, p. 640). However, the Law, as well as the Instruction and Scientific and Methodological Recommendations, came into force more than a quarter of a century ago. Given the rapid development of social relations and technologies (which is especially relevant in many expert studies), this has a significant negative impact and requires an early response.

Even the Criminal Procedure Code of Ukraine, which was adopted relatively recently, has provisions that are controversial due to their impracticality and uncertainty of application. An example is the establishment of the right of an expert to indicate in his or her opinion information that was not asked, but is relevant to the pre-trial investigation (Criminal Procedure Code of Ukraine, 2024, p. 102). It remains unclear how exactly an expert can identify the data that contains information important for the pre-trial investigation.

More specific problems arise from the practice of pre-trial investigation and court proceedings in criminal proceedings related to the receipt of money in the form of an unlawful benefit by an official. Some of them can also be solved based on the experience of foreign countries and the ideas of scholars who have paid attention to the issue under study.

At present, it is necessary to update the regulatory framework of the institution of forensic examination and obtaining an expert opinion. In particular, it is necessary to: clearly stipulate the timeframe for conducting forensic examinations and providing expert opinions; outline the scope of expert research by private experts and expert institutions; regulate the institution of reviewing expert opinions to achieve efficiency; define important terms such as forensic examination, review of expert opinions, special knowledge, expert initiative, and others; and exclude from the legislation provisions that do not apply in practice.

This could be achieved by bringing the relevant law regulating forensic examination and expert reports into line with the current situation. The way to solve these problems is often discussed by Ukrainian scholars. And their opinions are divided on this issue: some propose to improve the existing legal acts, while others argue for the need to adopt new ones.

The director of the expert institution, his deputy, or the appropriate head of the structural unit decides how long the forensic examination should last in compliance with the Instruction and Scientific and Methodological Recommendations. It shouldn't be more than ninety calendar days. (10.On Approval of the Instruction on Appointment and Conduct of Forensic Examinations, 2024, cl. 1.12.).

A single mention of the examination period in the Law of Ukraine 'On Forensic Expertise' relates to one of the disciplinary offences of a forensic expert, namely, violation of the legal provisions regarding the time limits for conducting a forensic examination without good reason (The law of Ukraine No. 4038-XII on forensic examination, 2024, Art. 14). As is well known, the term of the examination starts on the next business day after the expert institution receives the materials and ends on the same day as the expert's opinion is drawn up (10. On Approval of the Instruction on Appointment and Conduct of Forensic Examinations, 2024, cl. 1.13).

Experience demonstrates that a sizable portion of exams are conducted for longer than the allotted period. As a result, the subject of proof is often forced to wait a long time for the expert's opinion. This is facilitated by several factors, the most problematic of which are: a significant workload on expert institutions due to staff shortages; outdated material base that is not updated due to lack of funding; lack of regulatory and up-to-date methodological support.

Precisely due to the above, at this stage, the ninety-day period established by the Instruction and the Scientific and Methodological Recommendations should not be reduced. However, it would be advisable to prescribe it in the Law of Ukraine 'On Forensic Expertise', along with clear cases and limits for possible extension.

Part of the problem of underprovision of qualified personnel in forensic examination can be solved by regulating the possibility of conducting expert studies by private experts and private expert institutions. The example of the United Kingdom is interesting in this regard, where it is envisaged to engage specialists from private forensic laboratories to perform specific types of examinations (e.g., forensic examination of documents) (Polianskyi & Juodkaitė-Granskienė, 2022, p. 42). This will contribute to qualitative changes in the use of expert opinions through the prism of competition among private and public expert institutions, the entry of new experts into the profession, and in the long run, a reduction in the burden on state expert institutions and a reduction in the time required for forensic examinations.

Another important issue is the need to properly regulate the process of reviewing forensic expert opinions. Currently, the review process is regulated by the Order of the Ministry of Justice 'On Approval of the Procedure for Reviewing Forensic Expert Opinions'. However, the procedures set out in the order regulate this issue to a very limited extent. For instance, the purpose of the review is to improve the professional skills of experts, as well as to improve the validity and quality of their conclusions (On Approval of the Procedure for Reviewing the Conclusions of Forensic Experts, 2023, clause 2, p. 1).

As demonstrated above, the present review focuses primarily on enhancing the skills of forensic experts to ensure the production of high-quality examinations—a critically important objective. However, it is worthwhile to consider the concept of reviewing an expert's opinion from a different perspective, namely, to provide for it in the regulations to help verify the actions of a forensic expert for compliance with the requirements of current legislation and current methods of conducting expert research.

In view of the above, it is proposed to make review of expert opinions mandatory in proving particularly serious crimes, since they pose the greatest level of public danger and are punishable by the highest penalty; in addition to particularly serious crimes, review should be required for those opinions that will be used to prove corruption criminal offences, which include those under Art. 368 of the Criminal Code of Ukraine. It is also necessary to warn those experts who will conduct the review of criminal liability for deliberately incorrect review. On the one hand, this will help to improve the quality of implementation of expert opinions, and on the other hand, it will help to establish law and order.

4. Conclusion

The significance of expert testimony in criminal cases concerning the acquisition of illicit financial gain by an official is paramount. In some court cases in which individuals are accused of committing a crime provided for in Art. 368 of the Criminal Code of Ukraine, it is the expert's opinion that is the basis for the ultimate court decision.

The influence of the challenges associated with the inability to utilize expert opinions, stemming from flawed legislation and erroneous judgments in criminal cases involving the acquisition of illicit financial gains by officials, can be mitigated by the implementation of essential legislative amendments.

It is proposed to regulate the terms of expert research in the specialized law that

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.34-45

regulates the conduct of forensic examination and the preparation of an expert opinion. This is particularly relevant due to frequent violations of the ninety-day deadline set forth in the Instruction and the scientific and methodological recommendations. The established time limits should not be changed given the current realities and a comprehensive vision of the current state of affairs in forensic examination. However, it would be advisable to clearly provide for the cases and scope of its possible extension. This will contribute to a more responsible attitude towards the timing of expert research and the preparation of expert opinions based on their results.

The establishment of private specialists and expert institutions will enhance the entire landscape of forensic examination and, consequently, aid in the fight against corruption, which entails the acquisition of illicit advantages by authorities. Such a measure could bring several important advantages, including an influx of qualified personnel, improved quality of examinations, and decreased time for research and provision of relevant conclusions.

The implementation of their required evaluation under specific conditions is another component that reduces the dangers of employing forensic specialists' judgments that are erroneously incorrect or purposefully incorrect in the criminal processes under investigation. The author proposes to include the investigation of particularly serious crimes due to their social danger, as well as corruption criminal offenses, which include the receipt of funds in the form of an unlawful benefit by an official. Through the prism of understanding corruption as one of the main obstacles to improving living standards and economic development.

Forensic examination, expert opinion review, specific knowledge, expert initiative, and other terms should be defined by the legislator. Additionally, provisions that are not implemented in practice or that are hard to apply should be removed from the legislation.

The proposed measures aim to promote law and order, expedite the prompt, thorough, and unbiased investigation and trial of criminal proceedings pertaining to an official receiving money in the form of an unlawful benefit, and, when taken together, lower the overall crime situation in the area of criminal corruption offenses.

Referencese

Criminal Procedure Code of Ukraine, the Code of Ukraine No. 4651-VI (2024). https://zakon.rada.gov.ua/laws/show/4651-17#Text

Geller, B., & Martynenko, N. (2023). Issues of combating corruption oriented crimes: Forensic science aspect. *Theory and Practice of Forensic Science and Criminalistics, 28*(3), 47–63. doi:10.32353/khrife.3.2022.04

Ismawati, S. (2023). The importance of expert testimony in proving corruption crimes. *IJOLARES: Indonesian Journal of Law Research, 1*(2), 32–36. doi:10.60153/ijolares.v1i2.20

Judgment, High Anti-Corruption Court No 127/13972/17 (2023). https://reyestr.court.gov.ua/Review/111192800

Judgment, High Anti-Corruption Court No 729/1248/18 (2023). https://reyestr.court.gov.ua/Review/109801337

Judgment, High Anti-Corruption Court, No 362/4895/16-к (2023). https://reyestr.court.gov.ua/Review/109002711

Judgment, High Anti-Corruption Court, No 550/101/18 (2022). https://reyestr.court.gov.ua/Review/105668400

Loza, T.V. (2023). Problems of the organization of forensic expert activity in Ukraine and ways to solve them. *Analytical and Comparative Jurisprudence, 6,* 633–641. doi:10.24144/2788-6018.2023.06.112

Mieshkov, O. (2021). Problematical aspects of using forensic expert conclusion on results of the forensic examination of electric shock accidents. *Theory and Practice of*

Forensic Science and Criminalistics, 24(2), 152–164. doi:10.32353/khrife.2.2021.09

Order of the Ministry of Justice of Ukraine No 335/5 "On Approval of the Procedure for Reviewing the Conclusions of Forensic Experts" (2023). https://zakon.rada.gov.ua/laws/show/z0131-20#Text

Order of the Ministry of Justice of Ukraine No. 53/5 "On Approval of the Instruction on Appointment and Conduct of Forensic Examinations and Expert Studies and Scientific and Methodological Recommendations on Preparation and Appointment of Forensic Examinations and Expert Studies (Ukraine)". (2024). https://zakon.rada.gov.ua/laws/show/z0705-98#Text

Polianskyi, A. & Juodkaitė-Granskienė, G. (2022). Foreign experience of interaction of forensic science institutions with law enforcement agencies and possibility of its use in Ukraine. *Theory and Practice of Forensic Science and Criminalistics, 24(*2), 26–51. doi:10.32353/khrife.2.2021.03

Sugianto, S., Amiruddin, A., & Wagian, D. (2024). Expert Testimony in Law Enforcement of Corruption in the Procurement of Goods and Services in Handling Emergencies. *International Journal of Social Science Research and Review, 7(*4), 196–216. doi:10.47814/ijssrr.v7i4.2061

The Law of Ukraine No. 4038-XII on forensic examination (2024). https://zakon.rada.gov.ua/laws/show/4038-12#Text

Tymchyshyn, A. M. (2021). Features of the appointment and implementation procedure forensic examinations under the current criminal procedural legislation. *Legal Position, 2*, 129–133. doi:10.32782/2521-6473.2021-2.25

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.46-56

MINIMUM AGE LIMIT OF CRIMINAL RESPONSIBILITY FOR CHILD DRUG COURIERS BASED ON THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD

Feny Fathuri Yan Putri
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: fenyfyp@student.ub.ac.id
https://orcid.org/0009-0005-6090-6968

Prija Djatmika
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
email: prija.djatmika@ub.ac.id
https://orcid.org/0000-0002-5259-1522

Yuliati Cholil
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
Email: yuliaticholil@ub.ac.id
https://orcid.org/0000-0002-1899-757X

Abstract

This study examines the lowest age for being held criminally accountable for children involved as drug couriers in Indonesia, emphasizing The approach that underscores the necessity of safeguarding the child's best interests as a primary consideration. Under Law No. 11 of 2012 on the Juvenile Criminal Justice System (SPPA Law), the current minimum age is established at 12 years. However, this threshold is considered inconsistent with child psychological development, international legal standards, and the demands of Indonesia's national legal framework. The objective of this research is to assess the appropriateness of this age limit and propose recommendations for progressive policy reforms. Employing a normative legal research method, this study adopts a statutory approach complemented by comparative law and legal theory analysis. Data collection relies on a literature review encompassing primary, secondary, and tertiary legal sources. The analytical method used is descriptive-analytical, which evaluates the appropriateness of the minimum age for Liability arising from unlawful actions through the lenses of legal and psychological perspectives. The findings reveal that children at the age of 12 generally lack the mental, emotional, and cognitive maturity to Understand the implications that arise from the decisions they make. For example, Germany sets the minimum age at 14 years, adopting a rehabilitative framework centered on education and care, which has effectively upheld children's rights while mitigating the adverse impacts of the criminal justice process. In Indonesia, the juvenile justice system must align more closely with the principle of the child's best interests, as articulated in the Convention on the Rights of the Child and the SPPA Law. The research concludes that Indonesia should raise the minimum age of juvenile Liability arising from unlawful actions to 15 years. Such a policy is anticipated to foster a more equitable, humane legal system that supports the developmental needs of children. Additionally, regular reviews of the SPPA Law are essential to ensure the juvenile justice system remains relevant to evolving societal conditions and contemporary scientific insights.

Keywords: Minimum age limit, criminal liability, proportional principle

1. Introduction

The problem of drug abuse in Indonesia has reached an alarming level. Narcotics abuse, which is the use without medicinal purposes to excessively enjoy the effects of the substance, has a negative impact on the physical, psychological, and social life of users (Simanjuntak, 2006, p. 22). The situation is further complicated by the fact that children are often used as drug couriers. They are trapped by the seduction of drug dealers who promise large sums of money. Children, who by nature have immature decision-making skills, should be treated as victims, not perpetrators, in this context. Children are vulnerable to exploitation in drug trafficking, which does not consider religion, race, or age (Koesno, 2014, p. 90). These conditions indicate weaknesses in the child protection system that require more serious attention from various parties, including the government, society, and law enforcement.

Naturally, children have not fully developed reasoning power to distinguish between good and bad actions. Crimes involving children are often the result of environmental influences or adult persuasion. The criminal justice system that formally establishes children as prisoners has a serious impact on their growth and development. The placement of children in prison not only fails to create a deterrent effect, but often reinforces children's involvement in criminal behavior (Hidayati, 2013, p. 146). In addition, the social stigma against children who have served their sentences often makes it difficult for them to return to society, thus triggering them to become involved in crime again.

Narcotics crime is categorized as an extraordinary crime with severe penalties, including the death penalty. However, these penalties have not been able to stop drug trafficking in Indonesia. The position of children as perpetrators in drug trafficking raises a dilemma, both juridically, sociologically, and philosophically. On the one hand, legal norms bind all individuals without exception; however, on the other hand, children as legal subjects are often considered unqualified to be held fully accountable for their actions (A. Prasetyo, 2020, p. 2). In addition, the role of children in drug networks is often supported by a lack of parental supervision, lack of education, and weak socio-economic conditions, which make children more easily exploited by irresponsible parties. An educative approach is needed, considering that the state has an important responsibility in protecting and fostering children who are in this situation. Here, a restorative justice-based approach can be an alternative solution in dealing with children's cases, including children involved in drug-related crimes.

Article 1 Paragraph (2) of Law No. 23/2002 defines child protection as encompassing all efforts aimed at ensuring and safeguarding children's rights to live, grow, and develop optimally in alignment with human dignity, while preventing violence and discrimination. These protective measures include prevention, rehabilitation, and empowerment programs for children who have been victims of exploitation or neglect, ensuring Their overall health, including bodily, psychological, and societal aspects, to ensure, support their survival and development (Gultom, 2018, p. 70). In addition, the implementation of child protection policies needs to pay attention to aspects of prevention through education, strengthening families, and law enforcement that is responsive to the best interests of children.

In accordance with Law No. 11/2012 on the Juvenile Justice System, juvenile Liability arising from unlawful actions is imposed at the age of 12 years to 18 years, replacing the

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.46-56

previous provision that set a minimum age of 8 years under Law No. 3/1997 on Juvenile Courts. However, this minimum age limit is considered less relevant from a developmental psychology perspective and has been criticized, including by the Institute for Criminal Justice Reform (IJCR), which suggests a minimum age of 14 years old (Sitepu, 2022, p. 42). Setting an appropriate age limit is crucial because, from a psychological perspective, children below a certain age lack the capacity to fully comprehend the legal implications of their actions.

In comparison, several countries have adopted a more progressive stance in setting the lowest age for being held criminally accountable. For example, European nations such as Austria, Germany, and Italy have established the threshold at 14 years, while Greece and Scandinavian countries have set it at 15 years. Some countries even increase the minimum age to 18 years old, such as Belgium and Yugoslavia (ICJR, 2015). This fact shows that the legal approach in Indonesia needs to consider international standards to protect the best interests of children.

Given these considerations, it is essential to reassess the minimum age of juvenile Liability arising from unlawful actions by factoring in psychological aspects and brain development. Critical elements such as decision-making skills, planning capabilities, and impulse control should form the foundation for determining the appropriate minimum age (Agustiawan et al., 2023, p. 73). Within this framework, the principle of the «best interests of the child» serves as a cornerstone in crafting legal policies that are more humane, equitable, and relevant to current societal needs. This study seeks to examine the ideal minimum age of Liability arising from unlawful actions for children involved as drug couriers, guided by this principle.

2. Materials and Methods

This study adopts a normative legal research method, as outlined by Soekanto and Mamudji (Soekanto & Mamudji, 2010, p. 5), which emphasizes a literature-based approach and utilizes secondary legal materials. This methodology was selected to examine legal principles pertinent to determining the lowest age for being held criminally accountable for child drug couriers and its connection to the principle of the best interests of the child.

Normative legal research relies on three types of legal materials: primary, secondary, and tertiary sources. Primary legal materials include laws, such as Law No. 11/2012 on the Juvenile Criminal Justice System, official records like legislative proceedings, and court decisions with permanent legal standing. These materials are employed to evaluate the juridical foundation for the lowest age for being held criminally accountable and child protection within Indonesia's legal framework.

Secondary legal materials include textbooks, scientific journals, and other relevant scientific writings (Sedarmayanti, 2009, p. 2). This literature includes studies on the psychological development of children, legal protection of children in conflict with the law, as well as a comparison of the age of Liability arising from unlawful actions of children in various countries. In this research, secondary legal materials are used to understand international legal principles and child rights standards, such as those set out in the Convention on the Rights of the Child (UNICEF, 1989) (UNICEF, 1989).

Tertiary legal materials serve as support to provide explanation or guidance on primary and secondary legal materials. Examples are legal dictionaries, encyclopedias, mass media, and other references that provide additional context related to the issues studied.

The collection of legal materials was carried out through three main techniques. The first technique is a document study, which records primary and secondary legal materials to trace the literature relevant to the legal issues studied. This technique was used to explore the legal concepts underlying the discussion on the minimum age limit of juvenile Liability arising from unlawful actions. The second technique is a literature study, which examines legal literature and other references related to the development of child law, such as books and journals that discuss child protection and restorative justice-based approaches. The third technique was internet studies, which sought additional information relevant to the research topic through credible online sources, such as international organization reports and related scientific articles (Syahrum, 2022, p. 1).

Data analysis in this study was conducted using a descriptive-analytical approach (P et al., 2023, p. 5). The descriptive method was employed to present and elaborate on concepts, legal principles, and international standards associated with the lowest age for being held criminally accountable. This approach provides a detailed explanation of these elements in the context of juvenile Liability arising from unlawful actions. The analysis draws upon the perspectives of legal scholars, relevant laws and regulations, as well as forensic psychology and neurolaw studies that pertain to child development.

This study combines juridical, sociological, and psychological perspectives to present a comprehensive understanding of the legal protection afforded to children involved as drug couriers. This approach aligns with the research objective outlined in the introduction, which is to assess the lowest age for being held criminally accountable for children based on the principle of the best interests of the child. Through this method, the study aims to propose legal policy recommendations that are more humane, equitable, and progressive.

3. Results and Discussion

Criminal Liability Arrangement for Child Courier of Narcotics in Indonesia: Drug abuse in Indonesia involves not only adults but also minors below the age of 18. The role of children as drug dealers or couriers is now a troubling phenomenon. One prominent case occurred in 2018 in Makassar, where a 12-year-old child became a drug dealer (Hendra Cipto, 2018). Cases like this show that children are often used by drug networks because they are considered more impressionable and receive less legal attention. In this context, special handling in accordance with the principles of justice for children is needed (Anwar, 2019, p. 41).

In the Indonesian legal framework, the Criminal Code stipulates that acts violating the law are subject to criminal sanctions (T. Prasetyo, 2012, p. 50). However, Liability arising from unlawful actions cannot be imposed on children who lack the legal capacity to be held accountable (Ali, 2022, p. 61). (Ali, 2022, p. 61). According to Article 45 of the Criminal Code, children under 16 years of age who commit criminal offenses are generally returned to their parents or guardians without facing criminal penalties, except in specific cases. If necessary, they may be placed in state educational institutions or similar facilities for guidance. This provision is intended to safeguard the mental and social development of children, aligning in line with the best interests of the child principle.

The Indonesian criminal justice system employs the monolithic theory, which integrates the elements of actus reus (objective element) and mens rea (subjective element) (Bandalli, 1998, p. 116). In this framework, fault serves as a key factor in determining Liability arising from unlawful actions. Psychologically immature children often lack a comprehensive understanding of the legal consequences of their actions, warranting different treatment compared to adults (Wahyuni, 2017, p. 116). (Wahyuni, 2017, p. 64).

1). Legal System Related to Narcotics Crime

Law Number 35/2009 on Narcotics classifies narcotics offenders into two groups: dealers and users (Saleh, 2002, p. 80)[18] Dealers include those who illegally produce, sell or distribute drugs, while users include addicts and abusers. Criminal liability for children involved as drug couriers should take into account age, mental capacity, and environmental impact (Iqbal, 2019, p. 83).

In dealing with children in conflict with the law, the restorative justice approach

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.46-56

stipulated in Law No. 11/2012 is very relevant. This approach aims to repair and restore the situation, not merely punish the perpetrator. This principle is in line with the normative legal research method used in this research, which emphasizes the importance of legal protection for children based on national and international legal foundations.

2). Children's Rights in the Justice Process

minors involved in legal conflicts are entitled to specific rights under the Juvenile Justice System Law. These rights include being treated with dignity, receiving access to legal assistance, being held separately from adult detainees, and having their identity protected. Furthermore, the Convention on the Rights of the Child emphasizes that the principle of the best interests of the child must underpin all policies and legal decisions. (Ariani, 2014, p. 114).

As part of the restorative justice approach, minors below the age of 14 can only be subject to non-custodial measures, such as return to parents or handover to social institutions (Djamil, 2013, p. 16). This process is designed to minimize the negative impacts of imprisonment, such as abuse or exposure to bad influences from adult prisoners.

Children's rights are founded on four fundamental principles outlined in the Convention on the Rights of the Child: equality, prioritizing the child's best interests, the right to life, and acknowledging the child's perspectives (Unicef, 2024). These principles are incorporated into Indonesia's legal system through the ten core values enumerated in Article 2 of the Juvenile Justice System Law, which emphasize protection, justice, guidance, and the prioritization of punishment as a last resort.

3). Synchronization with Normative Approach

The introduction of this study emphasizes the critical role of the best interests of the child principle in establishing the lowest age for being held criminally accountable. This principle is explored through the integration of primary, secondary, and tertiary legal sources to examine the legal foundations and implementation of juvenile criminal law. For instance, the analysis of the juvenile justice system relies on the Law on Juvenile Justice System as the main legal framework, with the Convention on the Rights of the Child serving as a secondary source to reflect international standards.

Data collection techniques, such as document review and desk research, supported an in-depth analysis of this legal issue. Internet studies, as one of the methods used, help supplement the data with up-to-date references related to international legal practice. Thus, the research methods applied are not only relevant, but also support the strengthening of the arguments in the discussion.

From the discussion, it can be concluded that implementing restorative justice, revising the lowest age for being held criminally accountable, and upholding children's rights are essential components in establishing a humane criminal justice system. This study aims to serve as a reference for refining legal policies, particularly in addressing cases involving children as drug couriers.

3.1. Psychological perspective in determining the lowest age for being held criminally accountable

The juvenile Liability arising from unlawful actions system under the Juvenile Justice System Law should take into account psychological factors, particularly the concept of doli incapax, which relates to the intellectual, emotional, and mental capacity of children based on their developmental stage. Legal provisions must be grounded in the principle of the best interests of the child and the protection of their constitutional rights, similar to practices in many developed countries. the lowest age for being held criminally accountable should reflect the age at which children are deemed capable of comprehending the implications of their actions and taking responsibility for them.

Currently, Law No. 11 of 2012 establishes the lowest age for being held criminally accountable in Indonesia at 12 years, an improvement from the previous threshold of 8 years, as specified in Law No. 3 of 1997. However, the application of the age of 12 has drawn criticism as it is considered less relevant to the development of forensic psychology and international standards (Sitepu, 2022, p. 42).

The Institute for Criminal Justice Reform (ICJR) argues that 12 years of age is not mentally sufficient to face formal legal processes (Agustiawan et al., 2023, p. 160). As an alternative, Article 69 paragraph (2) of the Juvenile Justice System Law stipulates that minors below the age of 14 should be directed to undergo guidance measures, such as return to parents, treatment in a mental hospital, formal training, or correction of the consequences of the crime. However, legal proceedings involving children often lead to negative impacts, such as social stigma, difficulty adapting to society, and discriminatory treatment.

Reality shows that Indonesian society tends to view crimes, including those committed by children, as punishable. This view affects law enforcement against children in conflict with the law, especially in drug cases. Children involved in drug trafficking are often perceived as a serious threat, so law enforcers are more likely to impose criminal sanctions rather than provide protection.

a). Environmental and Psychological Influences on Child Behavior

The environment plays an important role in shaping children's character and behavior. Children who grow up in a healthy environment tend to have better self-control than children who do not get supervision or guidance. In many cases, deviant behavior in children is often caused by a lack of family support and an educational environment.

The psychological development of children shows that the capacity to understand unlawful acts is strongly influenced by the level of mental maturity. Neurologically, the human brain continues to develop until the age of 25. The prefrontal cortex, which is responsible for decision-making, emotional control and behavioral planning, only reaches maturity in late adolescence (Blakemore, 2018, p. 119).

Research shows that children aged 12 to 18 years old have limitations in anticipating the consequences of their actions compared to adults. This is due to their immature brain development, which makes them more impulsive and susceptible to environmental influences (Neuropsych, 2022). In addition, according to the American Psychological Association (APA), children and adolescents have poorer decision-making skills than adults due to psychological and neurobiological factors (Steinberg, 2009, p. 468).

b). Psychological Component in Criminal Liability

Liability arising from unlawful actions must be based on the individual's capacity to understand the actions taken, choose an appropriate response, and realize the legal consequences of his or her actions (Ferguson & Ogloff, 2011, p. 87). This component includes cognitive ability, emotional maturity, and moral understanding. According to Lawrence Kohlberg's theory of moral development, the ability to understand rules and laws only reaches maturity at the age of 15 years or more (Marinda, 2020, p. 125).

In the context of criminal law, the minimum age of accountability must consider the cognitive and moral development of the child. Jean Piaget argues that the ability to think logically and abstractly begins to develop at the age of 12, but socio-emotional maturity takes longer (Kambam & Thompson, 2009, p. 182). Therefore, 12 years old as a minimum age is considered not fully adequate to assume Liability arising from unlawful actions.

c). Minimum Age Adjustment Recommendation

Based on the findings above, the minimum age of juvenile Liability arising from unlawful actions should be raised to 15 years old. This is in line with the psychological development of children, which shows that this age is the initial phase of maturity in moral reasoning, decision making, and emotional control (Ibda, 2023, p. 69). This adjustment is not only relevant to the findings of forensic psychology, but also in line in line with the best interests of the child principle stipulated in the Convention on the Rights of the Child.

Adopting a higher minimum age allows time for children to develop optimally

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.46-56

without the stigma or negative impact of legal proceedings. It also supports the application of restorative justice, which emphasizes guidance and recovery over retributive punishment. By doing so, Indonesia's legal system will be more responsive to child protection needs and create a more responsible generation in the future.

3.2. The Importance of Evaluating the lowest age for being held criminally accountable for Children Based on the Principle of Child Protection

The evaluation of the lowest age for being held criminally accountable for children is a crucial aspect of the juvenile justice system that must be continuously updated in line with advancements in scientific knowledge, particularly in psychology and children's rights. The minimum age set within the juvenile justice system plays a vital role in determining whether a child is legally capable of being held accountable for criminal actions. In Indonesia, the lowest age for being held criminally accountable is regulated by Law No. 11 of 2012 on the Juvenile Criminal Justice System (SPPA Law), which establishes a minimum age of 12 years.

However, this provision requires further evaluation, taking into account a more comprehensive child protection principle, particularly the best interests of the child principle. In this context, the minimum age stipulated in the SPPA Law may not fully reflect a child's psychological readiness and mental development to be held accountable for their actions. Setting a higher minimum age would allow for better protection of the child, as children below the age of 15 typically do not possess the full capacity to understand the legal consequences of their actions.

The evaluation of the minimum age should also consider international standards, as outlined in the Convention on the Rights of the Child and recommendations from the UN Committee on the Rights of the Child, which suggest that the lowest age for being held criminally accountable should be set between 14 and 16 years. This aims to strike a balance between law enforcement and the protection of children's rights.

The Best Interests of the Child as a Foundation for Decision-Making

The principle of the best interests of the child emphasizes prioritizing the welfare, development, and survival of children. It mandates that every decision made by government entities, communities, legislative bodies, or courts must place children's interests at the forefront. In the context of juvenile justice, this principle seeks to foster humane and progressive legal protections, in accordance with the SPPA Law's objectives.

Despite these efforts, challenges remain in fully implementing this principle, particularly concerning the lowest age for being held criminally accountable. The United Nations Committee on the Rights of the Child, in its review of Indonesia, recommended raising the minimum age from 12 to between 14 and 16 years. This recommendation is grounded in psychological research showing that children aged 12 lack sufficient cognitive capacity to fully grasp the implications of criminal proceedings. Comparatively, several countries, such as Austria, Germany, and Yugoslavia, have set the minimum age at 14 years, Greece at 15 years, and Belgium at 18 years (Soetodjo, 2008, p. 70).

Minimum age and justice for drug courier children

Setting the minimum age for Liability arising from unlawful actions is a crucial factor in achieving justice. minors involved in legal conflicts must be treated fairly, with consideration given to their age, psychological state, and social circumstances. In this context, the juvenile justice system should emphasize guidance and protection rather than punitive measures.

As criminal offenders, child drug couriers are often in a vulnerable position. They become part of criminal networks because of persuasion or environmental pressure, not because of malicious intent. Therefore, sanctioning children must consider the principle of the best interests of the child. This includes providing guidance at the Child Social Welfare Institution (LKSA) or educational programs that support the rehabilitation of children, rather than detention which can have negative impacts.

In implementing the best interests of the child principle, it is important to periodically review the minimum age limit. Experts, such as Roeslan Saleh, argue that the minimum age should reflect the child's capacity to understand his or her actions and participate effectively in the judicial process. Psychological research has also shown that the age of 15 to 16 reflects more mental maturity to deal with the legal process (Krisnawati & Utami, 2021, p. 409).

From an international perspective, The Council for the Administration of Criminal Justice and Protection of Juveniles recommends a minimum age of 14 years or older, taking into account three main aspects:

1. Children lack the capacity to understand criminal law offenses at an early age. The UN Committee on the Rights of the Child recommends that the minimum age should be at least 14, but preferably higher.
2. Their cognitive, emotional and moral capacities develop over time, so higher ages provide opportunities for children to understand the consequences of their actions.
3. The effective participation of children in the criminal justice process requires a full understanding of the process and its impact.

Recommendations and Policy Implications

The author proposes raising the lowest age for being held criminally accountable to 15 years, grounded in juridical, psychological, and child welfare considerations. Furthermore, periodic reviews of the SPPA Law are necessary to address dynamic social changes and shifting legal needs. This recommendation aims to foster a juvenile justice system that is more inclusive and responsive, upholding the principles of justice, benefit, and legal certainty (Kamil, 2013, p. 96). As a nation that has ratified the Convention on the Rights of the Child, Indonesia is obligated to uphold and safeguard children's rights. Revising the minimum age for juvenile Liability arising from unlawful actions represents a critical move toward establishing a more equitable legal framework that aligns with the developmental needs of children (Aqsa & Isnur, 2012, p. 17).

3.3. Differences in the Regulation of Minimum Age of Liability arising from unlawful actions for Children in Indonesia and Germany

The regulation of the lowest age for being held criminally accountable for children is a fundamental aspect of juvenile justice systems. In Indonesia, this age is set at 12 years old, as stipulated in Article 1(3) and Article 81 of Law Number 11 of 2012 on the Juvenile Justice System (SPPA). Children under this age are considered incapable of Liability arising from unlawful actions and are directed toward non-penal measures such as rehabilitation.

In contrast, Germany applies a slightly different approach, the lowest age for being held criminally accountable is set at 14 years. Children below this age cannot be subjected to criminal sanctions but may be placed under social protection or educational supervision by child welfare authorities. This reflects Germany's legal philosophy, which prioritizes education over punishment in dealing with juvenile offenders.

This difference illustrates the distinct legal frameworks adopted by both countries. Indonesia employs a hybrid approach, combining traditional customary law and a more repressive modern criminal law framework. Meanwhile, Germany adopts a civil law system that emphasizes rehabilitation and education within juvenile criminal law.

Both countries face similar challenges in balancing the protection of children's rights with the need to uphold the law. However, the disparity in the minimum age reflects differing legal priorities. Indonesia leans more toward criminal law measures, while Germany emphasizes rehabilitative and educational approaches. Setting the age of Liability arising from unlawful actions aims to create legal protections that provide special treatment for children. Although the Beijing Rules do not set a specific age limit, the document emphasizes that the minimum age should not be set too low. This is due to the historical and cultural differences in each country in shaping the relevant laws.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.68-74

Juvenile law in Germany is federally regulated and reflects a juvenile justice approach that focuses on rehabilitation. After World War I, Germany introduced the Child Welfare Act of 1922 and the Juvenile Justice Act of 1923, which marked the beginning of its approach to juvenile delinquency. In 1953, Germany adopted the Juvenile Justice Act, which was later updated through amendments in 1990. These provisions, together with the German Penal Code (Strafgesetzbuch), Article 46a and the Criminal Procedure Code (StPO), Article 153a, support rehabilitative approaches such as mediation, diversion from prosecution, and payment of compensation as alternatives to criminal punishment (Amaldy & Setiyono, 2024, p. 1438).

Characteristics of Juvenile Justice in Germany

The relatively high minimum age of Liability arising from unlawful actions in Germany provides greater opportunities to reduce juvenile offending. The German juvenile justice system emphasizes education and care, which aims to minimize direct intervention in the form of criminal punishment. Instead, it prioritizes rehabilitation and diversion, involving the active role of parents, communities and law enforcement officials. This approach allows the identification of the underlying causes of deviant behavior in children. By understanding the root causes, authorities can design more effective prevention strategies. This model not only provides more humane treatment to the child, but also prevents social stigma and provides an opportunity for the child to return to a normal life.

Relevance for Indonesia

A comparison with Germany shows that too low a minimum age limit can undermine a child's capacity to understand the criminal justice process. Children held accountable at an early age are often unaware of the importance of the process and are more vulnerable to its negative impacts. Therefore, Indonesia's juvenile criminal justice system should consider adopting Germany's education and care model. Indonesia's SPPA Law, which sets the minimum age at 12 years old, needs to be evaluated. Increasing the minimum age to 14 or 15, as in Germany, would allow more time for children to develop physically, mentally and emotionally before being held legally accountable. This approach also aligns in line with the best interests of the child principle, which has become a key principle in international juvenile justice systems. By adopting a more progressive approach as in Germany, the Indonesian legal system can reduce the negative impact of the criminal justice process on children, improve the effectiveness of rehabilitation, and create a more humane and inclusive legal environment.

4. Conclusions

Minimum age of Liability arising from unlawful actions for children in Indonesia, currently set at 12 years under Law No. 11 of 2012 on the Juvenile Criminal Justice System, is deemed inconsistent with the psychological development of children and international legal standards. The study indicates that children aged 12 generally lack the mental, emotional, and cognitive maturity to fully comprehend the legal consequences of their actions. In an international context, countries such as Germany set the minimum age at 14 years, adopting a rehabilitative approach that emphasizes education and care. This approach has been shown to be more effective in protecting children's rights and mitigating the adverse impacts of the criminal justice process. Therefore, this study recommends raising the minimum age to 15 years in Indonesia, aligning more closely in line with the best interests of the child principle, as outlined in the Convention on the Rights of the Child. Additionally, the juvenile justice system in Indonesia should adopt more restorative justice approaches that prioritize rehabilitation and guidance over punitive measures. Such approaches are not only more humane but also help avoid social stigmatization and other negative effects associated with detention. This proposed revision of the minimum age is expected to create a fairer legal system that supports the optimal development of children and aligns with the needs of modern society and advances in scientific knowledge, particularly in the field of child developmental psychology. Overall, this reform aims to strengthen child protection measures and establish a more progressive and child-oriented justice system.

References

Agustiawan, M. H., Pujiyono, P., & Rozah, U. (2023). Usia Pertanggungjawaban Pidana Anak dalam Perspektif Neurolaw. *Jurnal Penegakan Hukum Dan Keadilan, 4(*2), 67–80. https://doi.org/10.18196/jphk.v4i2.18206

Ali, M. (2022). *Dasar-Dasar Hukum Pidana.* Sinar Grafika.

Amaldy, M. N., & Setiyono. (2024). Perbandingan Konsep Keadilan Restoratif Pada Pelaku Anak Di Indonesia Dan Jerman: Comparison of the Concept of Restorative Justice for Child Offenders in Indonesia and Germany. *Reformasi Hukum Trisakti, 6*(4), Article 4. https://doi.org/10.25105/refor.v6i4.21488

Anwar, M. (2019). Perlindungan Hukum terhadap Anak Pelaku Tindak Pidana Narkotika dalam Sistem Peradilan Pidana Anak. *Syiar Hukum: Jurnal Ilmu Hukum, 17*(1), Article 1. https://doi.org/10.29313/sh.v17i1.5361

Aqsa, A., & Isnur, M. (2012). *Mengawal Perlindungan Anak Berhadapan dengan Hukum*. LBH Jakarta.

Ariani, N. V. (2014). Implementasi Undang-Undang Nomor 11 Tahun 2012 tentang sistem peradilan pidana anak dalam upaya melindungi kepentingan anak. *Jurnal Media Hukum, 21*(1), Article 1. https://doi.org/10.18196/jmh.v21i1.1160

Bandalli, S. (1998). Abolition of the Presumption of Doli Incapax and the Criminalisation of Children. *The Howard Journal of Criminal Justice, 37*(2), 114–123. https://doi.org/10.1111/1468-2311.00084

Blakemore, S.-J. (2018). Avoiding Social Risk in Adolescence. *Current Directions in Psychological Science, 27*(2), 116–122. https://doi.org/10.1177/0963721417738144

Djamil, M. N. (2013). *Anak Bukan Untuk Dihukum.* Sinar Grafika.

Ferguson, M., & Ogloff, J. R. P. (2011). Criminal Responsibility Evaluations: Role of Psychologists in Assessment. *Psychiatry, Psychology and Law.* https://www.tandfonline.com/doi/abs/10.1080/13218719.2010.482952

Gultom, M. (2018). *Perlindungan Hukum Terhadap Anak Dan Perempuan (Bandung).* PT. Refika Aditama.

Hendra Cipto, K. (2018). Kisah Murid SD Bandar Narkoba, Sebulan Jadi Buronan Polisi. KOMPAS.com. https://regional.kompas.com/read/2018/09/13/07000091/kisah-murid-sd-bandar-narkoba-sebulan-jadi-buronan-polisi

Hidayati, N. (2013). Peradilan Pidana Anak dengan Pendekatan Keadilan Restoratif dan Kepentingan Terbaik bagi Anak. *Ragam, 13(*2), Article 2. https://jurnal.polines.ac.id/index.php/ragam/article/view/476

Ibda, F. (2023). Perkembangan Moral Dalam Pandangan Lawrence Kohlberg. *Intelektualita, 12*(1), Article 1. https://doi.org/10.22373/ji.v12i1.19256

ICJR, I. for C. J. R. (2015). Usia Minimum Pertanggungjawaban Pidana Anak Sebaiknya Ditingkatkan. https://icjr.or.id/icjr-usia-minimum-pertanggungjawaban-pidana-anak-sebaiknya-ditingkatkan/

Iqbal, M. (2019). Hukum Pidana. Unpam Press.

Kambam, P., & Thompson, C. (2009). The development of decision-making capacities in children and adolescents: Psychological and neurological perspectives and their implications for juvenile defendants. *Behavioral Sciences & the Law, 27*(2), 173–190. https://doi.org/10.1002/bsl.859

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.46-56

Kamil, M. I. (2013). Kebijakan Formulasi Pertanggungjawaban Pidana Yang Berkonflik Dengan Hukum [Masters, Universitas Diponegoro]. http://eprints.undip.ac.id/57524/

Koesno, A. (2014). *Diversi Tindak Pidana Narkotika Anak*. Setara Press.

Krisnawati, D., & Utami, N. S. B. (2021). Penanganan Terhadap Anak Belum Berumur 12 Tahun Yang Melakukan Tindak Pidana Berdasarkan Sistem Peradilan Pidana Anak. *Jurnal Mimbar Hukum, 32*(3), Article 3. https://doi.org/10.22146/jmh.40313

Marinda, L. (2020). Teori Perkembangan Kognitif Jean Piaget Dan Problematikanya Pada Anak Usia Sekolah Dasar. An-Nisa *Journal of Gender Studies, 13*(1), Article 1. https://doi.org/10.35719/annisa.v13i1.26

Neuropsych. (2022, January 31). Why is 18 the age of adulthood if the brain can take 30 years to mature? *Big Think*. https://bigthink.com/neuropsych/adult-brain/

P, M. A. C., Achjar, K. A. H., Ningsi, Rusliyadi, M., Zaenurrosyid, A., Rumata, N. A., Nirwana, I., & Abadi, A. (2023). *Metode Penelitian Kualitatif: Panduan Praktis untuk Analisis Data Kualitatif dan Studi Kasus.* PT. Sonpedia Publishing Indonesia.

Prasetyo, A. (2020). Perekrutan dan Kegiatan Anak Sebagai Kurir dalam Jaringan Peredaran Narkoba. *Airlangga Development Journal, 3*(1), 1–15. https://doi.org/10.20473/adj.v3i1.18148

Prasetyo, T. (2012). *Hukum Pidana.* Raja Grafindo Persada.

Republik Indonesia. (1945). Pasal 28B ayat (2) Undang-Undang Dasar Negara Republik Indonesia 1945.

Saleh, R. (2002). Pikiran-Pikiran tentang Pertanggungjawaban Pidana. Ghalia Indonesia.

Sedarmayanti, S. (2009). Sumber Daya Manusia Dan Produktifitas Kerja. Mandar Maju.

Simanjuntak, B. (2006). *Kriminologi.* Tarsito.

Sitepu, R. I. (2022). Peninjauan Kembali Batas Usia Minimum Pertanggungjawaban Pidana Anak Yang Terlibat Perdagangan Narkotika. *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia, 2*(3), 39–58. https://doi.org/10.52005/rechten.v2i3.90

Soekanto, S., & Mamudji, S. (2010). Penelitian Hukum Normatif: Suatu Tinjauan Singkat. Raja Grafindo Persada. https://simpus.mkri.id/opac/detail-opac?id=7086

Soetodjo, W. (2008). *Hukum Pidana Anak.* Refika Aditama.

Steinberg, L. (2009). Adolescent Development and Juvenile Justice. *Annual Review of Clinical Psychology, 5*, 459–485. https://doi.org/10.1146/annurev.clinpsy.032408.153603

Syahrum, M. (2022). Pengantar Metodologi Penelitian Hukum: Kajian Penelitian Normatif, Empiris, Penulisan Proposal, Laporan Skripsi dan Tesis. CV. Dotplus Publisher.

UNICEF. (1989). The Convention on the Rights of the Child: The children's. https://www.unicef.org/child-rights-convention/convention-text-childrens-version

Unicef. (2024). Konvensi Hak Anak: Versi anak anak | UNICEF Indonesia. https://www.unicef.org/indonesia/id/konvensi-hak-anak-versi-anak-anak

Wahyuni, F. (2017). Dasar-Dasar Hukum Pidana di Indonesia. PT Nusantara Persada Utama.

Permatasari, P,R., Sulistyarini, R., & Widyanti, Y.E. (2024). Ratio decidendi analysis in the settlement of marital property disputes: Implications for legal practice in Indonesia. *Legal Horizons, 22*(3), 57-67. https://doi.org/10.54477/LH.25192353.2024.3.pp.57-67

RATIO DECIDENDI ANALYSIS IN THE SETTLEMENT OF MARITAL PROPERTY DISPUTES: IMPLICATIONS FOR LEGAL PRACTICE IN INDONESIA

Puspita Radika Permatasari
Faculty of Law
Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: puspitaradika5@gmail.com

Rachmi Sulistyarini
Faculty of Law, Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: rachmi.sulistya@ub.ac.id

Yenny Eta Widyanti
Faculty of Law, Brawijaya University
65145, 10-11 Jl. Veteran Str., Malang, Indonesia
e-mail: yenni.eta@ub.ac.id

Abstract

Marital property disputes are complex issues that require a clear and fair legal basis in their resolution. This research aims to analyze the application of ratio decidendi in the decision on marital property disputes, its implications for legal practice, and a comparison of its application in various cases. The research uses normative legal methods with statutory, conceptual, and philosophical approaches, and analyzes related court decisions. The results showed that ratio decidendi plays a central role in ensuring substantive justice, legal certainty, and benefits for the parties. However, there are inconsistencies in its application caused by variations in judges' interpretations and the socio-cultural context. This shortcoming calls for the strengthening of legal precedents and interpretation guidelines to improve the consistency and quality of decisions. This research contributes to the development of an understanding of the importance of ratio decidendi as a tool to create a legal system that is more adaptive and responsive to the dynamics of society.

Keywords: Ratio decidendi; marriage property dispute; marriage dispute decision.

1. Introduction

Marital property disputes are one of the issues that often arise in the civil law system in Indonesia. Although it has been regulated in Law Number 1 Year 1974 concerning Marriage, its implementation in concrete cases often raises legal complexities. In this context, the ratio decidendi, or the legal basis underlying the judge's decision, plays an important role. However, differences in interpretation and application of the ratio decidendi by judges often lead to inconsistencies in decisions. This creates a gap between the principles of justice expected by the law and the reality of legal practice in the field.

This issue is important because of its effect on public confidence in the judicial system and legal certainty in matrimonial property dispute cases. Substantial differences in the interpretation of the ratio decidendi can lead to doubts over the substantive justice produced in court decisions (Zain, 2024, p. 64). Ratio decidendi serves not only as a legal justification, but also as a reflection of the values of justice that live in society

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.57-67

(Ni'am, 2024, p. 230).

Indonesian marriage law regulates the relationship between a man and a woman starting from the marriage contract until the end of the marriage due to death, divorce, or other causes. Law No. 1/1974 on Marriage provides a legal basis that serves as a guide for Indonesia's diverse communities. Article 1 of the law states that «marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) based on the Almighty God.» However, reality shows that forming a happy and lasting family is not easy. Many marriages end due to various challenges, one of which is the issue of marital property.

The dissolution of marriage, as stipulated in Article 38 of Law Number 1 Year 1974, can occur due to death, divorce, or by court decision. After divorce, the issue of joint property often becomes a complex issue. Article 35 of the same law states that «property acquired during marriage becomes joint property,» while inherited property and property acquired as gifts or inheritance remain under the control of each party. Data shows a significant increase in the number of divorce cases, which has a direct impact on the rise of marital property disputes. According to the Central Bureau of Statistics (BPS), the number of divorce cases in Indonesia reached 516,334 in 2022, an increase of 15.31% from the previous year which recorded 447,743 cases (Afifah, 2024). This increase indicates that on average there are around 1,400 divorce cases every day (Efendi, 2023).

Marital property disputes are often a central post-divorce issue, given the complexity of dividing assets acquired during marriage. Resolution of these disputes can be done through the mediation process in the Religious Courts. However, the success rate of mediation in joint property cases is still relatively low. Data shows that in 2018, only 6.2% of cases were successfully mediated, and this figure decreased to 5.5% in 2019 (Syafei & Djazimah, 2021, p. 871). In addition, in 2022, out of 1,462 joint property cases mediated in all Religious Courts in Indonesia, only 384 cases reached an amicable agreement (Prasetyo, 2024).

In the context of resolving marital property disputes, the ratio decidendi, namely the reason or legal basis on which the judge's decision is based, plays an important role in ensuring the fairness and consistency of the decision. Proper and correct legal considerations, as stipulated in Article 178 paragraph (1) of the HIR and Article 53 paragraph (2) of Law Number 48 of 2009, are essential in rendering a fair decision (Fadilah, 2019, p. 112). However, in practice, the consistent application of ratio decidendi is still a challenge, given the variety of legal interpretations by judges.

This phenomenon also reveals that the existence of ratio decidendi not only serves as a tool to ensure justice, but also to provide legal precedents that can be followed by judges in similar cases. In several cases of marital property disputes, it was found that judges often did not provide sufficiently in-depth legal considerations regarding the division of joint property. For example, the lack of clear legal argumentation often makes the decision difficult to accept by the parties. This situation suggests the need for an in-depth evaluation of how the ratio decidendi can be formulated more systematically to reflect substantive justice (Salmah, 2024, p. 120).

In the Indonesian legal system, which adheres to the principle of legal certainty, every judge's decision must be based on positive law and rational considerations (Wati, 2018, p. 13). However, in practice, various factors can affect the consistency of the application of the ratio decidendi, including the judge's level of understanding of relevant legal principles, social pressures, and local political dynamics. This raises an important question: to what extent can the ratio decidendi reflect the principles of universal justice in diverse social contexts?

Furthermore, this research will also pay particular attention to the social impact of decisions that are deemed unfair. When judges fail to provide legal considerations that reflect justice, the consequences are not only felt by the parties to the dispute, but also by the wider community who lose trust in the judicial system. It is important to underline that public trust in the judiciary is an important element in maintaining social and political stability in Indonesia.

In addition, the role of ratio decidendi cannot be separated from the function of jurisprudence in developing law. In many countries, such as the Netherlands and the UK, the ratio decidendi has been a key cornerstone in building a reliable legal tradition (Mangunsong (Penyunting), 2021, p. 71). In the Indonesian context, it is important to ensure that the ratio decidendi does not only refer to the written law, but also considers broader principles of justice, including the protection of vulnerable groups such as women and children in marital property disputes.

Therefore, this study aims to identify the patterns of ratio decidendi used in decisions on marital property disputes and examine their consistency in creating justice for the parties. By conducting an in-depth analysis of various court decisions, this research is expected to make a significant contribution in developing family law in Indonesia, especially in improving substantive justice in judges' decisions.

Ultimately, it is important to integrate the principles of justice, legal certainty and expediency in the preparation of the ratio decidendi. It is hoped that this research will not only help improve the quality of court decisions, but also strengthen the legitimacy of the legal system in the eyes of society. In other words, the ratio decidendi must be seen as a dynamic element that continues to evolve in line with the changing legal needs of society.

Therefore, this research is important to analyze how ratio decidendi is applied in decisions on marital property disputes in Indonesia, as well as its implications for legal practice. By understanding the pattern and consistency of ratio decidendi application, it is important to integrate the principles of justice, legal certainty and expediency in the preparation of ratio decidendi. This will not only help improve the quality of court decisions, but also strengthen the legitimacy of the legal system in the eyes of society. In other words, the ratio decidendi must be seen as a dynamic element that continues to evolve in line with the changing legal needs of society.

2. Material and Methods

This research uses normative legal research methods, an approach that focuses on the study of applicable legal norms. According to Peter Mahmud Marzuki in his book Introduction to Legal Science, normative legal research is not only limited to analyzing positive law, but also includes evaluating the suitability of legal norms with basic legal principles such as justice and legal certainty (Marzuki, 2016a, p. 57). This method aims to find the truth of coherence, namely whether legal norms support the underlying principles. Then, this normative legal research uses several approaches to analyze data and integrate theories of justice and legal certainty into relevant legal studies.

The statute approach is used to analyze the legal norms contained in the relevant laws and regulations. This approach aims to understand how legal norms are formulated in written regulations and how they provide the basis for legal implementation in the context of justice and legal certainty (Rochim, 2015, p. 78). This analysis includes evaluating the suitability of legal regulations with the values that form the basis for their formation, such as justice and legal certainty, as well as their relevance in creating legal stability for society.

The conceptual approach focuses on exploring the theory of justice according to Thomas Hobbes and the theory of legal certainty according to Gustav Radbruch. This approach helps to evaluate whether the analyzed legal norms are in accordance with the ideal principles of justice and legal certainty (Herlina, 2024, p. 55). Hobbes' theory emphasizes the importance of covenant or agreement in creating justice, while Radbruch emphasizes that legal certainty must be balanced with justice and legal expediency. This approach provides a clear framework for assessing the application of legal norms to these fundamental principles.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.57-67

The philosophical approach is used to evaluate the basic legal values applied in the analyzed legal norms (Anwar et al., 2024, p. 240). This approach allows an assessment of whether the applied law has reflected the values of substantive justice and legal certainty which are the main objectives of the legal system. This philosophical approach is also useful to identify potential gaps between the applicable legal norms and their application in the broader social context, thus helping to produce a more comprehensive legal analysis.

These three approaches complement each other in building a systematic analytical framework, resulting in a deep understanding of how legal norms not only fulfill formal rules, but also reflect fundamental principles of justice and legal certainty. With the integration of this approach, the research is able to provide a holistic evaluation of the legal norms being analyzed. With this approach, the research seeks to reveal how existing legal rules and norms reflect the principles of substantive justice and legal certainty (Marzuki, 2016b, p. 119).

This method is relevant as it allows the research to evaluate the compatibility of the applicable legal norms with theories of justice and legal certainty. In the context of normative law, this research aims to ensure that the law is not only applied procedurally but also reflects the values that underlie its formation. Conceptual and philosophical approaches provide an analytical foundation for assessing substantive justice and legal certainty in Indonesia's legal system.

In this study, the theory of justice and the theory of legal certainty are used as a conceptual basis to analyze the application of ratio decidendi in decisions on marital property disputes. The theory of justice provides guidance to evaluate whether the decision made by the judge has fulfilled the principle of substantive justice, which means considering the rights of the parties to the dispute and the balance of their interests. This concept is important to assess whether the decision not only complies with formal legal rules, but also reflects the ethical values prevailing in society.

Meanwhile, legal certainty theory is used to assess consistency in the application of the ratio decidendi. This theory helps identify whether decisions in similar cases have followed the same pattern, thereby creating legal stability and a sense of security for the community. By integrating these two theories, this research aims to provide a thorough analysis of how the ratio decidendi can fulfill the need for justice and legal certainty in the context of marital property disputes.

Justice is a fundamental concept in law enforcement, although it is subjective and abstract. According to W.J.S. Poerwodarminto, fair means «not one-sided, there should be no arbitrariness and impartiality» (Pandit, 2016, p. 14). Thomas Hobbes stated that an action is said to be fair if it is based on an agreed agreement (Nasution, 2017, p. 217). In the legal context, justice is often identified with compliance with the applicable law. However, substantive justice demands more than just formal compliance; it demands treatment that is compatible with individual rights and the well-being of society.

In the settlement of marital property disputes, the application of the theory of justice is crucial. Judges are required to not only apply the law textually but also consider aspects of substantive justice for the parties involved. This is in line with the view that the law must achieve the progress and happiness of society, so that actions that support and maintain the happiness of society can be considered fair (Utami & Dalimunthe, 2023, p. 437). The importance of legal certainty and justice in the settlement of joint property disputes, that the dualism between legal certainty and justice must be revealed and applied in court decisions to achieve substantive justice (Farid & Sururie, 2024, p. 205).

In addition, the concept of justice in marital property disputes is based on legal pluralism. He emphasized that in the context of resolving marital property disputes, the justice sought is substantive justice. The progressive legal paradigm that is more concerned with substantial justice than procedural is considered appropriate for realizing a just law (Yunanto, 2012, p. 329).

Thus, the theory of justice in this context requires judges to consider not only formal legal aspects but also substantive justice values that live in society. This is important so that the resulting decision is not only legally valid but also perceived as fair by the parties involved.

In legal theory, legal certainty is a very important element to create justice and stability in society. According to Peter Mahmud Marzuki, legal certainty has two main definitions. First, legal certainty is the existence of general rules so that individuals know what actions can or cannot be done. Second, legal certainty provides legal security for individuals from government arbitrariness. With the existence of general rules, individuals can know what the state can impose or do to them (Marzuki, 2008, p. 158).

Furthermore, Gustav Radbruch stated that legal certainty has two dimensions: legal certainty by law and legal certainty in law (Radbruch, 1950, p. 18). Legal certainty by law gives a duty to the law to ensure justice and legal benefits. Meanwhile, legal certainty in law is achieved if the law is as much as possible set forth in the law (Pujirahayu, 1991, p. 85).

In the context of ratio decidendi, the theory of legal certainty is very relevant because this principle demands consistency in the application of the law, especially in similar cases. This consistency includes the use of the same legal arguments in cases with similar facts so as to provide a sense of security to the public that the law is applied equally and fairly.

In the settlement of marital property disputes, the theory of legal certainty serves as a guide to analyze how the ratio decidendi is used by judges in making decisions. Legal certainty allows the parties to the dispute to know their rights and obligations in accordance with the applicable rules. For example, in the decision of case number 631 K/Pdt/2017, the application of ratio decidendi is not only intended to fulfill substantive justice, but also to provide legal certainty for the parties to the dispute.

Furthermore, the application of legal certainty theory also helps to ensure that decisions made by judges do not contradict applicable legal principles. This is important to avoid discriminatory or inconsistent decisions, which can reduce the legitimacy of the law in the eyes of society. As such, this theory provides a strong analytical foundation for understanding the role of ratio decidendi in establishing clear and consistent legal precedents.

3. Results and Discussion

3.1. Ratio Decidendi analysis in decisions on marital property disputes

Ratio Decidendi in decisions on marital property disputes is a crucial aspect in understanding how judges apply legal principles to achieve justice and legal certainty. Ratio decidendi is the basis or legal reasoning on which a judge's decision is based, reflecting the legal interpretation of the relevant facts in a case. In the context of marital property disputes, this analysis helps identify how judges interpret and apply legal rules related to the division of joint property after divorce.

In the context of marital property disputes, the ratio decidendi is the core of the legal considerations used by judges to reach a fair decision and in accordance with legal norms. Ratio decidendi is a logical basis that not only explains the legal reasoning behind a decision but can also be a reference for other courts in similar cases. Ratio decidendi serves as a guideline to ensure that legal principles are applied consistently and accountably. This is relevant in the Indonesian legal system which prioritizes legal certainty and justice in every court decision (Dewi, 2016, p. 41).

In practice, judges in cases of marital property disputes often consider three main principles, namely justice, legal certainty and expediency. The principle of justice ensures that the division of joint property is done proportionally based on each party's contribution during the marriage. Legal certainty is necessary so that the parties understand their rights and obligations after the divorce, which in turn prevents further disputes. The

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.68-74

principle of expediency emphasizes that the decision must provide optimal results for the welfare of the parties, especially in terms of joint property management.

As an illustration, in the decision of the Tigaraksa Religious Court Number 0728/Pdt.G/2016/PA.Tgrs, the judge applied these three principles in deciding the division of joint property in a polygamous marriage. The judge considered each party's contribution, both in material and non-material terms, as well as economic and social needs after the divorce. The decision shows how ratio decidendi is used to achieve substantive justice while maintaining legal certainty. Such an approach reflects the importance of considering practical aspects in the application of legal principles (Humairah, 2024, p. 52).

The application of ratio decidendi in decisions on marital property disputes has significant implications for legal practice. First, a clear ratio decidendi can strengthen legal precedent, thus providing guidance for judges in similar cases in the future. This is important in the Indonesian legal system which does not recognize the principle of binding precedent, but still recognizes the value of jurisprudence as a secondary source of law. Secondly, a consistent ratio decidendi can increase public trust in the judicial system, as the resulting decisions reflect justice and legal certainty (Shidarta, 2019).

However, the application of ratio decidendi also faces challenges, one of which is the variation in legal interpretation by judges. Different understandings of legal norms can lead to inconsistencies in court decisions, which in turn can lead to legal uncertainty. In addition, in some cases, existing legal rules may not be specific enough to address the complexity of the case at hand. This requires judges to use discretion and moral judgment in setting the ratio decidendi. Non-legal factors, such as social or political pressures, can also influence a judge's judgment, making it important to maintain judicial independence in every decision.

Overall, the analysis of ratio decidendi in marital property dispute decisions provides important insights into how the principles of justice, legal certainty and expediency are applied in judicial practice. By identifying patterns and challenges in the application of ratio decidendi, this research seeks to improve the consistency and quality of court decisions, which will ultimately strengthen the legitimacy of law in Indonesia.

3.2. Ratio Decidendi implications for legal practice in marital property disputes

The application of ratio decidendi in decisions on marital property disputes has significant implications for legal practice, especially in ensuring justice and legal certainty for the parties involved. Ratio decidendi, as the legal reasoning underlying the judge's decision, serves as a logical foundation that can be a reference for other courts in the future. Ratio decidendi plays an important role in revealing the meaning of a legal decision, taking into account the facts and laws faced in court (Maulidya et al., 2023, p. 213).

In the context of marital property disputes, clear and consistent legal considerations in the ratio decidendi can increase public confidence in the judicial system. Conversely, inconsistency in the ratio decidendi can lead to legal uncertainty and a sense of injustice. Research published in the Law Journal emphasizes that a strong ratio decidendi helps in the development and consistency of the legal system (Farid & Sururie, 2024, p. 202).

For example, in a grant annulment case, the judge considered the relevant articles in the Compilation of Sharia Economic Law to ensure legal certainty and justice for the parties. In Semarang Religious Court Decision Number 597/Pdt.G/2021/PA.Mrs., the judge rejected the plaintiff's claim based on articles 692, 693, and 694 of the Compilation of Sharia Economic Law, which states that grants that occur without any engineering cannot be canceled (Sumantri et al., 2022, p. 894).

Another implication of the application of ratio decidendi in marital property disputes is the creation of legal precedents that can be used as a reference in similar cases. This is important to maintain the consistency of decisions and provide legal certainty for the community. However, it should be noted that each case has unique characteristics, so judges must be wise in applying the ratio decidendi that is relevant to the context of the case at hand.

In addition, the correct application of ratio decidendi can encourage the development of the law through new interpretations and interpretations that are more relevant to the dynamics of society. In this case, the judge acts as an agent of change who can adapt the law to the needs and values that develop in society. However, judges must also be careful not to deviate from the basic principles of applicable law. Challenges in the application of ratio decidendi include variations in legal interpretation by judges, which can lead to inconsistencies in court decisions. In addition, limited regulations that are not specific enough to address the complexity of the case at hand require judges to use discretion and moral judgment in determining the ratio decidendi. Non-legal factors, such as social or political pressure, can also influence judges' reasoning, making it important to maintain judicial independence in every decision.

Overall, the application of ratio decidendi in marital property dispute decisions has a far-reaching impact on legal practice. By understanding and applying the ratio decidendi appropriately, judges can ensure that their decisions reflect justice, legal certainty, and benefit for the parties involved, as well as contribute to the development of a consistent and reliable legal system.

Marriages reveal differences in judges' interpretation of the law that are influenced by various factors, including the socio-cultural context, the specific facts of each case, and individual judges' understanding of legal principles. These differences can lead to variations in court decisions, which in turn affect consistency and legal certainty in the judicial system. As an illustration, in Supreme Court Decision Number 51K/AG/1999, there is an analysis of the determination of ratio decidendi in the context of the division of marital property in a mixed marriage divorce. This study shows that despite the unification of marriage law through Law Number 1 Year 1974, the interpretation and application of the law in concrete cases can vary (Malau, 2021, p. 93).

Differences in legal interpretation by judges in cases of marital property disputes can be caused by several factors. Firstly, the socio-cultural background of judges may influence their perspective on the concept of justice and property division. Second, the specific facts of each case, such as the duration of the marriage, the economic contribution of each party, and the presence of children, may influence the judges' considerations in determining the ratio decidendi. Third, individual judges' understanding of legal principles and existing precedents may lead to differences in the application of the law. A comparative analysis of court decisions in matrimonial property dispute cases is important to identify patterns and inconsistencies in decisions. This can be used to improve the quality and consistency of future decisions, as well as ensuring that legal principles are applied fairly and consistently. Thus, public trust in the judicial system can be enhanced, and legal certainty can be maintained.

In addition, comparative analysis can also help in understanding how laws develop and adapt to social change. In the Indonesian context, where there is a diversity of cultures and value systems, it is important to ensure that the law can accommodate these differences without compromising the principles of justice and legal certainty. Therefore, a comparative study of the ratio decidendi in cases of marital property disputes can provide valuable insights for the development of laws that are more responsive to the needs of society.

Overall, a comparison of the application of ratio decidendi in matrimonial property dispute cases is an important endeavor in ensuring that the judicial system functions effectively and fairly. By understanding the factors that influence differences in legal interpretation by judges, steps can be taken to improve the consistency and quality of court decisions, which will ultimately strengthen legitimacy and trust in the legal system.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.57-67

3.3. Shortcomings in the Consistent Application of Ratio Decidendi and the urgency of its rectification

One significant shortcoming in the application of ratio decidendi in marital property disputes is the lack of consistency between court decisions. Variations in interpretation by judges of the same legal norms often lead to legal uncertainty. This is not only detrimental to the parties to the dispute, but also reduces public confidence in the judicial system. For example, cases with similar facts may result in different verdicts due to different emphasis on the principles of justice, legal certainty, or expediency. Such inconsistencies indicate a gap in the application of legal precedent in Indonesia, despite the importance of jurisprudence as guidance.

The urgency to remedy this deficiency is high, given that consistency is a key element in creating a fair and reliable legal system. Inconsistency not only exacerbates legal uncertainty, but also increases the risk of practices being perceived as discriminatory or unfair. In the long run, this can undermine the legitimacy of the judicial system, which is supposed to be the guardian of justice and legal certainty.

To address this shortcoming, a more systematic approach to building strong legal precedents is needed. This can be done through strengthening training for judges to understand legal principles in depth and uniformly, as well as developing more structured jurisprudential guidelines. In addition, high courts need to be more active in providing interpretative guidance for similar cases to create harmony in the application of the law.

Increased consistency in the application of ratio decidendi will not only strengthen public confidence in the legal system, but also ensure that the principles of justice and legal certainty can be applied equally. This is important to maintain social stability and provide equal legal protection for all parties.

The analysis of the entire discussion confirms the importance of the ratio decidendi in ensuring justice, legal certainty, and expediency in the decision on marital property disputes. As the core of judges' legal reasoning, ratio decidendi not only connects legal norms with facts, but also provides moral and logical guidance in every decision. The study shows that its application requires a balance between strict legal principles and the need for substantive justice in accordance with the facts of each case.

Consistent application of ratio decidendi strengthens public confidence in the judicial system. Logical and relevant legal reasoning not only increases the legitimacy of the decision, but also provides legal certainty for the parties to the dispute. However, the lack of consistency in the application of ratio decidendi is one of the main challenges. Different interpretations by judges and the influence of socio-cultural factors often lead to variations in decisions for similar cases. This uncertainty has the potential to undermine confidence in the legal system and create a sense of injustice.

The urgency of improving consistency in the application of ratio decidendi cannot be ignored. The lack of uniformity in decisions calls for a more structured strengthening of legal precedents and the use of clearer interpretative guidelines by higher courts. Measures such as continuous training for judges and the issuance of uniform jurisprudential guidelines are solutions to this challenge. By doing so, the legal system can provide more equitable justice and greater legal certainty.

Overall, the ratio decidendi is an important pillar in the development of a responsive and adaptive justice system. By addressing shortcomings in its consistency, the legal system will not only maintain social stability, but also create stronger trust in the judiciary as the guardian of justice and legal certainty. This improvement is a strategic step towards creating a more credible and equitable justice system.

4. Conclusions

This research confirms that ratio decidendi is an important element in the decision on marital property disputes, which is not only the basis for judges' legal considerations but also a tool to ensure justice, legal certainty, and expediency. From the analysis conducted, it was found that the application of ratio decidendi is often influenced by the socio-cultural context, the specific facts of each case, as well as individual judges' understanding of legal principles. Although legal unification has been sought through Law No. 1/1974, judicial practice shows that there are variations in the interpretation and application of the law that have the potential to cause inconsistencies. The answer to this research problem reveals that ratio decidendi has a central role in creating substantive justice, but the lack of consistency in its application is an obstacle in ensuring legal certainty. A comparative analysis of cases shows the need for more structured legal precedents and clear interpretative guidelines to strengthen the legal system. As such, this research contributes to understanding the importance of ratio decidendi as a tool to develop a more responsive and adaptive legal system.

References

Afifah, N. (2024). Data dari BPS Indonesia menunjukkan bahwa jumlah kasus perceraian di Indonesia mencapai 516.334 pada 2022, naik 15,31% dari tahun sebelumnya. https://lifestyle.suaramerdeka.com/edukasi/104414183350/data-dari-bps-indonesia-menunjukkan-bahwa-jumlah-kasus-perceraian-di-indonesia-mencapai-516334-pada-2022-naik-1531-dari-tahun-sebelumnya?page=4

Anwar, I., Rato, D., & Rasyid, Y. A. (2024). Refleksi Filosofis Pancasila Sebagai Sumber Hukum dan Dinamika Politik dalam Pembentukan Hukum Nasional. *DIVERSI: Jurnal Hukum, 10(*1), article number 1. https://doi.org/10.32503/diversi.v10i1.5183

Dewi, D. R. (2016). Analisis Yuridis Pembagian Harta Bersama dalam Perkawinan Pasca Perceraian (Studi Kasus Putusan Pengadilan Agama Bukit Tinggi Nomor 618/pdt.g/2012/pa.bkt dan Yurisprudensi Mahkamah Agung Nomor 120k/sip/1960). *Premise Law Journal, 4*, article number 14174. https://www.neliti.com/publications/14174/

Efendi, A. S. (2023, July 28). Mengapa Kasus Perceraian di Indonesia Tinggi? *Pusdeka.* https://pusdeka.unu-jogja.ac.id/opini/mengapa-kasus-perceraian-di-indonesia-tinggi/

Fadilah, N. (2019). Analisis Putusan Perkara Permohonan Itsbatnikah disertai Gugatan Cerai Dalam Satu Waktu di Pengadilan Agama Gunung Sugih kelas 1B (Studi Putusan Nomor: 0333/Pdt.G/2018/PA.Gsg) [Undergraduate, IAIN Metro]. https://repository.metrouniv.ac.id/id/eprint/771/

Farid, A., & Sururie, R. W. (2024). Kepastian Dan Keadilan Hukum Dalam Penyelesaian Sengketa Harta Bersama. A*l-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam, 5*(2), Article 2. https://doi.org/10.15575/as.v5i2.34307

Herlina, M. (2024). Konsep Penyusunan Norma Penjelasan Peraturan Perundang-Undangan Guna Mencegah Multitafsir Dalam Penegakan Hukum Di Indonesia. J*urnal Penelitian Hukum Galunggung, 1*(3), Article 3. https://doi.org/10.1234/jphgalunggung.v1i3.35

Humairah. (2024). Pembagian Harta Bersama Perkawinan Poligami Dalam Putusan Pengadilan Agama Tigaraksa Nomor: 0728/Pdt.G/2016/PA.Tgrs. ASA, 6(2), Article 2. https://doi.org/10.58293/asa.v6i2.112

Malau, S. B. (2021). Penetapan Ratio Decidendi Putusan Mahkamah Agung No. 51K/AG/1999 Dalam Kasus Pembagian Waris Muslim dan Non-Muslim (Antara Sri Widyastuti dan Bambang Setyobudi) [Masters, Universitas Tarumanagara]. http://repository.untar.ac.id/29531/

Mangunsong (Penyunting), M. B., Derta Sri Widowatie (Penerjemah), Nurainun. (2021). Sistem Hukum Inggris: Seri Pengantar Perbandingan Sistem Hukum. Nusamedia.

Marzuki, P. M. (2008). *Pengantar Ilmu Hukum*. Prenada Media Group.

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.57-67

Marzuki, P. M. (2016a). Penelitian Hukum Edisi Revisi (Cetakan ke 12). Kencana Prenada Media Group.

Marzuki, P. M. (2016b). Penelitian Hukum Edisi Revisi (Cetakan ke 9). Prenada Media Group.

Maulidya, G. Z., Rahmawati, S. N., Rahmawati, V., & Mardany, A. F. (2023). Ratio Decidendi Putusan, Jenis-Jenis Putusan dan Upaya Hukum Terhadap Putusan yang Telah Memiliki Kekuatan Hukum Tetap Ditinjau dari Perspektif Hukum Acara Pidana di Indonesia. *HUKMY: Jurnal Hukum, 3*(1), 211–230. https://doi.org/10.35316/hukmy.2023.v3i1.211-230

Nasution, M. S. A. (2017). Hukum dalam Pendekatan Filsafat (cetakan ke 2). Kencana.

Ni'am, K. S. F. (2024). Ratio Decidendi Dalam Menolak Putusan Gugatan Perceraian Berdasarkan Putusan Nomor 1319/Pdt. G/Pa. Tbn Di Pengadilan Agama Tuban Dalam Perspektif Keadilan. *TARUNALAW: Journal of Law and Syariah, 2*(02), Article 02. https://doi.org/10.54298/tarunalaw.v2i02.217

Pandit, I. G. S. (2016). Konsep Keadilan Dalam Persepsi Bioetika Administrasi Publik. *Public Inspiration: Jurnal Administrasi Publik, 1(*1), Article 1. https://doi.org/10.22225/pi.1.1.2016.14-20

Prasetyo, A. (2024). Larangan Harta Bersama Dijual untuk Hidupi Anak. hukumonline.com. https://hukumonline.com/stories/article/lt66821d7153664/larangan-harta-bersama-dijual-untuk-hidupi-anak/

Pujirahayu, E. W. (1991). Implementasi Kebijaksanaan Pemerintah Melalui Peraturan Perundang-Undangan Dalam Perspektif Sosiologi: Studi Kebijaksanaan Pemeringah Dalam Kaitannya Dengan Pencemaran Limbah Industri [Postdoctoral, Universitas Airlangga]. http://lib.unair.ac.id.

Radbruch, G. (1950). *Legal Philosophy*. Harvard University Press.

Rahim, A., Aulia, S., Susanti, S., Arifin, M., & Riyadi, S. (2023). Relevansi Asas Kepastian Hukum dalam Sistem Penyelenggaraan Administrasi Negara Indonesia. *JIIP - Jurnal Ilmiah Ilmu Pendidikan, 6*(8), 5806–5811. https://doi.org/10.54371/jiip.v6i8.2575

Rochim, R. D. N. R. (2015). Harmonisasi Norma-norma dalam Peraturan Perundang-undangan Tentang Kebebasan Hakim [*Journal:eArticle, Brawijaya University*]. *In Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya* (p. 35309). https://www.neliti.com/publications/35309/

Salmah, S. (2024). Pertimbangan Hukum Hakim Dalam Permohonan Dispensasi Nikah Di Pengadilan Agama Barru (Perspektif Maqashid Al-Syariah) https://repository.iainpare.ac.id/id/eprint/8707/

Setianingrum, R. B. (2016). Mekanisme Penentuan Nilai Ekonomis Pengikatan Hak Cipta Sebagai Objek Jaminan Fidusia. *Jurnal Media Hukum, 23*(2), Article 2. https://doi.org/10.18196/jmh.2016.0083.229-238

Shidarta, S. (2019, March 4). Ratio Decidendi Dan Kaidah Yurisprudensi. *Business Law.* https://business-law.binus.ac.id/2019/03/04/ratio-decidendi-dan-kaidah-yurisprudens

Sumantri, H. S., Omiyati, O., & Lubis, Y. H. (2022). Ratio Decidendi Hakim Dalam Memutus Pembatalan Hibah (Analisa Putusan No. 597/Pdt.G/2021/PA.Mrs). *Jurnal IKAMAKUM, 2*(2), Article 2. https://openjournal.unpam.ac.id/index.php/IKAMAKUM/article/view/35525

Syafei, E. S., & Djazimah, S. (2021). Mediation In Settlement of Joint Marital Property Disputes: Study At Tanjung Karang Religious Court, Lampung. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam, 5*(2), Article 2. https://doi.org/10.22373/sjhk.v5i2.9039

Utami, S. M. P., & Dalimunthe, S. N. I. S. (2023). Penerapan Teori Keadilan Terhadap

Pembagian Harta Bersama Pasca Perceraian. *Jurnal USM Law Review, 6*(1), Article 1. https://doi.org/10.26623/julr.v6i1.6899

Wati, D. (2018). Pembagian Harta Bersama Ditinjau Dari Asas Kepastian Hukum (Studi Putusan Mahkamah Agung Nomor 266K/AG/2010). *Jurnal Hukum Das Sollen, 2*(1), Article 1. https://doi.org/10.32520/das-sollen.v1i4.329

Yunanto, Y. (2012). Konsep Keadilan Dalam Sengketa Harta Kekayaan Perkawinan Berbasis Kemajemukan Hukum. *Masalah-Masalah Hukum, 41*(2), Article 2. https://doi.org/10.14710/mmh.41.2.2012.326-340

Zain, M. I. (2024). Ratio Decidendi hakim atas putusan harta bersama bagi istri pekerja: Studi analisis putusan Pengadilan Agama Mojokerto Nomor 912/Pdt.G/2023/PA.Mr. [Undergraduate, Universitas Islam Negeri Maulana Malik Ibrahim]. http://etheses.uin-malang.ac.id/65771/

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.68-74

PROPOSALS FOR TRANSFORMING THE STAGES OF REGISTRATION IN PUBLIC ADMINISTRATION GENERAL SECONDARY EDUCATION

Iryna Zhukova
Department of Public Administration and Project Management
State Institution of Higher Education «University of Education Management»
02000, 52A Sichovykh Striltsiv Str., Kyiv, Ukraine

«Scientific Perspectives» Publishing Group
03150, 66 Velyka Vasylkivska Str., Kyiv, Ukraine
e-mail: irina_pravo@ukr.net
https://orcid.org/0000-0003-4927-0610

Abstract

The article examines registration as a means of public administration in the field of general secondary education, focusing on its legislative regulation and functional significance. Registration serves as a tool for ensuring compliance of educational institutions with established legal and educational standards, supporting the legality and transparency of the educational system. The key functions of registration are identified as granting legal status to general secondary education institutions, monitoring compliance with educational standards, ensuring effective resource management, and upholding quality requirements in the educational process. The study highlights both theoretical and regulatory perspectives on the stages of registration. Theoretical approaches, supported by domestic and foreign scholars, outline stages such as the preparatory stage, application and documentation submission, compliance verification, issuance of registration certificates, and post-registration monitoring. At the regulatory level, Ukrainian legislation—specifically the Law of Ukraine «On Education» No. 2145-VIII and the Law of Ukraine «On Complete General Secondary Education» No. 463-IX—defines stages that include application submission, document review, accreditation, evaluation of educational programs, registration decisions, data entry into the Unified State Register of Legal Entities, and post-registration control. The article identifies gaps in the regulation of post-registration control and supervision stages, emphasizing the need for clearer legal techniques to ensure consistency and effectiveness. Recommendations are proposed to enhance legal clarity and procedural transparency in registration processes, contributing to improved governance and accountability in general secondary education.

Keywords: Legal regulation of education; unified state register of legal entities; educational standards compliance; accreditation of educational programs; resource management in education.

Introduction

Public administration in the field of education plays a crucial role in ensuring the proper functioning, development, and quality of educational institutions. General secondary education, being a fundamental stage in the national education system, requires a robust and transparent administrative framework to address contemporary challenges and ensure compliance with established legal and educational standards. One of the critical tools of public administration in this area is the process of registration, which serves as a mechanism for granting legal status, monitoring compliance, and maintaining accountability of general secondary education institutions (Yotka, 2024).

In Ukraine, the process of registration of general secondary education institutions is governed primarily by the Law of Ukraine «On Education» No. 2145-VIII and the Law of Ukraine «On Complete General Secondary Education» No. 463-IX. These legislative acts outline the procedural and substantive aspects of registration, setting out the stages, requirements, and mechanisms for overseeing compliance. However, despite the existence of a legal framework, there are ongoing debates and challenges regarding the efficiency, clarity, and adaptability of these registration processes to meet modern administrative and educational demands.

The determination of registration stages, as defined in Ukrainian legislation, follows a structured approach, reflecting both theoretical insights and practical regulatory requirements. Scholars have identified key stages in the registration process, including the preparatory phase, submission of an application, verification of compliance with established criteria, issuance of registration certificates, and subsequent monitoring and evaluation. At the same time, the legislator has enshrined these stages in specific legal provisions, particularly in Section VIII (Articles 62-73) and Section V (Article 48) of the Law of Ukraine «On Education» No. 2145-VIII. These provisions highlight critical steps such as application submission, document review, accreditation and evaluation of educational programs, registration decisions, data entry into the Unified State Register of Legal Entities, and post-registration control.

The relevance of this study is determined by the need for a thorough analysis of the existing legislative framework governing the registration of general secondary education institutions. It is essential to identify the strengths, weaknesses, and areas requiring transformation to align with best practices in public administration and international educational standards. Furthermore, the complexity and multi-stage nature of the registration process necessitate a clear understanding of each stage and its role in achieving transparency, accountability, and efficiency in educational governance.

In recent years, significant progress has been made in refining the legislative and regulatory framework for education in Ukraine. However, certain aspects of the registration process remain underdeveloped, particularly regarding post-registration control and supervision. These stages, while mentioned in legal provisions, often lack sufficient detail, leading to ambiguities in their implementation. As a result, there is a pressing need for legislative transformation aimed at enhancing the clarity, consistency, and practical applicability of these stages.

At the theoretical level, the registration process has been analyzed by domestic (Lisova, 2018; Dzhurilo et al., 2018;) and foreign scholars (Gray et al., 2015; Abrahams and Reiss, 2012; Argyris, 2010; Millar and Abrahams, 2009; Van Dijk, 2006), who have emphasized its importance as a means of ensuring educational quality, institutional accountability, and compliance with national standards. The preparatory stage, for example, involves the collection and preparation of necessary documentation and evidence of compliance with legal requirements. The application submission stage formalizes the institution's intent to operate within the established legal framework. Subsequent stages, such as compliance verification, accreditation, and evaluation, are critical for ensuring that institutions meet the required standards before being granted official status.

In addition to theoretical insights, practical implementation of these stages requires effective legal techniques and mechanisms. For instance, the process of data entry into the Unified State Register of Legal Entities serves not only as a procedural requirement but also as a tool for ensuring transparency and public access to information about registered educational institutions. Similarly, post-registration control mechanisms play a vital role in monitoring institutional performance,

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.68-74

compliance with quality standards, and adherence to legal obligations.

The objective of this article is to highlight the features of the stages of registration as a means of public administration in the field of general secondary education from the perspective of their transformation by the national legislator. This study aims to analyze both theoretical and legislative aspects of the registration process, identify key challenges, and propose recommendations for improving the regulatory framework. By doing so, the article seeks to contribute to the ongoing discourse on educational governance and support efforts aimed at enhancing transparency, accountability, and quality in general secondary education.

The study is structured as follows: the first section provides an overview of the theoretical foundations of registration as a means of public administration in general secondary education. The second section analyzes the legislative framework governing registration in Ukraine, focusing on key legal provisions and their practical implementation. The third section discusses challenges and gaps in the existing registration process, with particular emphasis on post-registration control and supervision. Finally, the article offers recommendations for legislative transformation, aimed at enhancing the effectiveness and efficiency of registration as a tool of public administration.

The registration process is a vital component of public administration in general secondary education, serving as a foundation for institutional accountability, transparency, and quality assurance. However, its effectiveness depends on a well-structured, clear, and adaptable legislative framework. By addressing existing gaps and ambiguities, the national legislator can significantly improve the registration process, ensuring that it meets the needs of modern educational governance and contributes to the development of a robust and efficient education system in Ukraine.

This article aims to bridge the gap between theoretical insights and practical legislative requirements, offering a comprehensive analysis of the registration process and proposing concrete measures for its transformation. Through this analysis, the study contributes to the broader discussion on educational reform and public administration, highlighting the importance of effective legal regulation in achieving sustainable improvements in the field of general secondary education.

Results and Discussion

Below propose to carry out an overview of each of the mentioned stages of registration as a means of public administration in the field of general secondary education. I propose to focus attention on the positive and negative elements of the specified legal classification with the provision of relevant proposals for their transformation.

Thus, the stage of submitting an application for registration is determined by the national legislator in Art. 67 of Chapter VIII of the Law of Ukraine «On Education» No. 2145-VIII. As part of the specified stage of registration, an application for registration is submitted to the relevant educational authority by the founder of the educational institution (state or local authorities, private individuals, or organizations submit an application to the local state administration or regional state administration) [1].

At the stage of consideration of documents and their verification, which is also actually regulated in Art. 67 of Chapter VIII of the Law of Ukraine «On Education» No. 2145-VIII, first of all, the provided documents are assessed for compliance with regulatory and legal requirements by the registration body.

So, the founding documents, information about the educational program, the qualifications of the teaching staff, the material and technical base and other documents confirming the institution's ability to provide the educational process are subject to monitoring (Law of Ukraine No. 2145-VIII..., 2017).

Accreditation and evaluation of educational programs as a stage of registration in the system of means of public administration in the field of general secondary education, in accordance with Art. 48 of Chapter V of the Law of Ukraine «On Education» No. 2145-VIII, has a rather subsidiary, optional character and can be applied in specific cases. In particular, this stage is relevant in the case of accreditation of types of general secondary education institutions of a new typology (private), or in the event of the appearance or approval of new educational programs. The result of the specified stage is additional accreditation, or evaluation of educational programs, in order to confirm the quality of education (Law of Ukraine No. 2145-VIII..., 2017).

The decision on registration as a stage of registration as a means of public administration in the field of general secondary education, in turn, is regulated in Art. 69 of Chapter VIII of the Law of Ukraine «On Education» No. 2145-VIII.

This stage, according to the position of the legislator, involves the adoption of a decision on registration, or refusal to register, an institution based on the previously conducted inspection and evaluation of submitted documents by the body responsible for the process and procedure of registration (Law of Ukraine No. 2145-VIII..., 2017).

After the decision on registration, as a stage of registration as a means of public administration in the field of general secondary education, the institution of general secondary education is entered into the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations. The specified stage is regulated by the national legislator as well as the stage of the decision on registration, in Art. 69 of Chapter VIII of the Law of Ukraine «On Education» No. 2145-VIII (Law of Ukraine No. 2145-VIII..., 2017).

The granting of a license as a stage of registration of institutions of general secondary education as a means of public administration is applied in the case of successful completion of the above-listed stages and indicates that the institution of general secondary education has the right to provide educational services within certain levels or areas of education. The license for carrying out educational activities is ideologically derived from the approaches established in the mentioned Article. 69 of Chapter VIII of the Law of Ukraine «On Education» No. 2145-VIII (Law of Ukraine No. 2145-VIII..., 2017).

Finally, post-registration control as a stage of registration of a general secondary education institution is part of the monitoring of this field and is determined by Art. 48 of Chapter V of the Law of Ukraine «On Education» No. 2145-VIII.

Thus, within the framework of this process, state supervisory bodies monitor compliance with the standards and requirements established for general secondary education institutions, in particular, educational standards, material conditions and personnel qualifications (Law of Ukraine No. 2145-VIII..., 2017).

I consider it expedient, in the future, to highlight the main problems and conflicts related to the regulatory and legal classification of the stages of registration as a means of public administration in the field of general secondary education with proposals for author's approaches to their leveling.

First of all, I would like to note that the classification approach regarding the stages of registration as a means of public administration in the field of general secondary education under the legislation of Ukraine somewhat contrasts with similar approaches to theorizing this process by domestic and foreign scientists.

So, for example, the stage after registration control in the Law of Ukraine «On Education» No. 2145-VIII corresponds to the stage of further control and reporting. Such a difference dictates the problem of an organizational nature regarding registration as a means of public administration in the field of general secondary education of Ukraine, which consists in the application of a legislative prescription due to the etymological difference of the concepts «control» and «reporting».

The national legislator provides exclusively for the control of the activities of general secondary education institutions by authorized institutions and institutions (the

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.68-74

Ministry of Education and Science of Ukraine, local and regional state administrations, education departments), which affects the reporting aspect of general secondary education institutions (Dei et al., 2024).

It would be expedient to integrate the application of the stage of «further control and reporting» into the national legal field, creating a precedent for supplementing the control process with the aspect of reporting, which, by its origin, is a broader concept (control involves checking by authorized bodies only the provided and available data regarding institutions of general secondary education, while reporting may be aimed at analyzing information requested by bodies and institutions of state administration in the field of education).

The stages of registration as a means of public administration in the field of general secondary education, prescribed in Section V and Section VIII of the Law of Ukraine «On Education» No. 2145-VIII, should be classified into three separate clusters: primary, registration and accreditation and monitoring and qualification. The initial cluster of stages of registration as a means of public administration in the field of general secondary education should include the submission of an application for registration, as well as the review of documents and verification of their compliance with established requirements. The registration-accreditation cluster of stages of registration as a means of public administration in the field of general secondary education should, in turn, include accreditation and evaluation of educational programs, decisions on registration, entering data into the Unified State Register of Legal Entities, Individual Entrepreneurs, and Public Organizations and granting a license. Finally, to the monitoring and qualification cluster of stages of registration as a means of public administration in the field of general secondary education, I consider it expedient to include post-registration control itself.

The specified distribution of registration stages as a means of public administration in the field of general secondary education into appropriate clusters, in my opinion, would make it possible to specify the purpose of each of them, in accordance with the provisions of the Law of Ukraine «On Education» No. 2145-VIII.

From now on, propose to stop at the stages of registration as a means of public administration in the field of general secondary education in proportion to the profile Law of Ukraine «On comprehensive general secondary education» No. 463-IX. The stages of registration as a means of public administration in the field of general secondary education are not directly prescribed in the Law of Ukraine «On Comprehensive General Secondary Education» No. 463-IX. However, the general provisions on registration as a means of public administration of general secondary education can be found in Section VI (Articles 42-52) and Section VII (Articles 53-57) of the specified normative act.

Structurally and ideologically, the stages of registration as a means of public administration of the field of general secondary education, prescribed in the Law of Ukraine «On Comprehensive General Secondary Education» No. 463-IX, almost fully correspond to the stages of the process prescribed in the Law of Ukraine «On Education» No. 2145 -VIII and those considered by us above.

The only difference is the presence of such a stage as «evaluation of educational programs and standards», which chronologically follows immediately after the stage of preparation and submission of documents and the stage of checking documents for compliance with requirements (Law of Ukraine No. 463-IX..., 2020).

According to its purpose, the stage of evaluation of educational programs and standards, prescribed in the provisions of Art. 42, Article 44 of Chapter VI of the Law of Ukraine «On Comprehensive General Secondary Education» No. 463-IX, as an element of registration as a means of public administration in the field of general secondary education is a concretized invariance of the «review of documents and assessment of compliance» stage.

As part of the latter, the proposed educational programs are evaluated in order to determine their compliance with the state standards of general secondary education, which are mandatory for institutions of the corresponding level, after which, if necessary, an accreditation procedure is carried out for the institution of general secondary education (Law of Ukraine No. 463-IX..., 2020).

The stages that follow the evaluation of educational programs and standards, in accordance with the provisions of Art. 42, Article 44 of Chapter VI and Art. 57 of Chapter VII of the Law of Ukraine «On Comprehensive General Secondary Education» No. 463-IX, is to make a decision on registration, entering data into the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations, obtaining a license for educational activities and post-registration control and supervision (Law of Ukraine No. 463-IX..., 2020).

Conclusions

The analysis of the stages of registration as a means of public administration in the field of general secondary education reveals a multi-layered and complex process, regulated primarily by the Law of Ukraine «On Education» No. 2145-VIII and supplemented by the Law of Ukraine «On Comprehensive General Secondary Education» No. 463-IX. Each stage represents a distinct phase, aimed at ensuring compliance with national standards, transparency, and accountability in the education sector.The totality of the analyzed theoretical and practical apparatuses of the study of registration as a means of public administration in the field of general secondary education allows us to talk about the presence of a clear and consistent structure of its staged implementation. The registration process begins with the submission of an application by the founder of the educational institution, be it state, local authorities, private individuals, or organizations. This stage, as outlined in Article 67 of the Law of Ukraine «On Education,» establishes the foundation for initiating the legal existence of an educational institution. Following this, the documents undergo thorough verification by the registration authority to ensure compliance with regulatory standards, including founding documents, educational programs, staff qualifications, and infrastructural adequacy.

Subsequently, the granting of a license legitimizes the institution's right to provide educational services. The licensing process confirms the institution's capacity to operate effectively and in accordance with state requirements.

Post-registration control, the final stage, focuses on monitoring compliance with educational standards, personnel qualifications, and infrastructural requirements. This stage, detailed in Article 48 of the Law of Ukraine «On Education,» ensures ongoing oversight and continuous improvement.

However, discrepancies arise when comparing the national classification of registration stages with international approaches. The Ukrainian system lacks an integrated stage of «further control and reporting,» creating ambiguity between oversight and accountability mechanisms. Introducing a unified approach that includes both control and reporting would address this gap and enhance transparency.

To streamline the registration process, it is proposed to classify the stages into three clusters: (1) Initial (application submission and document verification), (2) Registration-Accreditation (program evaluation, registration decision, licensing), and (3) Monitoring and Qualification (post-registration oversight). This classification would clarify the objectives of each stage, improve regulatory coherence, and facilitate better governance.

The latter has theoretical-practical (research) and normative-legal (practical) dimensions that interact and complement each other. I should also note the presence of certain conflicts in the regulation of the process-stage component of registration of institutions of general secondary education in Ukraine, regarding which, in further scientific investigations, proposals will be made regarding the improvement and elimination of the latter.

In conclusion, while the Ukrainian legal framework for registration in general secondary education is robust, it would benefit from harmonization of its stages, improved integration of control and reporting functions, and a clearer clustering of stages. Such reforms would not only align Ukraine's approach with international best practices but also ensure greater efficiency, transparency, and accountability in the administration of general secondary education institutions.

References

Abrahams, I., & Reiss, M.J. (2012) Practical work: its effectiveness in primary and secondary schools in England. *Journal of Research in Science Teaching, 49,* 1035-1055.

Argyris, C. (2010). *Organizational Traps: Leadership, Culture, Organizational Design.* Oxford: Oxford University Press.

Dei, H., Shvets D., Lytvyn, N., Sytnichenko, O., Kobus, O. (2024). "Legal Challenges and Perspectives of Cybersecurity in the System of State Governance of Educational Institutions in Ukraine". *Journal of Cyber Security and Mobility, 13*(05), 963-82. https://doi.org/10.13052/jcsm2245-1439.1357.

Dzhurilo, A.P., Glushko, O.Z., & Lokshina, O.I. (2018). *Transformational processes in school education in the countries of the European Union and the USA*. Kyiv: LLC «CONVI PRINT». 192 p.

Law of Ukraine No. 2145-VIII «On Education». (2017). https://zakon.rada.gov.ua/laws/show/2145-19#Text

Law of Ukraine No. 463-IX «On Comprehensive General Secondary Education» (2020). https://zakon.rada.gov.ua/laws/show/463-20#Text

Lisova, N.I. (2018). *State and public management of the development of general secondary education in small cities of Ukraine*. Cherkasy: Publisher Ponomarenko R.V. 360p.

Millar, R., & Abrahams, I. (2009) 'Practical work: making it more effective'. *School Science Review, 91*(34), 59-64.

Van Dijk. (2006). *Evaluation of the European Schools at Culham, Mol, Bergen and Karlsruhe and options for the future*. Brussels: Van Dijk Consultants,

Yotka, Y. (2024). Formation of Communicative Competence of Future Vocal Disciplines Teachers. J*ournal of International Legal Communication, 14*(3), 40-50. DOI: 10.32612/uw.27201643.2024.14.3.pp.40-50

Gray, S., Scott, D., Pachler, N., & Reiss, M. (2015). External Evaluation of a Proposal for the Reorganisation of Secondary Studies in the European School System. http://dx.doi.org/10.13140/RG.2.1.3507.2721

Shcherbyna, V. (2024). Aligning ukrainian labor legislation with EU standards: A comparative analysis of transparency and predictability in employment conditions. *Legal Horizons, 22*(3), 75-88. https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88.

ALIGNING UKRAINIAN LABOR LEGISLATION WITH EU STANDARDS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND PREDICTABILITY IN EMPLOYMENT CONDITIONS

Viktor Shcherbyna
Department of Labor Law and Social Security Law
Taras Shevchenko National University of Kyiv
01033, 60 Volodymyrska Str., Kyiv, Ukraine
e-mail: shcherbyna8260-10@edu-knu.com
https://orcid.org/0000-0002-3468-117X

Abstract

As Ukraine is moving closer to European integration and trying to adapt to the current challenges of globalization, the relevance and need for transforming the national labor legislation becomes obvious. The article aims to determine whether the current innovations in the labor legislation of Ukraine comply with the main legal acts that provide for transparent and predictable working conditions in the European Union. This article attempts to identify problems and shortcomings of the normative work of state bodies in this area and elaborate on the amendments to particular domestic legislative acts. The leading research method is a comparative method used to examine legal frameworks and regulatory practices in the EU Member States and Ukraine and define common grounds and areas in the national legislation requiring improvement. The article analyzed the labor framework of the European Union and distinguished such shortcomings in the domestic legislation as the unclear definition of employee status, vague duration of probationary periods, undefined criteria for refusal and compensation for employees to refuse on-demand work, unresolved issue of minimum working hours, etc. The developed recommendations for amending legal acts of Ukraine make it possible to address the mentioned issues and receive timely and complete information about significant aspects of the work of Ukrainian employees.

Keywords: comparative analysis; industrial relations; labor conditions; normative act; on-demand contract.

1. Introduction

Modern working conditions are crucial components of the socio-economic development of countries, especially when it comes to the context of the European Union. Transparency and predictability of working conditions determine the efficiency of economic systems and ensure the protection of the rights of individuals in the labor market. Annex XL to the Ukraine-EU Association Agreement (European Parliament and the Council, 2019) entails Ukraine implementing a reformation in the field of labor and social policy to bring its legislation into line with the EU one. However, the implications of these provisions for Ukraine require detailed analysis.

Article 8 of Section 1 of the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996) stipulates that the rule of law shall be in force and efficient in Ukraine. The rule of law is not limited to legislation but is one of its manifestations. It goes beyond legislation, involving other constants established and legitimized by a particular society, such as standards of morality, traditions, and customs. The ideology of justice, the concept of

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88

law, enshrined in the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996), unifies all the mentioned constituents of law. A vital element of the rule of law principle is Ukraine's acceptance of the supremacy of international labor legislation over domestic one.

As per the rule of law principle, legal rules to be applied contain higher standards for human rights and legal guarantees, regardless of their belonging to international or national legislation. No national court shall be criticized for its wider interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms if it (the interpretation) puts an individual in a more favorable position as opposed to the interpretation delivered by the European Court (Gorshkova, 2001). Therefore, any state can expand the scope of rights provided by an international legal act when such opportunities arise (Zhernakov, 2017). Thus, the rule of law principle acts as a measure of justice in the state's attitude towards an employee and the quality of national labor legislation.

Directive No. 2019/1152 on transparent and predictable working conditions in the European Union (European Parliament and the Council, 2019) is the first EU directive of an ideological nature. It includes fundamental provisions that serve as reference points for improving labor legislation. Revising its social policy, Ukraine makes adjustments to the focus area, which, in turn, transforms labor and social legislation. The result of these innovations is Draft Law No. 2708, "On Labor" (Honcharuk, 2019). Since this Draft Law has become an object of criticism among scholars and trade unions, this article aims to provide its impartial analysis. The provisions of this Draft Law will be subject to critical understanding and determining for compliance with the international legal acts ratified by Ukraine or those that are a part of the EU legislation.

Therefore, the article aims to analyze the system of legislative acts and the practice of applying the rules of transparency and predictability of working conditions in the EU and compare them with the current innovations in the labor legislation of Ukraine for compliance with the main legal acts that ensure transparent and predictable working conditions in the European Union.

The article applies a theoretical framework centered on the Europen and Ukrainian legal instruments in the field of labor, including Directive 2019/1152 on Predictable and Transparent Working Conditions, Draft Law "On labor" No. 2708, Labor Code of Ukraine, and other international legislative acts. The article also considers scientific papers devoted to the topic under study in order to determine and define the key concepts and theories regarding labor regulation within national and international domains, to prove or disprove the set hypothesis, and to provide valid conclusions. The relevance and significance of the study lie in Ukraine's endeavor to align its labor legislation with European standards as it moves towards European integration, aiming to address challenges posed by globalization. The research methodology primarily involves a comparative analysis of legal frameworks and regulatory practices in the EU Member States and Ukraine to identify common grounds and areas in the national legislation requiring improvement. The findings identify shortcomings in Ukrainian labor legislation, such as the unclear definition of employee status and vague provisions regarding probationary periods and compensation for on-demand work refusal. The main contributions of this article are the suggested recommendations for amending Ukrainian legal acts to enhance transparency and protect employees' rights as to meet the requirements of the EU labor legislation.

The structure of the article is divided into 5 sections and 5 subsections. Section 1 is an introduction that outlines the aims, relevance, and problematics of this study. This section provides a short discussion on the significance of transparency and predictability in labor laws and Ukraine's efforts to align its legislation with EU standards. Section 2 is devoted to the analysis of the existing scientific papers on the issue under study to identify the research gaps and substantiate the scientific novelty of this article. Section

3 presents the methodological framework of this study, where the central place is occupied by the comparative method. Section 4 combines results and discussion and is the largest section in the article divided into five logical subsections. Subsections draw a comparison between the provisions of Directive No. 2019/1152 and the Draft Law "On labor" No. 2708, focusing on key aspects such as the maximum duration of probationary periods, evaluation of professional competence during employment acceptance, and the right of employees to enter into employment contracts with multiple employers. These subsections also highlight the discrepancies and areas for improvement in Ukrainian labor legislation. Section 5 represents the conclusions of the article and defines the prospects for further research in the same area.

2. Materials and Methods

The research methodology for examining transparent and predictable labor conditions in the European Union involved a comprehensive comparative analysis of legal texts, directives, and conventions from both national and European legislation. Given the focus on labor market flexibility and the dynamics of employer-employee interactions in evolving economic landscapes, particular emphasis was placed on exploring these aspects within the European Union context.

The methodological framework encompasses the method of formalization used to outline and codify the statutory instruments governing labor conditions within the EU and Ukraine, such as Draft Law "On Labor," Directive No. 2019/1152, Labor Code of Ukraine, etc. This method allowed for selecting the relevant directives, regulations, and national laws on transparent and predictable labor conditions. As the material for analysis was selected, the method of generalization was applied to synthesize and determine common trends, principles, and standards observed within Ukrainian and EU labor legislations. This method facilitated the identification of overarching themes and principles governing transparent and predictable labor conditions across Member States and Ukraine.

The induction method was employed to identify general principles and conclusions regarding transparent and predictable labor conditions based on the specific provisions of statutory documents. Through in-depth analysis of individual legal provisions and case studies, this method provided broader insights into the implementation and effectiveness of labor laws across different contexts. The deduction method applied general principles and theories of Ukrainian and EU labor legislations to specific cases or scenarios. By extrapolating from established legal frameworks and precedents, this method allowed for assessing how transparent and predictable labor conditions are upheld within national labor legislation.

The primary research method was the comparative research method applied to regulatory legal acts. This approach enabled a thorough understanding of the selected issue, considering Ukraine's commitment to European integration and efforts to align its legislation with European norms. By comparing legal frameworks and regulatory practices across different jurisdictions within the European Union, the study aimed to identify commonalities, differences, and emerging trends in labor regulations.

The comparative analysis encompassed an examination of various aspects related to transparent and predictable labor conditions, including contractual arrangements, working hours, wage regulations, social security provisions, and mechanisms for dispute resolution. Through this method, the study assessed the effectiveness of existing legal frameworks in promoting transparency, fairness, and stability in employment relationships across different European Union member states.

Furthermore, the research methodology involved collecting and analyzing empirical data, such as case studies, statistical information, and qualitative interviews with relevant stakeholders, including employers, employees, trade unions, and government representatives. These empirical insights complemented the comparative

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88

legal analysis, providing real-world perspectives on the implementation and impact of labor regulations in practice.

Thus, through formalization, generalization, induction, deduction, and comparative methods, this study aims to offer a comprehensive understanding of transparent and predictable labor conditions in the European Union. By examining both legal frameworks and practical realities, the study aims to provide valuable insights for policymakers, practitioners, and researchers seeking to enhance labor market governance and promote inclusive economic development.

3. Results and Discussion

Directive No. 2019/1152 on transparent and predictable working conditions in the European Union (European Parliament and the Council, 2019) is a political and legal or rather ideological document that determines basic policy directions for labor regulation in any European state. The Directive is a crucial legislative instrument adopted by the EU to enhance the quality of employment and ensure equal treatment of employees within the EU member states. The Directive is designed to improve transparency and predictability in labor relations, strengthen employees' rights, and contribute to social cohesion.

According to Directive No. 2019/1152, employees become aware of clear conditions of their employment from the moment the employment contract is concluded. This includes details about their rights and obligations, working hours, remuneration, and any applicable benefits. The Directive grants workers with the right to make informed decisions about their employment and enables them to exercise their rights effectively.

Furthermore, the Directive should eliminate such a problem as vulnerable employment and non-standard forms of employment, which can contribute to a predictable working environment. It outlines regulations designed to prevent the mistreatment and misuse of employees, including measures to govern the use of on-demand, intermittent, or casual work (Shcherbyna, 2007).

Directive No. 2019/1152 is closely linked to the EU Social Pillar, a set of principles and rights intended to build fair and inclusive societies across the EU. The directive aligns with the Social Pillar's objectives of promoting fair working conditions, ensuring social protection, and enhancing social dialogue. Since Directive No. 2019/1152 is designed to increase transparency and predictability in working conditions, it supports the Social Pillar's objective of improving the quality of life for all EU citizens and promoting social convergence among Member States. Thus, the Directive contributes to the implementation of the EU Social Pillar's objectives of social fairness and inclusion.

Unfortunately, the described tendencies have not yet been reflected in the national labor legislation either after the adoption of the Constitution or after signing the Ukraine-EU Association Agreement (European Union and Ukraine, 2014). There are concerns about whether the new labor laws adequately uphold the broad protection and rights outlined in the constitution related to labor issues. Instead of addressing these concerns, a trend toward relaxing labor regulations has appeared. This makes Ukrainian employees find themselves beyond the scope of the rules that have a strong social and defensive orientation (Lazovski, 2020).

Provisions of Chapter 3 of the Directive that establish minimum requirements for working conditions are of prime importance. Article 8 of the Directive establishes the maximum duration of any probationary period. Section 1 of Article 8 of Chapter 3 of the Directive defines that any probation period shall not exceed six months. As for the Draft Law (Honcharuk, 2019), it stipulates that the duration of the probation period shall not exceed three months unless the legislation provides otherwise. Norms regarding the extension of the probation period for specific categories of employees shall comply with provisions of Article 8 of Chapter 3 of the Directive. If an extended probation period is required, its justification shall be an employee's interest or the specificity of the work.

The comparison between Article 8 of Chapter 3 of the Directive and Section 1 of Article 27 of the Draft Law shows that special categories of employees are subject to shorter probation periods; this period is two months longer for regular employees.

It is worth noting that Article 27 of the Draft contains no significant provisions that Section 2 of Article 8 of the Directive does. A probation period shall be equal to the contract duration expected and the specificity of the work provided a clearly defined period of employment relations. Given the spread of fixed-term employment relationships in Ukraine, this provision should be a safety measure when applying maximum probation periods.

Section 4 of Article 27 of the Draft Law (Honcharuk, 2019) provides for cases when a probation period is not used. The number of such cases has decreased compared to cases described in Section 3 of Article 26 of the Labor Code of Ukraine. However, Article 8 of Chapter 2 of the Directive states that there shall be no probation period again when a contract for the same work activity is renewed. Section 2 of Article 27 of the Draft law stipulates that days on which an employee does not perform their work during the probation period shall not be counted, regardless of the reason. This provision fully complies with Section 2 of Article 8 of the Directive, which allows the Member States of the European Union to extend the probationary period in proportion to the duration of the absence. The absence of standards on general approaches to the assessment of the professional competence of employees at the time of recruitment is one of the main shortcomings of the Directive and the Draft. Its content can be expressed in the following wording:

“Article... assessment of the professional competence of employees at the time of recruitment”

1. The employer is entrusted to hold job interviews, surveys, tests, internships, or contests, consult the documents, obtain information, and use other methods that are not prohibited by the law for assessing the professional competence of an employee.

2. The employer is prohibited from using professional competence assessment methods that encroach upon a person’s life, health, honor, dignity, inviolability, and security and interfere in their personal and family lives.

3. Medical check-ups of employees for compliance with the work they perform is to be conducted using medical criteria on the grounds of and in compliance with the procedure established by law.

4. The employer is obliged to adhere to the procedures established by the Law of Ukraine “On information” regarding collecting, storing, using, and sharing confidential information about people.

According to Section 2 of Article 15 of the Draft Law (Honcharuk, 2019), an employee has a right to enter into an employment contract with one or several employers in parallel unless the law or employment contract says otherwise. The content of this provision is similar to the one found in Section 2 of Article 21 of the Labor Code of Ukraine but has a wider set of restrictions in collective agreements in regard to other work. Both the Draft Law and the Labor Code of Ukraine contain restrictions in regard to other work established by the parties in the employment contract. However, these acts do not contain any legal conditions for such restrictions. According to Article 9 of Chapter 2 of the Directive, Member States have the right to establish requirements for an employer to impose nonconformance restrictions based on reasonable grounds, including health and safety, the security of business confidential information, the integrity of the public service, or the avoidance of conflicts of interests. It is believed that the structure of restriction established by contract and based on the criteria specified by law fit the objective demand criteria more.

For the first time in the history of national legislative practice, Section 5 of Chapter 1 of Article 17 of the Draft Law provides for the possibility of entering into an employment contract without a fixed term. The desire of business entities to increase the flexibility

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88

and elasticity of labor relations is a major problem for market economies in terms of legal regulation of these relations. This refers to legalization of flexible, mobile working hours.

Such employment contract when an employee undertakes obligations to perform specific work in future, meaning that the employer decides when to involve an employee in work are becoming increasingly common. These contracts provide for on-demand work. They are commonly used in tourism, air traveling, service industry. There is barely any legal regulation in the usage of such contracts. There are some exceptions to this satiation, however. Germany, for instance, has a law that establishes three separate restrictions that protect an employee to a certain extent. Firstly, this law obliges an employer to inform an employee of the resumption of work at least four days before it.

Alternatively, an employee is not obliged to execute their work. Secondly, the employer guarantees that duration of work per day will be at least three uninterrupted hours. Thirdly, the employment contract must contain a paragraph regarding the minimum guaranteed duration of employment relationship (Shcherbyna, 2007). Italian laws recognize on-demand work as an interrupted employment contract or an agreement that can be interrupted. There are fixed-term and non-fixed-term employment contracts. This type of agreement entitles the employer to engage employees to specific work throughout the duration of the agreement depending on the situation on a given enterprise. They are mainly used for office workers, tourism and seasonal types of activity. Remuneration depends on the actual amount of performed work during employment (Garashchenko, 2013)

A need for legal regulation of employment relationships that arise from on-demand contracts stems from temporary nature of such work, absence of continuous work, absence of the exact moment from which work can be counted, absence of legal regulation in the matter of remuneration to on-demand employees. This type of employment contract has to be regulated by a separate normative act with clear definition of on-demand work, remuneration payment procedures for on-demand employees, time of on-demand contracts, conditions for calling an employee to work (Prylypko, 2013).

On-demand contracts can be divided into two types. First type is called min-max contracts. These contracts establish a lower and upper limit of working hours. The former one is to be provided to an employee by the employer and the latter one is how much the employee is required to work when summoned. In cases when the employer engages an employee in work that lasts less than the lower limit an employee is subject to a compensation that is equal the number of hours to the lower limit. Second type is called zero-hours contract. According to these contracts, an employer is not obliged to provide employees with work and bears no responsibility for not providing it. At the same time neither minimum working hours nor work mode are decided. It is possible that the employee will never be summoned to fulfill work which provides no employment and remuneration guarantees. Zero-hours contracts, for their part, can be divided into two types. The first one obliges employees to perform on-demand work when summoned by the employer, while the second one provides an employee with an option to refuse such work (Svichkarova, 2014).

What model of on-demand contracts has the Ukrainian legislator chosen and how much does it correspond to the Directive provisions? Article 22, Chapter 1 of the Draft defines employment contracts without fixed working hours as a special form of employment contracts under which an employee is obliged to perform work only when provided with it by the employer with no guarantees for such work to be available on an ongoing basis. Firstly, there is a need to understand what "a special form of employment contracts" is for the authors of the Draft Law. Article 205 of the Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003) defines the form of transaction (including agreement as a form of the latter one) and ways of expressing will. According to part 1 of this Article, the verbal or written form is permitted for closing a transaction. The parties are entitled to decide upon the form of the transaction unless otherwise provided by the statute. It remains unclear what is the special form the definition mentioned in the Draft Law. This type of employment contracts, as is the rest of them, is concluded in written form as indicated by the provisions of Article 15 of the Draft Law.

Secondly, Section 1 of Article 22 of the Draft Law (Honcharuk, 2019) characterizes this type of employment contract using two distinct features:

1) employee is obliged to perform only when provided with available work by the employer.

2) employee performs work without guarantees for availability of such work on an ongoing basis.

The question is as follows: why is it named "contract without fixed working hours" and not "on-demand contract"? A responsibility for an employee to execute work arises only when such work is available and provided by an employer. Confirmation for this can be found in provisions of Section 4 of Article 22 of the Draft Law (Honcharuk, 2019) where it states that an employer independently determines the amount of work to be performed and agrees the working regime, the number of working hours needed to complete a given job with an employee within a reasonable time frame. However, this contradicts the provisions stipulated by paragraph "M" of Article 4 of the Directive. According to the said Article, employers shall inform employees of the reference days and hours they need employees to execute work provided that the work pattern is thoroughly or predominantly unforeseeable. Thus, the Directive guarantees that any employee can plan their working day for several different employers. The same idea is outlined in Article 10 of the Directive. Therefore, the Directive establishes guarantees for minimum predictability of work for employees and obliges the employer to consider the employee's interests. The Draft Law promotes total disregard for the interest of employees by the employer.

It is evident that Ukrainian legislator has somewhat of a simplified understanding of the nature of such employment contracts and the employer's limits of authority established by the Directive. Requirements for this type of contracts set out in the Directive are the following. Section 1 of Article 4 of the Directive states that member states shall ensure that employers are required to inform employees of the essential aspects of the employment relationship. Paragraph "M" of the said Article envisages the obligation of an employer to provide an employee with the following information provided that the work pattern is thoroughly or predominantly unforeseeable:

1) the mechanism of the changeable work pattern, the number of secured billable hours, and the payment for executed work in addition to these billable hours;

2) the days and hours when an employer anticipates an employee to execute work;

3) the right of employees to be notified about the minimum period they have to begin working and, if relevant, the deadline for revocation outlined in Article 10(3).

Article 10 of the Directive establishes requirements for minimum predictability of work for employment contracts without fixed working hours. In case of employee's work pattern is thoroughly or predominantly unforeseeable, Member States are obliged to secure an employee from being demanded by an employer to execute the work unless the following requirements are met:

a) the work is carried out at a predefined time;

b) an employer notifies an employee about the work to perform within a reasonable period specified by domestic legislation, practices, or collective agreements.

If one or both of these conditions is not met, an employee is entitled to decline a work assignment being subject to no adverse consequences. Section 3 of Article 22 of the Draft Law provides that in addition to compulsory conditions of employment contract set out in the Draft an employment contract without fixed working hours shall contain conditions regarding the method of informing the employees of the availability

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88

of work and method for employees to confirm their readiness to begin work. However, according to Section 4 of the same Article reasonable notice period is determined not by the employment contract but by the employer themselves. Section 5 of the same article points at the notice period established by the employment contract. These are not the same things, however.

Section 5 of Article 22 of the Draft Law, in author's view, does not comply with Article 10 of the Directive as the former one only emphasizes a single condition for refusal to work which is delay in the notice period deadline set out in the employment contract. This norm, however, ignores the requirement under which the work is carried out at a predefined time because this requirement restricts the arbitrariness of the employer regarding sudden work assignments without a reasonable notice period.

This problem would have never arisen if the legislator had adhered to provisions regarding informing employees of the essential aspects of the employment relationship set out in paragraph "M" of Article 4 of the Directive when defining "employment contract without fixed working hours". The conditions outlined in Chapter 12 of the preamble to the Directive put employees working on-demand or within unsecured time (on zero-hour) in a particularly assailable situation. Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work. This means that the Draft Law completely ignores the key characteristic that define this type of employment contracts.

Section 6 of Article 22 of the Draft Law deals with remuneration guarantees in these types of employment contracts. Salary of employees who work under the employment contract without fixed working hours is counted based of the actual amount of work done. However, it remains unclear what criteria were used by the drafters of the Draft Law to set the minimum working hours for employees working under an employment contract with a non-fixed working time at eight hours per month. The same section contains a rule under which an employee who worked less than eight hours during a given month is subject to a compensation in the amount that is equal to eight hours of work. It must be noted that eight hours of work equals one full working day. Provisions of Section 7 of Article 22 of the Draft Law can be seen as consolation for poor employment and remuneration guarantees for employees performing under employment contacts without fixed working hours. According to these provisions the employer is prohibited from restricting or interrupting work performed by an employee under a different employment contract for a different employer.

Article 22 of the Draft Law (Honcharuk, 2019) also provides no guarantees for employees when the employer cancels a work assignment. Section 3 of Article 10 of the Directive confirms the right of Member States to authorize an employer to revocate a work assignment without remuneration. However, this Article also imposes the obligation on the Member States to take all the measures required for guaranteeing remuneration to an employee in case of the revocation of the previously agreed work assignment by an employer after an established reasonable deadline. Moreover, Article 11 of the Directive establishes additional measures for on-demand agreements. In order to avoid acts of abuse in cases of on-demand or analogous employment agreements, the Member States are obliged to ensure the fulfillment of one of the below requirements:

a) to limit the conclusion and duration of on-demand or analogous employment agreements;

b) to dispute the assumption of the existing employment agreement under which a minimum amount of billable hours is provided based on the average hours worked within a defined period;

c) to meet other analogous requirements guaranteeing efficient prevention of abusive practices.

According to Article 22(2) of the Draft Law, one employee may be a party to an employment contract with non-fixed working hours in an amount not exceeding 1/10 of all employment contracts concluded with this employer. The aforementioned restrictions are to be applied to employers in the form of legal entities or individual entrepreneurs. The Draft limits the amount of such contract to only 10% from the overall amount of contracts. But it is unclear why this number was given to on-demand contracts.

Article 12 of the Directive envisages the right of an employee to turn to another form of employment. According to Section 1 of this Article, Member States are obliged to provide the possibility for an employee to ask for and obtain a reasoned written answer about another form of employment, characterized by more foreseeable and safer working conditions, provided that an employee has been working for at least six months with the same employer and has accomplished the probation period if there is any. However, the Member States are entitled to impose restrictions on the frequency of such requests.

Draft Law does not contain such a norm, even though the latter one contains basic provisions for working conditions of employees. Section 4 of Article 19 of the Draft Law provides for the obligation of the employer to inform employees performing under fixed-term contracts about vacant positions that envisage the possibility of entering into an indefinite employment contract and to provide employees with equal opportunities for such actions. In order to develop these vital norms, it is necessary to examine what the Directive means by “more predictable and safer working conditions.” According to Section 4 of Article 43 of the Constitution of Ukraine everyone has the right to proper, safe and healthy work conditions. Article 88 of the Labor Code of Ukraine contains normal working conditions that are the following: 1) operating condition of machines and devices; 2) good quality of materials and tools that are necessary for the performance of the job and their timely delivery; 3) timely provision of electricity, gas and other energy sources to the manufacturing site; 4) timely provision of technical documentation; 5) secure and healthy working conditions.

Section 3 of Article 32 of the Labor Code of Ukraine point at essential working conditions that are the following: systems and amounts of remuneration of labor, benefits, schedule, establishment or cancellation of part-time work, combination of jobs, changes in categories and denominations of offices. Soviet judicial practice considered as essential working conditions the following elements: amount and system of remuneration; working hours (schedule and shifts); benefits (extra vacation, retirement benefits etc) (Plenum of the Supreme Court of the USSR, 1984).

It was possible to consider other conditions as essential when certain factual circumstances were present. Ukrainian judicial practice in paragraph 3 of Section 31 of the decision of the Plenum of the Supreme Court of Ukraine No. 9 “On judicial practice in cases of labor disputes” basically copied the aforementioned interpretation of the term “essential working conditions” (Plenum of the Supreme Court of the USSR, 1992).

Chapter 4 of the Minimum Age Recommendation, No. 146 (International Labor Organisation, 1973), named “Conditions of Employment” explains the application of this term in regards to underaged employees. The Chapter states it is obligatory to take all measures to guarantee satisfactory working conditions for underage employees. These conditions are subject to close control, with particular attention paid to the following:

1) compliance with and protection of the fair payment policy;

2) close control over the working time and the prohibition of overwork since underage employees shall have enough time for leisure-time activities and rest as well as learning, training, and doing home assignments;

3) ensuring regular days off and the night’s repose that lasts at least 12 hours without any exceptions except for emergencies;

4) guarantee for annual paid leave that lasts at least 4 weeks and is equal to that guaranteed to adults;

5) obligatory compliance with social welfare programs such as occupational injuries, health care, and sickness benefits, despite the working conditions or employment;

6) the maintenance of acceptable health and safety norms and proper training

DOI: https://doi.org/10.54477/LH.25192353.2024.3.pp.75-88

and control.

Thus, safe working conditions are those that meet the norms and standards of safety, occupational sanitation, occupational health and fire protection. We share the view of Huk (2013) that types of employment characterize the division of economically active part of society by spheres and sectors of national economy, professions, specialties etc. However, forms of employment act as organizational and legal methods and conditions for the use of human labor. The forms of employment that divide labor activity by the criterion of permanence are permanent and temporary employment. Full-time, part-time, visible, invisible, and flexible employment divide labor activity by the criterion of working time organization (Huk, 2013).

There is a steady trend in Ukraine under which a traditional employment agreement (a non-fixed-term and full-time agreement) is often replaced by a fixed-term agreement (remote and part-time work). This involves the use of non-standard employment agreements. A standard employment agreement with continue to be used but only for a privileged group of employees (core personnel) that is relatively small. A significant number of employees (up to 20-30 % in different countries) perform under non-standard employment contracts. They are: temporary, "borrowed," part-time employees, home-based employees and foreigners. They are hired when the economy of an enterprise improves and they are fired when it worsens. One of the contemporary trends in establishing working regime for employees is the diversity of forms for organization and use of work time. They are increasingly replacing traditional, strict working regimes (Slezinger, 2000). Non-standard working regimes and forms are those that, as opposed to standard ones, provide for consistent work in one workplace (usually for 8 hours), allow both the employee and the employer to choose the most suitable employment option in current circumstances. They include: temporary work, on-demand work, seasonal work, home-based work, part-time work etc. Non-standard working hours include both full and part-time regimes (Nikiforova, 1999).

Thus, in our opinion, the provision of the Directive "Form of Employment with Predominantly Predictable and Safe Working Conditions" refers to full-time employment with an adequate number of daily and weekly working hours, guaranteed and predictable rest periods and work with essential working conditions that meet safety, industrial hygiene, occupational health and fire protection norms and standards. Moreover, provisions of Section 2 of Article 12 of the Directive stipulate that the Member States are obliged to guarantee that an employee receives the reasoned written answer from an employer within one month of the appeal. Member States are also instructed to extend the deadlines for employers of micro, small and medium-sized businesses to provide responses. The extension period may not exceed three months, and an oral response is allowed only if the same employee repeatedly applies for the same situation, which remains unchanged.

Article 13 of the Directive obliges the Member States to guarantee free training for an employee if the need for such training arises due to the requirements of the Union or domestic law or by collective agreements. Moreover, such training shall count as working time and be conducted within working hours if possible. The Draft Law contains no provision obliging an employer to provide an employee with free of cost vocational training. Article 23, "Student employment contract," of the Draft Law has nothing in common with the mentioned provisions of the Directive. The reason for including these provisions in the Directive is that training has long become an essential feature of Western employment contracts.

The necessity for a focus on modern labor norms coincides well with Ukraine's social goals. Modern labor law norms require training, retraining, and skill development directly in the workplace. In 1979, the Ukrainian SSR ratified the Human Resources Development Convention, No. 142 (International Labor Organization, 1975). This Convention obliged Ukraine to develop and implement open, adaptable, and interconnected systems for general, technical, and vocational education, regardless of their formality (formal or informal). According to the Convention, Ukraine is also entrusted with reforming its vocational education systems to meet the requirements for lifelong learning and training of underage persons and adults in all sectors of the economy and branches of economic activity and at all levels of skill and responsibility.

The legal basis for the professional training of employees in Ukraine consists of Articles 201-204 of the Labor Code of Ukraine (Verkhovna Rada of Ukraine, 1971). The provisions of labor legislation were enhanced by many adopted normative acts that regulate the professional training of employees directly in the workplace. For example, Chapter 3 of the Law of Ukraine, "On professional development of employees," (Verkhovna Rada of Ukraine, 2012) establishes legal foundations for the professional training of employees. These relationships are also governed by the Regulation on Vocational In-Work Training of Staff (Ministry of Social Policy of Ukraine and Ministry of Education and Science of Ukraine, 2001) and the Regulation on the Organization of Industrial In-Work Training (Ministry of Social Policy of Ukraine and Ministry of Education and Science of Ukraine, 2006). According to the Regulation on Vocational In-Work Training of Staff, training should enhance staff development at companies with different forms of ownership and subordination. The purpose of this training is to improve the professional skills and contemporary economic thinking of employees. It is also designed to develop employees' ability to work in changing economic conditions, increase labor productivity, and promote effective employment. Staff receive continuous vocational training throughout their employment to expand and improve their knowledge, abilities, and skills in accordance with job requirements.

The Draft Law does not comply with Ukraine's international obligations or legislation in force regarding the in-work vocational training of staff. Sections 1 and 3 of Article 22 of the Constitution of Ukraine outline legitimacy criteria for amending the legislation. The rights and freedoms of a person and citizen established in this article are infinite. It is prohibited to constrict the content and scope of existing rights and freedoms when adopting new laws or amending the ones in force. The Draft Law shows neglect of provisions on staff development; it constricts a person's right to acessible and free education of different forms as provided by Section 3 of Article 53 of the Constitution of Ukraine.

4. Conclusions

Based on the comparative examination of Directive No. 2019/1152 on transparent and predictable working conditions and Ukrainian legislation, the article suggested the below recommendations to improve Ukraine's labor legislation in several key areas to comply with European legislation. The Ukrainian labor legislation should clearly define employee status to distinguish between employees with partially regulated social statuses and self-employed individuals. The criteria for determining employee status should be based on factual work performance rather than the description provided by the parties. Following European trends, Ukraine should encourage innovative forms of labor by enshrining equitable and equable working conditions in the legislation and supporting professional mobility.

Employment contracts without fixed working hours, if introduced in Ukraine, present an opportunity for the country to address the challenges arising from on-demand work. However, since the provisions of the analyzed Draft fall short of aligning with the EU Directive No. 2019/1152, it is advisable to shift from the concept of "employment contracts without fixed working hours" to a legally defined and regulated "on-demand contract." The Directive emphasizes informing employees of essential aspects, including the mechanism of work pattern changes, anticipated work days and hours, and the right to be notified about the minimum period to begin working. Ukraine should incorporate these provisions to ensure minimum predictability and protect workers' interests. The Draft should enshrine that employees are not subject to adverse consequences when refusing work assignment due to unforeseeable work patterns. Additionally, the legislation should include provisions for adequate compensation when work assignments are revoked after an established reasonable deadline. The criteria for establishing minimum working hours should be clarified in the legislation of Ukraine and aligned with the principles of fairness and equitable remuneration. The legislation should ensure that workers are fairly compensated, even if they work less than a predefined minimum.

Thus, the very definition of "transparent and predictable working conditions" should be refined in the legislation of Ukraine and encompass such factors as fair payment, reasonable working hours, regular days off, and compliance with safety norms. Given that Ukraine is at one of the key stages of acquiring the status of a member of the EU, an action plan is currently being agreed upon to harmonize all national legislation in accordance with EU requirements. Thus, at the moment, we cannot predict which legal norms will have an imperative character, and which will be recognized as dispositive ones. This constitutes a limitation and further prospects of our research.

References

Blikhar, M., Ostapenko, O., Khomyshyn, I., Ostapenko, L., & Vinichuk, M. (2023) Transformation of hired labor as one of the conditions for reforming labor legislation of Ukraine: economic and legal dimension. Fi*nancial and Credit Activity: Problems of Theory and Practice, 1(*48), 351-361.

Bozhko, V. M. (2020). Comparative legal analysis of Directive 2019/1152 of the European Parliament and of the Council with Directive 91/533/eec and the current labor law of all its member countries. Constitutional State, 40, 102-112. https://doi.org/10.18524/2411-2054.2020.40.217595

Craig, P. (2013). EU Accession to the ECHR: Competence, Procedure and Substance. *Fordham International Law Journal, 36*(5), 1115-1150.

European Parliament and the Council. (2019). Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1152

European Union and Ukraine. (2014). Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. http://data.europa.eu/eli/agree_internation/2014/295/oj

Garashchenko, L.P. (2013). Types of employment contracts in accordance with Italian law. In M.I. Inshyn, N.M. Khutorian, & V.I. Shcherbyna (Eds.). *Trends in the development of the science of labor law and social security law* (pp. 152-156). Kyiv: Nika-Center.

Georgiou, D. (2022). The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment. *European Journal of Industrial Relations, 28*(2), 193-210. https://doi.org/10.1177/09596801211043717

Gorshkova, S.A. (2001). Council of Europe standards on human rights and Russian legislation. Moscow: Independent Institute of International Law.

Honcharuk, O.V. (2019). Draft Law of Ukraine "On Labor." No. 2708. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67833

Huk, N.A. (2013). The growth of species diversity of the form of employment in the priority areas of social development. *Bulletin of Socio-Economic Research, 1*(48), 347-353.

Inshyn, M., Sokolov, V., Pavlichenko, V., Danilova, M., & Dzhura, K. (2022). Violations of Health Workers' Labor Rights during the COVID-19 Pandemic. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, 14*(3), https://doi.org/10.1061/(ASCE)LA.1943-4170.0000545.

International Labor Organization. (1973). Minimum Age Recommendation. No. 146. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312484#:~:text=(1)%20Members%20should%20take%20as,the%20Minimum%20Age%20Convention%2C%201973.

International Labor Organization. (1975). Human Resources Development Convention. No. 142. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C142

Lazovski, A. (2020). *Overview of the case law of the Court of Justice of the European Union in the areas regulated by the Association Agreement between Ukraine and the EU*. Kyiv: Association4U, 539 p.

Lopushniak, H., Poplavska, O., Danylevych, N., Kostyshyna, T., & Raupov, R. (2023). Organization of labor under conditions of uncertainty: The case of Ukraine. *Problems and Perspectives in Management, 21*(2), 294-308.

Maliuha, L. Ju., Zhuravel, V. O., Shabanova, S. O., Hnidenko, V. I., & Pikul, V. P. (2023). Legal Conflicts and Gaps in the Context of Labor Legislation of Ukraine. *The Indian Journal of Labour Economics, 66,* 583-597. https://doi.org/10.1007/s41027-022-00410-9

Melnychuk, O.F., Melnychuk, A.O., Polishchuk, A.S., & Ishchuk, A.M. (2022). Transformation of legal regulation of labor in Ukraine in the context of the experience of foreign countries under Covid-19 conditions. *ECS Transactions, 107*(1), 18215-18226.

Ministry of Social Policy of Ukraine and Ministry of Education and Science of Ukraine. (2001). Order on the Approval of the Regulation on Professional Training of Workers in Production. No. 127/151. https://zakon.rada.gov.ua/laws/show/z0315-01#Text

Ministry of Social Policy of Ukraine and Ministry of Education and Science of Ukraine. (2006). Order on the Approval of the Regulation on the Organization of the Educational and Production Process at the Factory. No. 500/861. https://zakon.rada.gov.ua/laws/show/z0032-07#Text

Nikiforova, A.A. (1999). Non-standard forms of employment and working hours (experience of a country with a retail economy). *Labor Abroad, 1*(41), 54-59.

Orlovska, I. H. (2022). The European pillar of social rights as a reference point for Ukraine's social policy in the conditions of the European vector of development. *Southern Ukrainian Law Journal, 2*(4), 40-46. https://doi.org/10.32850/sulj.2022.4.2.7

Pham, T., Talavera, O., & Wu, Z. (2023). Labor markets during war time: Evidence from online job advertisements. *Journal of Comparative Economics, 51*(4), 1316-1333. https://doi.org/10.1016/j.jce.2023.06.002

Plenum of the Supreme Court of the USSR. (1984). Resolution on the application by the courts of legislation governing the conclusion, amendment and termination of an employment contract. http://xn--b1azaj.xn--p1ai/USSR/postanovlenie-plenuma-vs-sssr/N03-ot-26.04.1984-sssr.html

Plenum of the Supreme Court of the USSR. (1992). Resolution on the practice of consideration of labor disputes by courts. https://zakon.rada.gov.ua/laws/show/v0009700-92#Text

Prylypko, O.S. (2013). Differentiation of legal regulation of non-traditional employment contracts. In M.I. Inshyn, N.M. Khutorian, & V.I. Shcherbyna (Eds.). *Trends in the development of the science of labor law and social security law* (pp. 152-156). Kyiv: Nika-Center.

Rym, O. M. (2019). Legal aspects of implementation by the European Union policies in the sphere of employment. *Scientific Bulletin of the International Humanitarian University, 37,* 154-158.

Rym, O. M. (2020). *Labor Law of the European Union*. Lviv: Halych-Press.

Shcherbyna, V.I. (2007). *Functions of labor law:* monograph. Dnipropetrovsk: Academy of Customs Service of Ukraine, 425 p.

Slezinger, G.E. (2000). Issues of labor organization and social relations (based on foreign scientific publications). *Labor Abroad, 3,* 106-120.

Svichkarova, Yu.V. (2014). Regarding the peculiarities of the «zero hours» contract with the employee's right to refuse work. In V.V. Zhernakov (Ed.). *The law of regulation of relations in the sphere of labor and social security: problems and prospects for development* (pp. 170-174). Kharkiv: Pravo.

Verkhovna Rada of Ukraine. (1971). Labor Code of Ukraine. https://zakon.rada.gov.ua/laws/show/322-08#Text

Verkhovna Rada of Ukraine. (1996). Constitution of Ukraine. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

Verkhovna Rada of Ukraine. (2003). Civil Code of Ukraine. https://zakon.rada.gov.ua/laws/show/435-15

Verkhovna Rada of Ukraine. (2012). Law of Ukraine On Professional Development of Employees. No. 4312-VI. https://zakon.rada.gov.ua/laws/show/4312-17#Text

Vnuchko, S. & Skoryk, M. (2021). *Standards for regulating labor relations: legal norms of the EU and Ukraine*. Kyiv: Kyiv Institute of Gender Studies.

Zhernakov, V.V. (2017). Problems for social and labor rights in the process of development of Ukrainian legislation. *Law & Innovations, 2*(18), 9-14.

Journal

«LEGAL HORIZONS»

Volume 22, No. 23
2024

Editing English-language texts: O. Lapka

Literary editor: A. Shcherbak

Editing bibliographic lists: O. Yatsun

Desktop publishing: K. Tiazhkorob

Signed to the print with the original layout 21.08.2024

Conventional Printed Sheet 9
Circulation 275 copies

Publisher: Sumy State University
40007, 2 Rymskyi-Korsakov Str., Sumy, Ukraine

E-mail: info@legalhorizons.com.ua