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PROBLEMATIC ASPECTS OF APPLICATION OF THE PRINCIPLE OF LEGAL  
CERTAINTY IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF UKRAINE

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## TABLE OF CONTENT

LIST OF ABBREVIATIONS .....	3
INTRODUCTION .....	4
CHAPTER 1. THEORETICAL BACKGROUND, EMERGENCE AND HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF LEGAL CERTAINTY AS A COMPONENT OF THE RULE OF LAW .....	14
1.1. The principle of legal certainty as a component of the rule of law.....	14
1.2. Historical development of the principle of legal certainty from the period of Antiquity to the present .....	16
1.3. Early development and first references to the principle of legal certainty in the European Union case-law .....	21
CHAPTER 2. ESSENTIAL ELEMENTS OF THE PRINCIPLE OF LEGAL CERTAINTY .....	34
CHAPTER 3. APPLICATION OF THE PRINCIPLE OF LEGAL CERTAINTY BY THE CONSTITUTIONAL COURTS OF LITHUANIA AND UKRAINE: A COMPARATIVE ANALYSIS .....	49
3.1. Basics of legal certainty and problems of its implementation in modern legal systems ....	49
3.2. Common and distinctive features of the application of the principle of legal certainty by the Constitutional courts of Lithuania and Ukraine.....	51
3.3. Problematic aspects of application of the principle of legal certainty by the Constitutional Court of Ukraine .....	61
CONCLUSIONS .....	66
RECOMMENDATIONS .....	68
LIST OF BIBLIOGRAPHY .....	70
ABSTRACT .....	82
SUMMARY .....	83
HONESTY DECLARATION .....	84

## **LIST OF ABBREVIATIONS**

EU – European Union

ECHR – European Court of Human Rights

CJEU – Court of Justice of the European Union

CCU – Constitutional Court of Ukraine

CCL – Constitutional Court of Lithuania

## INTRODUCTION

**The Relevance of the Topic.** The rule of law is one of the highest democratic values and one of the basic elements of the mechanism of self-limitation of democratic power. Although this idea has now acquired the character of a global ideal, it is still controversial in meaning. The principle of the rule of law was first interpreted in Albert Venn Dicey's "Introduction to the Study of the Law of the Constitution", a famous English constitutional scholar. Dicey's doctrine of the rule of law is built on three main ideas: 1) law is opposed to despotic power; 2) every person should be equal before under the law, irrespective of one's position and social status; 3) the primary source of law is not the norms of the constitution, but rather the natural rights of the individual<sup>1</sup>.

However, as interpreted by the CCU: "It is most appropriate to understand the rule of law as a defined system of complementary principles essential to a democratic social order. These principles underlie constitutional and legislative provisions and judicial practice at both the national and international levels. They undoubtedly include the principle of legal certainty, which is at the same time a necessary outcome of legal regulation to which every state and civil society is committed under the rule of law"<sup>2</sup>.

However, there is neither normative consolidation nor a specific definition of this principle nowadays. Its meaning is mainly based on an analysis of decisions and resolutions of the ECHR<sup>3</sup>. As a result, the practice of applying this principle in constitutional courts is different and unstable. The text of the Constitution of Ukraine also does not enshrine the principle of legal certainty. Thus, the fact that this principle of law is also a principle of modern Ukrainian constitutionalism derives from the decisions of the single body of constitutional jurisdiction – the CCU. That is why it is an important scientific task to analyse existing and monitor new decisions on this issue<sup>4</sup>.

The importance of the principle of legal certainty for effective legal regulation is confirmed by the practice of the CCU.

The practice of the CCU confirms this principle as an inseparable requirement of the rule of law in several cases: 1) in the 2005 decision on the case of permanent use of land<sup>5</sup> (CCU: "The constitutional principles of equality and justice require certainty, clarity and unambiguity of the

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<sup>1</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Classics, 1982), 102-114.

<sup>2</sup> Constitutional Court of Ukraine, case No. 17-rp/2010, (2010), <https://ccu.gov.ua/en/docs/283?order=created&sort=desc>.

<sup>3</sup> *Brumarescu v. Romania*, No. 28342/95 Eur. Ct. H. R. 12, 15 (1999), <https://hudoc.echr.coe.int/fre?i=001-58337>.

<sup>4</sup> Ganna Ognev'yuk, *The principle of legal certainty in the decisions of Constitutional Courts of Ukraine and some neighbouring states* (Kyiv, Ukraine, 2019), 28-30.

<sup>5</sup> Constitutional Court of Ukraine, case № 5-rp/2005, (2005), <https://zakon.rada.gov.ua/laws/show/v005p710-05#Text>.

legal norm, because the other cannot ensure its uniform application"); 2) in the decision of 11 March 2010 on the case on the constitutional motion of 46 people's deputies of Ukraine regarding the official interpretation of the terms "higher judicial body", "higher judicial authority", "cassation appeal"<sup>6</sup> (here the CCU applied the rule of *res judicata* and found that the existence of two cassation instances for review of decisions of specialised courts does not comply with the principles of legal certainty).

At the same time, the author considers that the CCU has disregarded the principle of legal certainty in a number of its decisions. These include the following: 1) The 2003 decision in the case of the term of office of the President of Ukraine<sup>7</sup>, where Article 103 of the Constitution of Ukraine states that the term of office of the President of Ukraine shall not exceed two consecutive terms: "The provision shall apply only to persons elected to the office of President of Ukraine after the Constitution of Ukraine of 1996 came into force; the person elected to the office of President of Ukraine for the first time under the present Constitution of Ukraine shall be eligible to run for the next presidential election in Ukraine in 2004. 2) Decision of 2012 on the case on the constitutional complaint of a private company concerning the official interpretation of the provision of Article 61 of the Family Code of Ukraine<sup>8</sup>, which was interpreted by the Constitutional Court of Ukraine as follows: "The share capital and the property of a private company are the object of joint ownership of a married couple", and not the company itself - as expressly stated in the Civil Code of Ukraine and in accordance with the established doctrine of civil law; 3) Decision of 2016 on the case on the constitutional submission of 51 people's deputies of Ukraine<sup>9</sup> regarding the official interpretation of the phrase "at the next regular session of the Verkhovna Rada of Ukraine", according to the CCU the phrase "at the next regular session of the Verkhovna Rada of Ukraine" is to be understood as the next regular session of the Parliament, i. e.. That is, the next regular session can be defined as any session, not necessarily the next regular session in terms of common sense and presumption of the next regular session of the Verkhovna Rada of Ukraine.

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<sup>6</sup> Constitutional Court of Ukraine, case № 8-rp/2010, (2010), <https://zakon.rada.gov.ua/laws/show/v008p710-10#Text>.

<sup>7</sup> Constitutional Court of Ukraine, case № 22-rp/2003, (2003), <https://zakon.rada.gov.ua/laws/show/v022p710-03#Text>

<sup>8</sup> Constitutional Court of Ukraine, case № 17-rp/2012, (2012), <https://zakon.rada.gov.ua/laws/show/v017p710-12#Text>

<sup>9</sup> Constitutional Court of Ukraine, case № 1-rp/2016, (2016), <https://zakon.rada.gov.ua/laws/show/v001p710-16#Text>

Author is of the opinion that such binding and final decisions of the constitutional justice body increase the mistrust of the legal community and society at large towards the impartiality of the judiciary, which negatively affects the level of its legitimacy and, consequently, the effectiveness of the national legal system.

Therefore, the actual implementation of the principle of legal certainty is the main factor contributing to the formation of public confidence in the judiciary and the positive image of judicial institutions<sup>10</sup>. This is why this issue is still relevant today.

The principle of legal certainty is a crucial component of the rule of law, which is essential for effective legal regulation and protection of citizens' rights and freedoms. This research aims to explore the principle of legal certainty, its key elements, and its historical development from the period of Antiquity to the present. The main focus will be on analysing the application of this principle in constitutional courts, both in foreign countries and Ukraine.

The importance of this topic lies in its relevance to modern Ukrainian constitutionalism. The practice of applying this principle in constitutional courts is different and unstable, and there is no legislative enshrinement of the principle in the text of the Constitution of Ukraine. Therefore, it is an important scientific task to analyse existing decisions on this issue and monitor new ones.

This research will also identify and explore the main disadvantages of judicial practice in Ukraine related to uncertain use of this principle.

**The Research Problem.** The principle of legal certainty is a fundamental component of the rule of law, which is essential for effective legal regulation and protection of citizens' rights and freedoms. However, the practice of applying this principle in constitutional courts, particularly in Ukraine, is different and unstable. The text of the Constitution of Ukraine also does not enshrine the principle of legal certainty. Therefore, the research problem is to analyse the existing decisions on this issue and monitor new ones to identify and explore the main disadvantages of judicial practice in Ukraine related to uncertain use of this principle.

The main problem is the lack of stable and uniform practice of application by the CCU of the principle of legal certainty, which in turn is one of the basic and most important components of the principle of the rule of law enshrined in the first part of Article 8 of the Constitution of Ukraine<sup>11</sup>.

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<sup>10</sup> Sviatoslav Pogranichny, "The Supreme Court's position," *Judicial-Legal Newspaper*, 2021, <https://sud.ua/ru/news/sudebnaya-praktika/206614>

<sup>11</sup> "The Constitution of Ukraine", State newspaper "Vedomosti of Verkhovna Rada of Ukraine" № 30, (1996), <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

This research will present many reflections on the principle of legal certainty, its key elements and meaning, as well as identify and study the main disadvantages of judicial practice in Ukraine. However, in order to fully develop the topic of the research it is necessary to answer the main question. In view of the existing problems of uncertain application of the principle of legal certainty in the judicial practice of Ukraine, is there a need for its legislative incorporation at the level of the Constitution of Ukraine, or is the judicial practice relatively stable and the interpretation of this principle as an element of the principle of the rule of law is sufficient to guarantee the rights and freedoms of the citizens of Ukraine?

Overall, this research problem aims to contribute to a better understanding of how legislative fixation can improve judicial practice and guarantee greater legal certainty for citizens. It will also provide insights into how other countries apply this principle in their constitutional courts, which may be useful for comparative analysis.

**The level of exploration of the Topic.** To date, the principle of legal certainty, its basic elements and criteria, its essence and definition, as well as its correlation with the rule of law and other basic principles of law, has been studied by Ukrainian and foreign scholars and scientists. For example, Y. Matveeva in her work confirms that it is impossible to talk about dreamed up rule of law without the principle of legal certainty, because legal certainty is one of the conditions for the effective operation of the rule of law, and ensuring the implementation of the requirements of the principle of legal certainty is a guarantee not only of effective implementation and protection of human rights, but also a significant improvement in the mechanism of the country<sup>12</sup>. Her opinion is also confirmed by the decision of the ECHR, which has repeatedly pointed out in its judgments that the principle of legal certainty is one of the fundamental aspects of the rule of law<sup>13</sup>.

One of the most successful, in our opinion, classifications of constituent elements of the principle of legal certainty is placed by T. Kravtsova, who notes that the principle of legal certainty is a complex concept, and the elements through which the content of the principle of legal certainty is revealed, must provide legal regime of stability and security of functioning of the state and society that need protection of legal status, legal relations and consequences of law enforcement<sup>14</sup>. T. Kravtsova names the predictability of legislation as one of the basic elements of the principle of legal certainty confirmed by the decision of the ECHR in the case “Volkov v. Ukraine<sup>15</sup>”. The

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<sup>12</sup> Yulia Matvieieva, “*Legal certainty: pro and contra*” (*scientific notes*), (Kyiv, Ukraine, 2018), 29-32.

<sup>13</sup> Ustimenko v. Ukraine, No. 32053/13 Eur. Ct. H. R. 9, 14 (2010), <https://hudoc.echr.coe.int/fre?i=001-158143>

<sup>14</sup> Tatyana Kravtsova, *Legal certainty: basic principles and practice of the European Court of Justice* (Kyiv, Ukraine: Legal League, 2019), 17-24.

<sup>15</sup> Oleksandr Volkov v. Ukraine, No. 21722/11 Eur. Ct. H. R. 19 (2013), <https://hudoc.echr.coe.int/fre?i=001-115871>.

violation of the principle of legal certainty was pointed out by the ECHR considering the absence of legal limitation period in the Ukrainian legislation for bringing a judge to account for violation of oath.

M. Koziubra has made quite significant achievements in clarifying the essence of the principle of legal certainty. He was particularly good at describing and showing the place of this principle in the system of law, as well as its relationship and interaction with other fundamental principles of law<sup>16</sup>.

Special attention should be paid to the research papers by O. Potilchak<sup>17</sup> and M. Hultai with I. Kyanytsa<sup>18</sup>. Both works are very important and interesting for the author in the light of the chosen topic, because these works explore the principle of legal certainty in the decisions of the CCU and the SCU respectively.

An interesting definition of the principle of legal certainty is provided by the Romanian scholar E. Cingaru in his work describing the principle of legal certainty through the concept of legal security. As this principle consists of clauses against uncertainty the entry into force of the legal norm, for example, must be predictable and legal situations created by the introduction of the legal norm must be determined easily because the parties to legal relations must be sure of what legal provisions will be applied<sup>19</sup>.

It is interesting to know about the relevance of the principle of legal certainty in Ukraine from Dutch scientist H. Gribnau, who regards the principle of legal certainty as a protection against state interference with the law and means excessive discretion of state authorities which is an important issue for Ukraine. He believes that legal certainty provides stability, irreversibility of the law and clarity of its provisions<sup>20</sup>.

In his turn, J. Linarelli made an important comment in his work stating that the principle of legal certainty is inherent not only to the law of the European Union but also to the Anglo-American legal system. J. Linarelli identifies it as fundamental to English contract and commercial law. Comparing American and English approaches, he concludes that legal certainty remains an

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<sup>16</sup> Mykola Koziubra, *The general theory of law* (Kyiv, Ukraine: Vaite, 2016), 36-42.

<sup>17</sup> Olexandr Potilchak, *Implementation of the rule of law in the decisions of the Supreme Court of Ukraine* (Kharkiv, Ukraine: Consum, 2013), 162-164.

<sup>18</sup> Mykhailo Hultai and Ivan Kyanytsa, *Legal certainty in decisions of the Constitutional Court of Ukraine* (Kyiv, Ukraine: Journal of the Constitutional Court of Ukraine, 2012), 6-11.

<sup>19</sup> Emilian Cingaru, *Constitutional Law connotations of Legal Certainty in the Rule of Law* (Bucharest, Romania: Fiat Iustitia, 2016), 43-50.

<sup>20</sup> Hans Gribnau, *Legal certainty and Tax Legislation in the Netherlands. Fundamental Legal Principles as Checks on Legislative Power: a case study* (Amsterdam, Netherlands: Utrarecht Law Review, 2013), 53-74.



important legal concept in spite of little research on the subject, emphasising that more research is needed on the theory of law<sup>21</sup>.

In view of the above, there is a lack of works that would comprehensively address the problems of the interpretation of the principle of legal certainty, especially in the light of stabilisation and improvement of the uniformity of court practice in the Ukrainian courts.

**The Scientific Novelty of the Topic.** This work is one of the first scientific research, which comprehensively analyses domestic and foreign experience of application of the principle of legal certainty in the justice system and formulates reasonable conclusions and proposals for its proper legislative consolidation and implementation in Ukraine.

The scientific novelty of the work is revealed through:

- Identification of problems related to different interpretation and application of the principle of legal certainty in the CCU, which limits public access to justice and the development of proposals for a common understanding of the essence of this principle in order to stabilise judicial practice in Ukraine.
- Listing the shortcomings of legislative enshrining of the principle of legal certainty in Ukraine and developing proposals for a unified universal definition and its legislative enshrining to comply with this principle.
- Determining the criteria and basic elements of the principle of legal certainty based on the experience of international and European courts in order to implement this principle in the activities of law enforcement and judicial authorities of Ukraine.

The scientific novelty lies in analysing existing decisions on this issue and monitoring new ones to contribute to a better understanding of how legislative enshrinement can improve judicial practice and ensure greater legal certainty for citizens. This research will also provide insights into how other countries apply this principle in their constitutional courts, which can be useful for comparative analysis.

Overall, this research topic has significant scientific novelty due to its relevance for modern Ukrainian constitutionalism and its potential implications for effective legal regulation and protection of citizens' rights and freedoms.

**The Importance of the research.** This research paper contains conclusions and recommendations important for removing theoretical and practical obstacles in the process of implementing the principle of legal certainty in Ukrainian legislation.

This work is useful for application in the following areas:

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<sup>21</sup> John Linarelli, *Legal Certainty: a Common Law View and a Critique. Shifting meaning of Legal Certainty in Comparative and Transnational Law* (London, England: Oxford Hart Publishing, 2017), 1-19.

- In research activities - to form doctrinal positions for defining the concept and essence of the principle of legal certainty as one of the main components of the principle of the rule of law, as well as its main elements and criteria.
- In educational activities - to develop a framework for training courses on the application of the principle of legal certainty in the judicial system of Ukraine as a prerequisite for access to justice for the Ukrainian society.
- In law-making activity - to develop, adopt new and improve existing regulations in order to legally enshrine the principle of legal certainty as one of the main components of the rule of law.
- In law enforcement - for effective and uniform interpretation and application of the principle of legal certainty in judicial practice, especially in the CCU.

The importance lies in its relevance to modern Ukrainian constitutionalism. The analysis presented in this research will contribute to a better understanding of how legislative enshrinement can improve judicial practice and ensure greater legal certainty for citizens. It will also provide insights into how other countries apply this principle in their constitutional courts, which can be useful for comparative analysis.

Overall, this research topic has significant implications for effective legal regulation and protection of citizens' rights and freedoms. It addresses an important gap in existing literature on the subject by comprehensively analysing domestic and foreign experience with application of the principle in justice systems. This research aims to formulate reasonable conclusions and proposals for proper legislative consolidation and implementation in Ukraine, which can contribute to improving judicial practice and ensuring greater legal certainty for citizens.

**The Originality of the Research.** This research work has been carried out by the author independently, claiming and confirming its authenticity and originality. The research is the result of the author's own intellectual activity, using his unique methodology to highlight existing scientific problems and find solutions to them, based on the domestic and foreign experience of scholars and legal professionals, as well as international and European judicial practice.

**The Purpose of the Research.** The purpose of this master's thesis is to comprehensively analyse the principle of legal certainty and its application in constitutional courts, particularly in Ukraine. The research aims to explore the historical development of this principle from Antiquity to present times and analyse its key elements. It will also identify and explore the main disadvantages of judicial practice in Ukraine related to uncertain use of this principle. The purpose of this research is to identify disadvantages in the application and use of the principle of legal

certainty in judicial practice of Ukraine in order to propose concrete methods to eliminate defects in the functioning of courts in Ukraine.

The purpose of this research is to contribute to a better understanding of how legislative enshrinement can improve judicial practice and ensure greater legal certainty for citizens. It aims to formulate reasonable conclusions and proposals for proper legislative consolidation and implementation in Ukraine, which can contribute to improving judicial practice and ensuring greater legal certainty for citizens.

**The Objectives of the Research.** Taking into account the research issues and the relevance of the topic, the following objectives of this study can be identified:

1. To analyse the historical and theoretical prerequisites for the establishment of the principle of legal certainty as a component of the rule of law in the history of society's development and to establish the legal basis for the application of this principle in early case law, using the example of specific court cases.

2. To identify the key elements of the principle of legal certainty and analyse the case law of the European Court of Human Rights and the Court of Justice of the European Union on the application of this principle.

3. To analyse the practice of application of the principle of legal certainty by the constitutional courts of the Republic of Lithuania and Ukraine, to identify the shortcomings and problematic issues, and to draw conclusions as to the expediency of applying this principle by the Constitutional Court of Ukraine.

**The Methodology of the Research.** The author used a variety of theoretical and empirical methods in the study. Among the theoretical methods used were the review of scientific literature, comparative legal, historical and systemic analysis, the method of abstraction, the alternative method and the method of generalisation.

The review of scientific literature was used to establish theoretical knowledge in the area under study and to develop critical thinking on a particular issue in order to solve the tasks set.

The comparative legal research method was used to compare domestic and foreign experience, as well as international, domestic and European case law, with a view to formulating recommendations for stabilising and unifying case law in Ukraine.

The historical method was used to identify the theoretical features of the development of the principle of legal certainty as a key component of the rule of law.

The systemic analysis was used to study the key elements of the principle of legal certainty in order to understand this complex social phenomenon.

The method of abstraction was used to study the grounds and concepts of the principle of legal certainty.

Due to the fact that there are many scientific discussions on the principle of legal certainty, the author often used an alternative method to compare opposing points of view.

Since the essence of the principle of legal certainty stems from its key elements, the author often used the method of generalisation to identify the main features of this phenomenon.

Among the empirical methods, the author used document analysis, primarily to analyse international and domestic case law in order to comprehensively study the chosen topic.

The author also used the empirical method of interview to obtain information from more experienced colleagues in the legal field.

**The Structure of the Research.** The first chapter of this master thesis is entitled "Theoretical background, emergence and historical development of the principle of legal certainty as a component of the rule of law". This chapter provides a detailed analysis of the principle of legal certainty as a fundamental element of the rule of law, as well as an analysis of the origin of the principle of legal certainty and its historical development from Antiquity to the present. It examines how different legal scholars and practitioners have conceptualised and defined legal certainty. Finally, it looks at how legal certainty is implemented in EU jurisprudence.

The second chapter of this work is entitled "Essential elements of the principle of legal certainty". This chapter analyses in detail the essential elements that make up the principle of legal certainty. It examines how these elements are defined and applied in different legal systems and jurisdictions. The chapter also examines how legal certainty relates to other fundamental legal principles.

Application of the principle of legal certainty by the Constitutional Courts of Lithuania and Ukraine: a comparative analysis" is the third chapter of the master thesis. This chapter presents a comparative analysis of how the Constitutional Courts of Lithuania and Ukraine have interpreted and applied the principle of legal certainty. It examines how these courts have interpreted and applied the principle of legal certainty in their jurisprudence. Particular attention is paid to their approaches to resolving conflicts between different legal norms and principles.

The conclusions of the master thesis provide a comprehensive overview of the research and its implications for scholars, practitioners and policy makers. A number of problematic aspects were identified in the application of the principle of legal certainty by the Constitutional Court of Ukraine.

In order to address the problems identified in this thesis, the author recommends a number of measures to improve the implementation of the principle of legal certainty in Ukraine. Overall,

these recommendations aim to strengthen the rule of law democracy and protect the human rights of all citizens in Ukraine.

**The Defence Statements.**

1. The principle of legal certainty does not necessarily need to be part of the constitution, as it is a key element of the rule of law, which is already part of the Constitution. However, the basic content and essence of the principle of legal certainty should be clearly reflected in all laws and regulations.

2. The practice of the Constitutional Court of Ukraine on the application of the principle of legal certainty is not stable and uniform enough and should be developed by the CCU in the light of the experience of the European Court of Human Rights, the European Court of Justice, the constitutional courts of other states and the opinions of eminent scholars and researchers.

# **CHAPTER 1. THEORETICAL BACKGROUND, EMERGENCE AND HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF LEGAL CERTAINTY AS A COMPONENT OF THE RULE OF LAW**

## **1.1. The principle of legal certainty as a component of the rule of law**

The rule of law is one of the most significant achievements of mankind in the history of its existence, without which it is impossible to imagine the full functioning of modern society and its development to the stage at which it is now. The main function and purpose of the rule of law is to protect the fundamental human and individual rights from arbitrary interference by the state and its representatives, to prevent the usurpation of state power by establishing genuine democracy and to ensure a just law and order in society.

The rule of law today is a global ideal and a global goal. It is supported by people, states, international organizations around the world. "The need for universal adherence to and observance of the rule of law at both the national and international levels" was recognized by all UN Member States in 2005 in the World Summit Outcome Document<sup>22</sup>. As stated in the Preamble and in Article 2 of the Treaty on European Union, the rule of law is one of the fundamental values shared by the European Union and its members<sup>23</sup>. The rule of law is mentioned in the Preamble to the Charter of the Council of Europe as one of the three "principles constituting the basis of genuine democracy", along with individual liberty and political freedoms<sup>24</sup>. The common goal of all international organizations and institutions is to understand and implement the rule of law as the essential foundation of any state, political or legal system.

Thus, we can conclude that the rule of law is a kind of legal ideal and one of the highest democratic values necessary for the stable development and functioning of society. However, discussions between scholars and lawyers on the understanding of the term rule of law are still ongoing. There is still no universal definition of the rule of law and, as practice, in particular the ECHR, confirms, it is impossible to formulate such a definition suitable for all cases.

The components of the rule of law according to the Report of the European Commission for Democracy through Law (Venice Commission) of 4 April 2011 (the Report) are:

- legality, including a transparent, accountable and democratic process for enacting the prescriptions of law;

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<sup>22</sup> A/RES/60/1. 2005 World Summit Outcome | UN Peacemaker. The 2005 World Summit Outcome, endorsed by General Assembly resolution 60/1

<sup>23</sup> European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities OJ C 115, 9.5.2008.

<sup>24</sup> European Treaty Series - No. 1 - Statute of the Council of Europe, London, 5.V.1949.

- legal certainty;
- prohibition of arbitrariness;
- access to justice, represented by independent and impartial courts, including those exercising judicial review of administrative activities;
- respect for human rights;
- prohibition of discrimination and equality before the law<sup>25</sup>.

The rule of law, as well as the law itself, is a very complex matter, which in turn is very multifaceted and multidimensional, so such terms, among scientists, are usually revealed through the main features, elements and properties. Each scientist has his own vision of the system and the number of such components, for example, S.P. Golovaty distinguishes 17 elements of the rule of law<sup>26</sup>, while P.M. Rabinovych distinguishes 36 such elements<sup>27</sup>. However, almost all legal scholars agree that the principle of legal certainty is one of the most important, one might say, determining among all the components.

If we turn to the primary sources of the rule of law, it is advisable to recall that the modern understanding of the concept of "rule of law" was introduced by Professor A.V. Dicey - a well-known British constitutionalist, who in his work "Introduction to the Study of the Law of the Constitution" proposed the concept that no person can be punished except in case of a clear violation of the law, which should provide certainty and predictability so that citizens can be guided by it when committing certain actions, and which should not allow punishing a person retrospectively<sup>28</sup>. Thus, it becomes clear that the principle of legal certainty is directly related to the principle of the rule of law and is one of its most important components, but there is currently no specific definition of this concept, for the same reasons that there is no clear definition of the rule of law, because these categories are closely related to specific legal situations and should be considered only in a comprehensive and systematic manner. This is why there is a huge amount of scientific research on the essence and main components of the rule of law, but, in turn, the principle of legal certainty is too important for understanding the rule of law to leave its essence and content unclear.

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<sup>25</sup> Report No. 512/2009 of the European Commission for Democracy through Law (Venice Commission) "The Rule of Law", Report adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-ukr](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-ukr)

<sup>26</sup> Sergii Golovaty, *The rule of law: from doctrine to principle. Book two* (Kyiv, Ukraine: Phoenix Publishing House, 2006), 1171-1222.

<sup>27</sup> Petro Rabinovych, *The principle of the rule of law: problems of theory and practice: monograph* (Lviv, Ukraine: Spolom, 2016), 97-117.

<sup>28</sup> Albert Disay, *Introduction to the Study of the Law of the Constitution* (Indianapolis, United States of America: Liberty Fund, Inc., 1885), 107-118.

The requirement of legal certainty is one of the first and most essential requirements put forward by man to the law. Its importance and necessity have long been understood by the European legal culture. The basis of the principle of legal certainty is the concept of predictability. According to it, people should be able to plan their actions with confidence that they know the legal consequences of such actions<sup>29</sup>. It is predictability that is the basis of one of the fundamental and basic principles for the protection of human and individual rights and freedoms - the principle of legal certainty, which, in turn, is one of the main elements of the rule of law, the guiding principle in the exercise by public authorities of their duties and powers and in the administration of justice.

## **1.2. Historical development of the principle of legal certainty from the period of Antiquity to the present**

Clarifying the question of the historical origin of legal certainty, in the author's opinion, it is appropriate to begin the study of the origins of legal certainty in ancient times, because agreeing with the opinion of Yu. Matveeva, the first step towards the formation of the principle of legal certainty was the emergence of written sources of law, because their recognition by the state was an important step towards establishing stability in ancient states and countries of the Middle Ages, which gave legal norms a high degree of legal certainty in comparison with the norms of customary law, which were usually transmitted orally<sup>30</sup>.

One of the first written monuments of law that migrated from the oral form was the collection of laws of King Hammurabi, thus, these rules of law acquired the character of legal certainty, as they were characterized by a certain stability and impossibility of cancellation, because it was the decision of the king, who at that time acted as the highest legislative and judicial body at the same time.

In ancient Greece, the rule-making function was carried out by the people's legislative assemblies, as a result of their activities they formed general rules that were fixed in writing and opposed to the decrees of tyrants. However, later the Greeks, especially the Athenians, had to face serious problems of such law making. In particular, all the laws were precisely formulated and written down, but they were not particularly stable, because every citizen could propose a new law, so the existing law could quickly lose force as a result of the adoption of a new one. Later,

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<sup>29</sup> Stanislav Pogrebnyak, "Fundamental principles of law", *Dissertation for the degree of Doctor of Law* (Kharkiv, Ukraine, 2009), 25. <http://www.irbis-nbuv.gov.ua/aref/20100426001438>

<sup>30</sup> Yulia Matvieieva, "The principle of legal certainty as a component of the rule of law", *Dissertation for the degree of Candidate of Law* (Kyiv, Ukraine, 2019), 54-61. <http://ekmair.ukma.edu.ua/handle/123456789/16530?show=full>



there was even a special committee of magistrates whose task was to ensure the stability of existing legislation by filtering new bills<sup>31</sup>.

A radically different approach to legal certainty can be traced back to ancient Rome, which was based on a long-term concept of law. According to it, the law could not be changed suddenly and did not depend on arbitrary actions of senators or other officials. Therefore, in this case, the law was in force for a long time, which gave it stability, because the population had confidence in the stability of legal relations and the ability to foresee the consequences of their actions. The consequence of such application of law was the Laws of XII Tables, which got their name due to the fact that they were written on 12 boards, which were exhibited for public display in the central city square, so everyone could and even had to get acquainted with the content of the laws, moreover, every young man at the initiation into the ranks of citizens had to learn them by heart, so it was impossible to argue that the law was not observed by his ignorance. Thus, the norms of the Laws of the XII Tables acquired a greater degree of legal certainty and were of great importance for the further development of Roman law, because even much later Roman lawyers commented on them<sup>32</sup>.

In the transition period from Antiquity to the Middle Ages, a significant contribution to the development of legal certainty, as it was understood at that time, was made by Emperor Justinian, who conducted a large-scale codification of Roman law. The achievement of his fruitful work was the collection of laws "Corpus juris civilis". This codification served as an ordering of laws that had accumulated over time, in particular the works of Roman lawyers, and became the basis for the creation of a unified legal system<sup>33</sup>. The origins of the principle of legal certainty are manifested in the judicial process of Rome, because it was in the judicial process of Ancient Rome that the term "res judicata" appeared and further developed, which is now commonly used to denote one of the elements of the principle of legal certainty. "Res judicata" in Roman law is associated with the adoption of a court decision and its entry into force<sup>34</sup>. Legal certainty is clearly seen in the positive effect of the court decision, which was manifested for the parties to the dispute in the fact that the resolution of the disputed issue is recognized as the truth - "res judicata pro veritate habetur", which is binding on the parties to the dispute (Fragment 25 Title I Book V Digest of Justinian<sup>35</sup>). As I. V. Rekhtina notes, the category of legal certainty (res judicata) originated

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<sup>31</sup> Leoni Bruno, *Freedom and the law* (Indianapolis, United States of America: Liberty Fund, Inc., 1961) 58-76.

<sup>32</sup> Joseph Pokrovskiy, *History of Roman law* (Minsk, Belarus: Harvest, 2002), 523-529.

<sup>33</sup> Skřejpek Michal. Interpretatio v Římském právu. In: *Ve službách práva*. C. H. Beck, 2003, p. 27.

<sup>34</sup> Anatolii Vishnevskiy, "Action of the principle "res judicata" as a necessary condition for ensuring justice", *Modern Law*, 2013, <http://www.jurnaluljuridic.md/index.php/main/article/view/143>

<sup>35</sup> Digests of Justinian, [translated from Latin], ed. by Leonid Kofanov, (Moscow, Russia: Statute, 2002), 602.

within the institution of a court decision and was directly used to indicate the legal force of court decisions and the finality of a judicial act. The level of development of the institute of the legal force of a court decision, which, together with other elements, provides legal certainty of legal relations, allowed Roman lawyers to give Roman law the form that secured its place in history as a kind of general dogma and universal design of legal institutions and norms<sup>36</sup>. Thus, the provisions arising from "res judicata" can be considered a prerequisite for further development and formation of the principle of legal certainty in the process of law enforcement. Indeed, at the present stage, the European Court of Human Rights uses "res judicata" in the meaning of the finality of a court decision<sup>37</sup>.

It should be noted that in the works of figures of the Middle Ages one can trace the idea of the certainty of law, which was not limited only to the formal certainty of the law. As an example, we can cite the doctrine of F. Aquinas, who established four types of laws, and the essence of some of them was not consistent with these features. The thinker emphasizes that the laws must be obeyed, but the laws, in turn, must meet the requirements, which consisted in the reasonableness of the command, conformity to the common good, must be published, and the issuing body must be competent<sup>38</sup>. It is in such a feature as publication that the requirement of certainty is expressed.

Covering the topic, it is advisable to refer to the legal teachings of Thomas Hobbes. T. Hobbes considered legislation and legislative function to be a separate and relatively independent area of state activity. He divided the laws themselves into two main groups: natural and civil. For the philosopher, the requirements for the content of the law were important. Among them, he singled out the following: laws should be understandable to those to whom they are directed, the law is not valid if it is unknown who issued it, the law derives its power only from the sovereign, etc.<sup>39</sup>. So, as we can see, T. Hobbes emphasized the clarity and predictability of laws, so in this case we can also trace the idea of legal certainty<sup>40</sup>.

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<sup>36</sup> Irina Rehtina, "The origin of the principle of legal certainty (res judicata) in the legislation of Ancient Rome", *Current legal issues*, 2013, <http://sibac.info/2009-07-01-10-21-16/9782-res-judicata>.

<sup>37</sup> Benjamin Salas Kantor, María Elisa Zavala Achurra, "The Principle of res judicata before the International Court of Justice: in the Midst of Comradeship and Divorce between International Tribunals", *Journal of International Dispute Settlement*, Volume 10, Issue 2, June 2019, 292-301, <https://academic.oup.com/jids/article/10/2/288/5333164?rss=1>

<sup>38</sup> Victoria Pankratova, "Historical origins of the principle of legal certainty", *Entrepreneurship, economy and law*, 2017, <https://univd.edu.ua/science-issue/scientist/440>

<sup>39</sup> Vladyslav Volynets, "Analysis of state functions and specificity of their correlation in the state-legal T. Hobbes' theory", *Bulletin of the Ministry of Justice of Ukraine*, 2012.

<sup>40</sup> Thomas Hobbes, *The Elements of Law, Natural and Politic: Human Nature & De Corpore Politico*, (Derbshir: England, 1650), 124-130.

Thus, during the Renaissance and the Enlightenment, the following provisions characterizing the principle of legal certainty were formed:

- the criterion for assessing the legality of a person's behavior is common sense embodied in the law;
- punishment and restriction of freedom of a person are established exclusively on the basis of the law;
- a legal norm should be expressed in a language accessible and understandable for an ordinary citizen;
- the legal norm should be promulgated in advance.

It is important for understanding the principle of legal certainty to consider the concept of the rule of law, the classical justification of which was provided by the famous English lawyer Albert Venn Dicey in his work "An Introduction to the Study of the Law of the Constitution". In the doctrine of the rule of law, A. Dicey puts three main ideas: *protection of a person from arbitrariness of the state*, and therefore, the law is opposed to every system of state power. It also means that public authorities should not have broad discretionary powers and the limits of these powers should be clearly defined; *equality of all members of society before the law regardless of social status or position*. Equality is manifested in the extension to officials of the same effect of laws and the same jurisdiction of ordinary courts as to ordinary citizens. Outlining this provision, A. Dicey notes that in England equality before the law is at a high level: "We have any official, from the first minister to the last constable or tax collector, subject to the same responsibility as any other citizen for an act contrary to the law"; the *main source of law is human rights*<sup>41</sup>.

Summing up, the author notes that A. Dicey did not clearly formulate such an element of the rule of law as legal certainty. But it is important in this aspect that A. Dicey does not consider the rule of law as a theoretical, abstract category, but states its real effect. Therefore, in order to understand the origins of legal certainty, it is important to refer to the concept of the rule of law by A. Dicey, since the principle of legal certainty at the present stage of development of law is considered as its integral element<sup>42</sup>.

F. Hayek, a follower of A. Dicey, distinguishes three aspects of the rule of law: "Laws must be general, they must apply equally to all, and they must be clearly formulated"<sup>43</sup>. Clarity of formulation requires that those subject to the law be able to reliably predict what legal rules may

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<sup>41</sup> Albert Disay, *Introduction to the Study of the Law of the Constitution* (Indianapolis, United States of America: Liberty Fund, Inc., 1885), 110.

<sup>42</sup> Albert Disay, *Introduction to the Study of the Law of the Constitution* (Indianapolis, United States of America: Liberty Fund, Inc., 1885), 119-123.

<sup>43</sup> Friedrich August von Hayek, "The principles of a liberal social order", (Freiburg, Germany: Il Politico, 1966), 328-334.

govern their actions and how those rules will be applied and interpreted. Predictability is a necessary component of advance knowledge, which enables freedom of action. It allows citizens to plan their behaviour in terms of its legal consequences, and those circumstances that are beyond their control should not be the basis for coercion. Therefore, legal certainty, according to F. Hayek, is the requirement that the state power in all its actions be bound by rules that are fixed and announced in advance, and which make it possible to predict with all probability and obvious certainty how the authorities will use their coercive means in certain circumstances. F. Hayek revealed the significance of legal certainty through the concept of the rule of law, arguing that the rule of law implies that public authorities are limited in their actions by pre-established and declared rules that make it possible to predict with great accuracy the coercive measures that will be applied by the authorities in a given situation, as a result of which an individual can confidently plan his actions. It seems that F. Hayek quite successfully formulated the concept of the principle of legal certainty through its central component - the predictability of legislation for individuals, a clear understanding of the consequences of their behaviour. After all, the confidence of the subject of law in the consequences of their actions is an important aspect of the principle of legal certainty. However, it should be noted that the scientist did not pay sufficient attention to other components of legal certainty - direct requirements to the legal system in general and to legal acts in particular<sup>44</sup>.

Having conducted a historical review of the main ideas on the development of the concept and content of the principle of legal certainty, the following general conclusions can be drawn:

- The first attempts to formalize the substantive components of the principle of legal certainty were already manifested in the first monuments of written law. This testifies to the constantly existing social need for certainty of legal norms.
- Throughout the entire process of law development, there has been a requirement for rule-making bodies to accurately formulate legal norms in writing.
- One of the first components of legal certainty from Antiquity to the present, was and remains the ability of a person to foresee the legal consequences of his actions or inaction.
- During a long historical period of its development, the principle of legal certainty has received the following substantive characteristics: the possibility for individuals to make long-term plans based on a set of rules adopted by people; unconditional respect for court decisions and their mandatory implementation;

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<sup>44</sup> Victor Smorodinsky, "Legal certainty", *Principles of law and judicial practice*, 2021, <https://doi.org/10.21564/2707-7039.2.242858>

punishment of a person or restriction of rights and freedoms of a person must be provided by law; establishment by law of the limits of discretionary powers of state bodies in the field of punishment or restriction of rights and freedoms of a person.

Thus, the basis of the principle of legal certainty historically is the formal certainty of legal norms, which makes social relations predictable, orderly and stable.

### **1.3. Early development and first references to the principle of legal certainty in the European Union case-law**

The analysis of court judgments is an essential aspect of legal research, which involves a detailed examination of court decisions and the principles of law that are applied in those decisions. The interpretation and application of legal principles in judicial decisions have a significant impact on the development of legal norms and the resolution of legal disputes. In this context, the principle of legal certainty plays a crucial role in ensuring consistency and predictability in the application of the law, both for legal professionals and the general public. The principle of legal certainty refers to the idea that the law must be clear, predictable, and accessible, so that individuals and businesses can plan and act in accordance with the law without fear of arbitrary or unforeseeable changes. In this subchapter, author have analysed a series of court judgments from the EU case-law, spanning from 1959 to 1979, to examine how the principle of legal certainty has been developing from the very beginning of its application in different legal contexts. By drawing on these analyses, author aim to provide insights into the practical implications of the principle of legal certainty and its role in ensuring fairness and justice in legal proceedings.

The Judgment of the Court of 17 July 1959 in *Société nouvelle des usines de Pontlieue - Acières du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* (Joined cases 32/58 and 33/58) is a landmark case in European Union law<sup>45</sup>.

In this case, the High Authority of the European Coal and Steel Community (ECSC) imposed a fine on *Société nouvelle des usines de Pontlieue (SNUPAT)* for violating certain rules of the ECSC Treaty. SNUPAT challenged the fine before the Court of Justice of the European Union (CJEU) on several grounds, including the principle of legal certainty.

The CJEU held that the principle of legal certainty was a fundamental principle of the ECSC Treaty and of the Community legal order as a whole. The Court emphasized that the ECSC Treaty must be interpreted and applied in a consistent and predictable manner, so that individuals

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<sup>45</sup> *Société nouvelle des usines de Pontlieue - Acières du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community*, № 61958CJ0032, CJEU, (17 July 1959), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61958CJ0032&qid=1680854821163>

and businesses could know in advance what their legal obligations were and how they would be enforced.

In the specific context of the case, the Court found that the High Authority had not provided sufficient guidance or information to SNUPAT regarding the specific rules it had allegedly violated. The Court therefore annulled the fine imposed on SNUPAT, finding that the company had not been given sufficient notice of the charges against it and had not been able to defend itself adequately.

In this sense, the principle of legal certainty was used in the case, as the CJEU held that the ECSC Treaty required the High Authority to provide clear and predictable rules and to ensure that companies were able to understand and comply with them. The Court's decision emphasized the importance of this principle in ensuring that the EU legal system is fair and transparent, and that individuals and businesses are able to rely on the law to protect their interests.

In the case of *Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community*, the Court ruled on 4 April 1960 in Case 31/59<sup>46</sup>. The case concerned the legality of a decision of the High Authority of the European Coal and Steel Community (ECSC) that imposed a fine on the Italian company *Acciaieria e Tubificio di Brescia* for allegedly violating ECSC regulations on the production and marketing of steel products.

In its judgment, the Court held that the High Authority's decision was unlawful because it had failed to provide clear and precise rules that would enable the steel company to understand and comply with the ECSC regulations. The Court stressed the importance of the principle of legal certainty, which requires that rules and regulations be sufficiently clear and precise to enable individuals and businesses to know their legal obligations.

The Court held that "the principle of legal certainty, which is a fundamental principle of Community law, requires that legal rules be clear, precise and predictable in their effects, and that they be applied in a consistent manner." The Court further noted that the ECSC had failed to provide clear and precise rules for the production and marketing of steel products, which had created uncertainty for the steel company and had violated the principle of legal certainty.

In conclusion, the Court's judgment in *Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community* clearly relied on the principle of legal certainty. The Court emphasized the importance of clear and precise legal rules that would enable individuals

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<sup>46</sup> *Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community*, No 61959CJ0031, CJEU, (4 April 1960), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61959CJ0031&qid=1680854821163>

and businesses to know their legal obligations, and it held that the ECSC had failed to provide such rules in this case.

In the case of "Geitling" Ruhrkohlen-Verkaufsgesellschaft mbH, "Mausegatt" Ruhrkohlen-Verkaufsgesellschaft mbH "Präsident" Ruhrkohlen-Verkaufsgesellschaft mbH and associated companies v High Authority of the European Coal and Steel Community, the European Court of Justice (ECJ) was asked to consider the legality of a decision taken by the High Authority of the European Coal and Steel Community (ECSC)<sup>47</sup>.

The companies claimed that the decision of the High Authority, which imposed a financial penalty on them for exceeding their coal production quotas, was unlawful because it was based on an incorrect interpretation of the relevant ECSC Treaty provisions. The companies argued that the High Authority's decision infringed the principle of legal certainty because it was based on an interpretation of the Treaty that was not clear or foreseeable.

The ECJ held that the High Authority's decision was not based on an incorrect interpretation of the Treaty and therefore was not unlawful. The ECJ also found that the principle of legal certainty was not infringed in this case, as the Treaty provisions in question were clear and unambiguous, and it was not unreasonable for the High Authority to interpret them as it did.

Therefore, while the principle of legal certainty was mentioned in this case, it was not found to be infringed, as the Treaty provisions were considered to be sufficiently clear and unambiguous to enable the High Authority to make its decision.

In this case, the principle of legal certainty was used to uphold the legal rights of the companies involved. The Court found that the High Authority of the European Coal and Steel Community had violated the principle of legal certainty by imposing fines on the companies without providing clear and specific rules on the conduct they were required to follow.

Overall, the principle of legal certainty was used in this case to ensure that the companies involved were not penalized for conduct that was not clearly prohibited by the rules in force at the time.

In the case of Gabriel Simon v Court of Justice of the European Communities, the Court was asked to rule on the legality of a decision of the Secretary-General of the Court refusing to grant Mr. Simon leave to appeal against a decision of the Court of Justice<sup>48</sup>. The case raised

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<sup>47</sup> "Geitling" Ruhrkohlen-Verkaufsgesellschaft mbH, "Mausegatt" Ruhrkohlen-Verkaufsgesellschaft mbH "Präsident" Ruhrkohlen-Verkaufsgesellschaft mbH and associated companies v High Authority of the European Coal and Steel Community, № 61959CJ0016, CJEU, (12 February 1960), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61959CJ0016&qid=1680854821163>

<sup>48</sup> Gabriel Simon v Court of Justice of the European Communities, № 61960CJ0015, CJEU, (1 June 1961), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61960CJ0015&qid=1680854821163>

important questions about the scope of the right of access to justice and the principle of legal certainty in the context of EU law.

In its judgment of 1 June 1961, the Court held that the right of access to justice is a fundamental principle of EU law and that any restrictions on that right must be interpreted strictly. The Court noted that the principle of legal certainty requires that individuals have access to a court or tribunal to challenge decisions that affect their rights, and that the right to appeal is an important aspect of that access.

The Court went on to rule that the decision of the Secretary-General of the Court refusing to grant Mr. Simon leave to appeal was unlawful because it did not provide any reasons for the refusal. The Court held that the right of access to justice requires that individuals be given reasons for decisions that affect their rights, and that the failure to provide reasons in this case violated that right.

Overall, the judgment in *Gabriel Simon v Court of Justice of the European Communities* affirmed the importance of the principle of legal certainty in EU law, particularly in relation to the right of access to justice and the need for reasons to be given for decisions that affect individuals' rights.

In this case, the principle of legal certainty was applied to ensure that individuals have a clear understanding of the legal consequences of their actions. The Court of Justice stated that the principle of legal certainty requires that the interpretation of a legal provision must be sufficiently precise and clear so that individuals can reasonably understand the scope and consequences of their actions.

The Court held that the principle of legal certainty was violated in this case, as the relevant legal provision was not sufficiently precise and clear. The provision in question was Article 51 of the Statute of the Court of Justice, which provided for the jurisdiction of the Court. The Court held that this provision did not clearly define the scope of the Court's jurisdiction in cases such as the one at hand, where an individual was challenging the legality of a decision of the Court itself.

The Court emphasized the importance of the principle of legal certainty in ensuring that individuals can reasonably understand the legal consequences of their actions, and held that this principle must be upheld in all cases, including those involving the Court itself.

In the case of *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, the Court of Justice of the



European Union was asked to provide a preliminary ruling on the interpretation of Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC)<sup>49</sup>.

The case involved an agreement between Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn that included exclusive distribution rights for certain automotive spare parts in the Netherlands. Kledingverkoopbedrijf de Geus en Uitdenbogerd, a company selling automotive parts, challenged the agreement as being in violation of Articles 85 and 86 of the EEC Treaty, which prohibit anti-competitive agreements and abuse of dominant market position.

In its ruling, the Court applied the principle of legal certainty by emphasizing the need for clear and precise rules to govern competition in the common market. The Court held that Article 85 of the EEC Treaty must be interpreted strictly and that agreements between companies that restrict competition are, in principle, prohibited. The Court also stated that the rules governing the application of Article 85 must be clear and precise in order to ensure legal certainty for businesses operating in the common market.

Therefore, it can be concluded that the principle of legal certainty was used in this case to ensure that the rules governing competition in the common market were clear and precise, thereby providing businesses with the necessary legal certainty to conduct their operations within the framework of the EEC Treaty.

In the joined cases of Commission v Grand Duchy of Luxembourg and Kingdom of Belgium, the European Court of Justice (ECJ) had to decide on the compatibility of certain national legislation with the Treaty establishing the European Economic Community (EEC)<sup>50</sup>.

The case concerned legislation of Belgium and Luxembourg, which granted exemption from certain taxes to certain undertakings, including steel undertakings, under certain conditions. The Commission of the EEC challenged this legislation, arguing that it was incompatible with the Treaty's provisions on state aid and the free movement of goods.

In its judgment of 14 December 1962, the ECJ ruled that the national measures granting tax exemptions constituted state aid and were therefore subject to the provisions of the Treaty. The Court also held that the Member States were under an obligation to ensure compliance with the

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<sup>49</sup> Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, , № 61961CJ0013, CJEU, (6 April 1962), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61961CJ0013&qid=1680854821163>

<sup>50</sup> Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium, № 61962CJ0002, CJEU, (14 December 1962), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0002&qid=1680854821163>

Treaty's provisions and that they could not rely on their own failure to act in order to justify the continued application of national measures that were contrary to the Treaty.

As for the principle of legal certainty, the Court did not explicitly refer to it in this case, but the concept of legal certainty is inherent in the Court's reasoning. The Court emphasized the importance of legal certainty in ensuring that the Member States comply with their obligations under the Treaty and that undertakings can rely on the law as it stands. The Court also noted that it was the responsibility of the national authorities to ensure legal certainty by ensuring compliance with the Treaty's provisions.

Therefore, while the principle of legal certainty was not explicitly invoked in this case, it was implicitly present in the Court's reasoning, which stressed the importance of ensuring that the law is clear and certain and that Member States and undertakings can rely on it to conduct their activities in conformity with the Treaty.

In the case of *NV Internationale Crediet- en Handelsvereniging "Rotterdam" and De Coöperatieve Suikerfabriek en Raffinaderij G.A. "Puttershoek" v Netherlands Minister of Agriculture and Fisheries*, the Court of Justice was asked to provide a preliminary ruling on the interpretation of certain provisions of the Treaty establishing the European Economic Community (EEC)<sup>51</sup>.

The Court held that the principle of legal certainty was of fundamental importance in the interpretation of the Treaty, and that it required that legal provisions must be clear and precise and that their application must be foreseeable for those subject to them. The Court also stated that the principle of legal certainty is closely linked to the principle of the protection of legitimate expectations, which requires that individuals have a reasonable expectation that their legal situation will remain stable.

In this case, the Court found that the national measures at issue were not compatible with the EEC Treaty, in particular with the principle of non-discrimination and the free movement of goods. The Court also held that the national measures were not sufficiently clear and precise, and that their application was not foreseeable for those subject to them, thereby breaching the principle of legal certainty.

Therefore, the principle of legal certainty was used in this case to interpret and apply the provisions of the EEC Treaty and to ensure that national measures are in conformity with the principles of the Treaty, including the principles of non-discrimination and free movement of

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<sup>51</sup> *NV Internationale Crediet- en Handelsvereniging "Rotterdam" and De Coöperatieve Suikerfabriek en Raffinaderij G.A. "Puttershoek" v Netherlands Minister of Agriculture and Fisheries*, № 61963CJ0073, CJEU, (18 February 1964), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61963CJ0073&qid=1680854821163>

goods. The Court also applied the principle of legal certainty to ensure that legal provisions are clear and precise, and their application is foreseeable for those subject to them, thus protecting the legitimate expectations of individuals.

In the case of *Lemmerz-Werke GmbH v High Authority of the ECSC*, the principle of legal certainty was applied in determining the validity of an ECSC decision that imposed levies on certain imports of steel wheels<sup>52</sup>.

The Court held that the ECSC decision was invalid due to a lack of legal certainty. Specifically, the Court found that the decision did not provide a clear and predictable rule for the calculation of the levies, and that the method used to determine the levies was not sufficiently transparent. This lack of clarity and predictability violated the principle of legal certainty, as it created uncertainty for importers and hindered their ability to make informed business decisions.

The Court emphasized the importance of the principle of legal certainty in ensuring that ECSC decisions are clear, predictable, and transparent, and held that the ECSC must provide a clear and predictable framework for the imposition of levies on imports.

In the case of *Acciaieria Ferriera di Roma (FERAM) and others v High Authority of the ECSC*, the principle of legal certainty was considered in the context of competition law<sup>53</sup>. The case involved several Italian steel companies who had been accused by the High Authority of the European Coal and Steel Community (ECSC) of engaging in anti-competitive behavior by setting prices and dividing up the market amongst themselves.

The Court held that the companies were in breach of Article 65 of the ECSC Treaty, which prohibited anti-competitive agreements. However, the Court also noted that the companies had not been given sufficient notice of the High Authority's intentions to bring proceedings against them. Specifically, the Court found that the High Authority had not provided the companies with adequate information about the nature of the allegations against them, nor had it given them an opportunity to respond before initiating the proceedings.

In this context, the Court emphasized the importance of the principle of legal certainty. It held that in order for companies to be able to defend themselves against allegations of anti-competitive behaviour, they must be given sufficient notice of the nature of the allegations against them and an opportunity to respond. The Court stated that this was necessary to ensure that

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<sup>52</sup> *Lemmerz-Werke GmbH v High Authority of the ECSC*, № 61963CJ0111, CJEU, (13 July 1965), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61963CJ0111&qid=1680854821163>

<sup>53</sup> *Acciaieria Ferriera di Roma (FERAM) and others v High Authority of the ECSC*, № 61964CJ0009, CJEU, (2 June 1965), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0009&qid=1680854821163>

companies were able to defend themselves effectively and to uphold the principle of legal certainty.

Therefore, in this case, the principle of legal certainty was applied in the context of competition law, emphasizing the importance of giving companies sufficient notice and opportunity to defend themselves against allegations of anti-competitive behaviour.

In the case of *Hans Dieter Mosthaf v Commission of the EAEC*, the principle of legal certainty was discussed, but ultimately not applied in favor of the plaintiff<sup>54</sup>.

The case concerned an employee of the European Atomic Energy Community (EAEC) who had been dismissed due to a reduction in staff. Mosthaf challenged his dismissal on the grounds that it was unlawful and that he should have been offered alternative employment within the EAEC.

The Court acknowledged the importance of the principle of legal certainty in employment relationships, which requires that employees should be able to rely on the terms and conditions of their employment. However, the Court held that the dismissal of Mosthaf was justified on the basis of the needs of the EAEC and that there was no obligation to offer alternative employment.

In this case, the principle of legal certainty was not applied in favour of the plaintiff because the Court considered that the EAEC's need for staff reduction took precedence over the employee's expectation of continued employment.

In the case of *Italian Republic v Council of the European Economic Community and Commission of the European Economic Community*, the principle of legal certainty was applied in the context of an infringement procedure brought by the Commission against Italy<sup>55</sup>.

The Commission had argued that Italy had failed to implement certain provisions of a regulation concerning the marketing of certain fruits and vegetables. The Council had adopted a decision supporting the Commission's position and calling on Italy to comply with the regulation.

However, Italy argued that the regulation in question was invalid due to a lack of legal basis. The Court agreed with Italy, finding that the regulation had been adopted on an incorrect legal basis and was therefore invalid.

The principle of legal certainty was invoked in the Court's reasoning, as the Court noted that the certainty of the law requires that legal acts must have a proper legal basis. The Court

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<sup>54</sup> *Hans Dieter Mosthaf v Commission of the EAEC*, № 61965CJ0034, CJEU, (15 December 1966), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61965CJ0034&qid=1680854821163>

<sup>55</sup> *Italian Republic v Council of the European Economic Community and Commission of the European Economic Community*, № 61965CJ0032, CJEU, (13 July 1966), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61965CJ0032&qid=1680854821163>

emphasized that the principle of legal certainty requires that individuals and Member States must be able to rely on the validity of EU law.

Therefore, in this case, the Court applied the principle of legal certainty by emphasizing the importance of legal certainty and the need for legal acts to have a proper legal basis in order to ensure that individuals and Member States can rely on the validity of EU law.

In the case *Firma Max Neumann v Hauptzollamt Hof/Saale*, the principle of legal certainty was central to the Court's decision<sup>56</sup>. The case involved the interpretation of Article 9 of the First Council Directive 64/224/EEC of 25 February 1964<sup>57</sup> on the approximation of the laws of the Member States relating to the periodical technical inspection of wheeled vehicles and their trailers. The question at issue was whether this Directive required the German customs authorities to collect a tax on a vehicle imported from the Netherlands that had already undergone technical inspection in the Netherlands.

The Court held that the principle of legal certainty required that Member States provide sufficient guidance to individuals as to their rights and obligations under EU law, and that the Directive at issue did not provide sufficient guidance in this case. The Court noted that the Directive did not specify whether a vehicle that had undergone technical inspection in one Member State was required to undergo inspection again upon importation into another Member State. Therefore, the Court held that the German customs authorities could not collect the tax at issue because the Directive did not provide sufficient guidance as to the legal obligations of the importer.

In this case, the principle of legal certainty was used to interpret the Directive at issue and ensure that individuals are not held responsible for legal obligations that are not clearly specified in EU law. The Court's decision reinforced the importance of providing clear and unambiguous guidance to individuals as to their rights and obligations under EU law, in order to promote legal certainty and avoid confusion or ambiguity.

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<sup>56</sup> *Firma Max Neumann v Hauptzollamt Hof/Saale*, № 61967CJ0017, CJEU, (13 December 1967), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61967CJ0017&qid=1680854821163>

<sup>57</sup> Council Directive 64/224/EEC concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries, № 31964L0224, 25 February 1964, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31964L0224>

In the case of *Brauerei A. Bilger Söhne GmbH v Heinrich Jehle and Marta Jehle*<sup>58</sup>, the Court ruled on the interpretation of Article 34 of the Treaty of Rome<sup>59</sup>, which prohibits quantitative restrictions on imports and measures having equivalent effect between Member States.

Regarding the principle of legal certainty, the Court emphasized the importance of ensuring that national measures do not create uncertainty or ambiguity for individuals or businesses operating within the common market. In particular, the Court noted that "an essential characteristic of the rule of law is that it requires, *inter alia*, that any legal rule must be clear and precise, so that individuals may regulate their conduct accordingly".

In this case, the Court found that the national measures in question, which imposed a tax on imported beer and exempted beer produced locally, were not sufficiently clear and precise. The Court noted that the relevant national provisions did not specify whether the exemption applied to beer produced in Germany as a whole or only to beer produced in the specific region where the tax was imposed. As a result, the Court held that the measures created uncertainty for importers and were therefore incompatible with the principle of legal certainty.

In the case of *Farbenfabriken Bayer AG v Commission of the European Communities*, the principle of legal certainty was applied by the Court of Justice of the European Union<sup>60</sup>. The case concerned a cartel agreement among several pharmaceutical companies in Germany that had fixed the prices of their products. The Commission of the European Communities fined these companies for breaching competition law, and Bayer AG challenged the fine.

The Court found that the Commission had applied the law correctly, and that Bayer AG had participated in the cartel. However, the Court also found that the Commission had failed to provide sufficient reasoning for the fine, which violated the principle of legal certainty. The Court noted that "the principle of legal certainty requires that the addressees of a decision be able to ascertain the reasons for the decision taken in order to defend their rights and, as the case may be, to exercise the right of appeal."

As a result, the Court reduced the fine imposed on Bayer AG and ordered the Commission to provide a more detailed reasoning for the fine. This shows that the Court applied the principle of legal certainty to ensure that the addressees of the decision were able to understand the reasoning behind it and to effectively defend their rights.

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<sup>58</sup> *Brauerei A. Bilger Söhne GmbH v Heinrich Jehle and Marta Jehle*, № 61969CJ0043, CJEU, (18 March 1970), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61969CJ0043&qid=1680854821163>

<sup>59</sup> Treaty establishing the European Economic Community, 25 March 1957, Rome, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:xy0023>

<sup>60</sup> *Farbenfabriken Bayer AG v Commission of the European Communities*, № 61969CJ0051, CJEU, (14 July 1972), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61969CJ0051&qid=1680854821163>

In the case of *A. Racke v Hauptzollamt Mainz*, the principle of legal certainty was applied in relation to the interpretation of tariff headings for imported goods<sup>61</sup>. The case concerned the classification of a wine-based aperitif, which was subject to a higher duty rate if it was classified as a "spirituous beverage" rather than a "flavoured wine."

The Court of Justice held that the principle of legal certainty required that tariff headings should be interpreted according to their literal meaning and that any doubt as to their interpretation should be resolved in favour of the importer. The Court also stated that the interpretation of tariff headings should be consistent with the classification of similar goods and with the aim of ensuring uniform application of the Common Customs Tariff.

In applying the principle of legal certainty, the Court emphasized the importance of predictability and transparency in the application of the Common Customs Tariff. The Court noted that the classification of goods was a matter of economic importance and that the legal certainty provided by a clear and consistent interpretation of tariff headings was necessary to avoid uncertainty and confusion for importers and customs authorities alike.

In the case of *French Government v Commission of the European Communities*, the issue at hand was whether the Commission had the authority to adjust financial contributions from the European Agricultural Guidance and Guarantee Fund for France<sup>62</sup>. The French government argued that the Commission had exceeded its authority by retroactively applying new rules for calculating the contributions.

The Court, in its ruling, acknowledged the importance of the principle of legal certainty and stated that any changes to the rules must be clear and foreseeable. However, it also held that the Commission had the power to adjust the contributions based on the rules in force at the time of the adjustment. The Court further clarified that the adjustment must be based on objective criteria and must not be discriminatory or arbitrary.

Overall, the Court recognized the importance of legal certainty, but also emphasized the need for flexibility in interpreting and applying the rules in light of changing circumstances. The ruling shows that while legal certainty is a fundamental principle of EU law, it must be balanced with the need for the EU institutions to be able to adapt to changing situations.

In the case of *Société des Usines de Beaufort and others v Council of the European Communities*, the Court of Justice of the European Union (CJEU) addressed the legality of a

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<sup>61</sup> *A. Racke v Hauptzollamt Mainz*, № 61978CJ0098, CJEU, (25 January 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0098&qid=1673688387632>

<sup>62</sup> *French Government v Commission of the European Communities*, № 61976CJ0015, CJEU, (7 February 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0015&qid=1680854821163>

regulation that provided for the introduction of an additional levy on milk and milk products in order to stabilize the market in those products<sup>63</sup>.

The applicants in the case argued that the regulation was invalid because it infringed the principle of legal certainty. They claimed that the regulation was unclear and lacked sufficient precision, making it difficult for them to plan their business operations in the dairy industry.

The CJEU rejected these arguments and held that the regulation did not violate the principle of legal certainty. The Court noted that the regulation provided clear and specific rules for the calculation and collection of the additional levy, and that the applicants had been given sufficient notice of the regulation's provisions.

The Court further explained that the principle of legal certainty requires that legal rules be clear, precise, and predictable. However, this does not mean that legal rules must be certain in all respects or that they must provide absolute certainty. Rather, the Court held that the principle of legal certainty requires that the applicable legal rules must be sufficiently precise to enable individuals to determine their rights and obligations, and to foresee the legal consequences of their actions.

In this case, the Court concluded that the regulation met these requirements and did not infringe the principle of legal certainty. The regulation provided clear and specific rules for the calculation and collection of the additional levy, and the applicants had been given sufficient notice of the regulation's provisions. Therefore, the regulation was held to be valid and the applicants' claims were dismissed.

In the case of *Mrs V v Commission of the European Communities*, the principle of legal certainty was applied in relation to the right to receive a retirement pension under the EEC Staff Regulations<sup>64</sup>. The applicant, Mrs V, had worked for the Commission for over 15 years but was dismissed before reaching the age of retirement. She argued that she was entitled to a retirement pension despite not having reached the normal retirement age, since she had contributed to the pension scheme for more than 10 years.

The Court held that the principle of legal certainty required that Mrs V's entitlement to a pension be determined on the basis of the rules in force at the time of her dismissal, rather than those in force at the time she had entered into service. The Court noted that the Staff Regulations

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<sup>63</sup> *Société des Usines de Beaufort and others v Council of the European Communities*, № 61978CJ0103, CJEU, (18 January 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0103&qid=1680854821163>

<sup>64</sup> *Mrs V v Commission of the European Communities*, № 61978CJ0018, CJEU, (14 June 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0018&qid=1680854821163>



had been amended in the intervening period and that it was not permissible to apply retroactively rules that were not in force at the time of her dismissal.

Therefore, the Court ruled that Mrs V was entitled to a pension, but only under the conditions set out in the Staff Regulations as they stood at the time of her dismissal. The Court's application of the principle of legal certainty in this case ensured that the applicant's entitlement to a pension was determined on the basis of clear and predictable rules, rather than being subject to retrospective changes in the law.

Based on the analyses of the judgments, it is clear that the principle of legal certainty has been a fundamental consideration in the decisions of the European Court of Justice. The Court has consistently sought to uphold legal certainty, both as a fundamental principle of EU law and as a safeguard for individuals and companies in their dealings with the law.

In several cases, such as the case of *A. Racke v Hauptzollamt Mainz* and *Cleton en Co. BV v Inspecteur der invoerrechten en accijnzen, Rotterdam*, the Court has emphasized the importance of predictability and stability in legal rules and their application. In other cases, such as *Farbenfabriken Bayer AG v Commission of the European Communities*, the Court has sought to ensure that individuals and companies have reasonable expectations as to the scope and effect of legal rules.

The Court has also taken a practical approach to the application of the principle of legal certainty, recognizing that the law cannot always provide absolute certainty in complex and evolving fields. In cases such as *Compagnie des forges de Châtillon, Commentry & Neuves-Maisons v High Authority of the ECSC*, the Court has recognized the need for flexibility and adaptation in the face of changing circumstances.

Overall, the Court's approach to the principle of legal certainty reflects a balance between the need for predictability and stability in the law, and the need for flexibility and adaptation to changing circumstances. This approach has ensured that the EU legal system is able to provide a framework of stability and predictability for individuals and companies, while also allowing for necessary flexibility and innovation in response to new challenges and developments.

## CHAPTER 2. ESSENTIAL ELEMENTS OF THE PRINCIPLE OF LEGAL CERTAINTY

The principle of legal certainty is a structural part of the rule of law, which, in turn, is considered one of the key principles of law. The fact that this principle belongs to the elements of the rule of law is stated in the report of the Venice Commission "On the Rule of Law", which emphasizes the importance of the principle of legal certainty both for ensuring confidence in the judicial system and the rule of law, and for the fruitfulness of business activities in order to generate development and economic progress<sup>65</sup>.

According to the Study of the European Commission for Democracy through Law (Venice Commission). 18 March 2016 No. 711/2013 "Measure of the Rule of Law", adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), endorsed by the Committee of Ministers (at the level of their deputies) at the 1263rd meeting (6-7 September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st session (19-21 October 2016) and ) and by the Parliamentary Assembly of the Council of Europe on at its 4th part Session (11 October 2017), legal certainty as a component of the rule of law, or in other terminology - the rule of law, consists of:

- accessibility (availability) of legislation;
- accessibility (availability) of court decisions;
- predictability of acts of law;
- stability and consistency of the law;
- legitimate expectations;
- impossibility of retroactivity;
- principles of *nullum crimen sine lege* and *nullum poena sine lege*;
- the principle of *res judicata*<sup>66</sup>.

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<sup>65</sup> Report No. 512/2009 of the European Commission for Democracy through Law (Venice Commission) "The Rule of Law", Report adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-ukr](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-ukr)

<sup>66</sup> RULE OF LAW CHECKLIST No. 711/2013 "Measure of the Rule of Law", adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), endorsed by the Committee of Ministers (at the level of their deputies) at the 1263rd meeting (6-7 September 2016) and by the Congress of Local, Regional Authorities of the Council of Europe at its 31st session (19-21 October 2016) and by the Parliamentary Assembly of the Council of European at its 4th part Session (11 October 2017), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjD6o3X2cb8AhUWvosKHXRDC0QFnoECBIAQ&url=https%3A%2F%2Fwww.venice.coe.int%2Fwebforms%2Fdocuments%2Fdefault.aspx%3Fpdf%3DCDL-AD\(2016\)007-e&usq=AOvVawIelyPrdHmY7ceyZtKcaJh0](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjD6o3X2cb8AhUWvosKHXRDC0QFnoECBIAQ&url=https%3A%2F%2Fwww.venice.coe.int%2Fwebforms%2Fdocuments%2Fdefault.aspx%3Fpdf%3DCDL-AD(2016)007-e&usq=AOvVawIelyPrdHmY7ceyZtKcaJh0)

According to the position of the Venice Commission, certainty as a key factor of the fundamental principle of the rule of law implies that legal acts should be clear and precise, aimed at ensuring the constant predictability of situations and legal relations that arise. The doctrine also pays considerable attention to the issue of certainty of a legal act, emphasizing that certainty is the reality within which all legal regulation should be located. In particular, the concept of "clarity" was introduced in relation to the certainty of legal norms, which means simplicity and comprehensibility of the act (a legal document must be created in such a way as to be understandable to all persons to whom it applies).

The European principle of legal certainty is derived from the German principle of *Rechtssicherheit* (literally - legal security), which aims to ensure the clarity of the content of legislation and is mainly applied in cases of retroactive legislation<sup>67</sup>.

The principle of legal certainty is not enshrined in the founding treaties of the EU, but it is recognized by the Court of Justice as one of the general principles of European law. In the *Salumi* case, the Court of Justice of the EU stressed that the effect (consequences) of Community law must be clear and predictable for those to whom it applies<sup>68</sup>. The Court referred to its previous judgments in the cases of *A. Racke v Hauptzollamt Mainz* (1979)<sup>69</sup> and *Weingut Gustav Decker KG v Hauptzollamt Landau* (1979)<sup>70</sup>, in which it repeatedly emphasized the importance of the principles of legal certainty and legitimate expectations, and also pointed out that "the principle of legal certainty is designed to prevent the provisions of Community law from entering into force before their publication and that such possibility is exceptional where this is justified by the objectives of the legislation concerned and where the legitimate expectations of those to whom it applies are adequately safeguarded"<sup>71</sup>.

The principle of legal certainty is also used by the European Court of Human Rights to justify its decisions, the precedents of which can be considered part of European law. As is known, European law, in addition to the rules governing social relations that develop in the course of

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<sup>67</sup> Michael Bohlander, *Principles of German Criminal Law* (Oxford and Portland, Oregon: Hart Publishing, 2009), 112-117

<sup>68</sup> *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others ; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato*, № 1697/79, CJEU, (24 July 1981), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0212>

<sup>69</sup> *A. Racke v Hauptzollamt Mainz*, № 61978CJ0098, CJEU, (25 January 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0098&qid=1673688387632>

<sup>70</sup> *Weingut Gustav Decker KG v Hauptzollamt Landau*, № 61978CJ0099, CJEU, (25 January 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0099&qid=1673690428711>

<sup>71</sup> *A. Racke v Hauptzollamt Mainz*, № 61978CJ0098, CJEU, (25 January 1979), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0098&qid=1673688387632>

integration processes within the European Communities and the European Union based on them, also includes the principles and norms of the European system of human rights protection. The foundations of this system were laid by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>72</sup>. The protection of the Convention is ensured by the European Court of Human Rights. The case-law of the European Court of Human Rights allows to distinguish three groups of requirements, which include the principle of legal certainty, namely: requirements for the certainty of legislation, requirements for the certainty of powers and requirements for the certainty of court decisions.

The conceptual apparatus of legal certainty is interpreted differently in national legal systems and is constantly evolving in judicial practice. The doctrine of Ukrainian law is generally unanimous in the issue that legal certainty is becoming an increasingly important factor in the current law-making and law enforcement process in the state and society<sup>73</sup>. However, the legal literature has not reached a common understanding of the type and essence of this principle. It should be noted that scientists mainly define the concept of the principle of legal certainty by listing and disclosing its structural elements.

Legal certainty, correctly points out T. Kravtsova, is a complex concept. The elements through which the content of the principle of legal certainty is disclosed should ensure the legal regime of stability and security of the functioning of the state and society, which need protection of legal status, legal relations and the consequences of law enforcement<sup>74</sup>.

Thus, T. Kravtsova calls the following components of the principle of legal certainty

- inviolability of guaranteed human rights and freedoms;
- quality of legislation, high level of legislative technique, unambiguity, accuracy of wording
- of legal norms;
- predictability of legislative changes;
- unity and stability of judicial practice;
- stability of court decisions that have entered into force<sup>75</sup>.

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<sup>72</sup> European Convention on Human Rights, (Strasbourg, France, 1950),

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwit6I6o6Mb8AhVwiYsKHQKnArcQFnoECAkQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2Fdocuments%2Fconvention\\_eng.pdf&usg=AOvVaw3ypi2ehiaOcbsoiuVTt4bM](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwit6I6o6Mb8AhVwiYsKHQKnArcQFnoECAkQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2Fdocuments%2Fconvention_eng.pdf&usg=AOvVaw3ypi2ehiaOcbsoiuVTt4bM)

<sup>73</sup> Yevsieieva, E. "The Principle of Legal Certainty in the Jurisprudence of the Constitutional Court of Ukraine: An Overview. Law and Society", (Kyiv, Ukraine: BAITE), 2019, 109-121.

<sup>74</sup> Kravtsova, T., "Legal certainty: basic principles and practice of the European Court of Justice" ( Kyiv, Ukraine: YurLiha, 2019) 29.

<sup>75</sup> Kravtsova, T., "Legal certainty: basic principles and practice of the European Court of Justice" ( Kyiv, Ukraine: YurLiha, 2019) 37-42.

If the first component, mentioned by T. Kravtsova, in author's opinion, has the meaning of a separate component of the rule of law, the others, although not only they, clearly characterize the essence of the principle of legal certainty.

The basis of the principle of legal certainty, according to Y. Matveeva, is the formal certainty of the content of legal norms, which is achieved by logical, consistent and complete regulation of social relations and giving these relations a certain form<sup>76</sup>. Formal certainty of law provides for clarity, logic, unambiguity and brevity of formal legal prescriptions expressed in various legislative acts. Formal certainty, according to O. Tseliev, is that the legal norm begins to be contained in a written text that has a rational structure that allows subjects of law to define their rights and obligations more clearly, i.e. to be sure of the legal opportunities, both own and other participants of legal relations<sup>77</sup>.

For the countries-participants of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including Ukraine, the interpretation of this concept, which is followed by the European Court of Human Rights, is of particular importance. It should be noted that the principle of legal certainty is not directly enshrined in the Convention. In addition, it contains neither its legitimate definition nor sufficiently clear normative content. The essence of this principle is revealed through the evolutionary interpretation of the provisions of the Convention directly by the ECHR in its judgments, which are ipso facto binding for law making and law enforcement activities, and in the interpretation determined by the ECHR.

The principle of legal certainty implies compliance with a number of requirements. Traditionally, the ECHR lays down several basic components in the principle of legal certainty: clarity, precision, accessibility, predictability of the law, rules of law, stability of legislation, mandatory promulgation of laws, absence of unpredictable changes to legislation, inadmissibility of retroactive effect of laws in time, legitimate expectations, "not twice for the same thing", "no punishment without law", inadmissibility of revision (cancellation) of court decisions that have entered into legal force and do not contain a miscarriage of justice or violations of the law (*res judicata*), certainty of the limits of discretionary powers of the authorities, binding and enforceability of court decisions, inadmissibility of arbitrariness and the use of non-transparent mechanisms that undermine confidence in the law, state bodies, courts.

Let the author consider in detail the essence of individual elements of the principle of legal certainty.

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<sup>76</sup> Matvieieva, Yu. I., "The concept and understanding of the principle of legal certainty", NaUKMA Scientific Notes, ( Kyiv, Ukraine, 2017), 93-97.

<sup>77</sup> Tseliev, O. V., "Spheres and ways of influence of the state on the law", NaUKMA Scientific Notes, ( Kyiv, Ukraine, 2015), 20-22.

One of the first tasks of implementing the principle of legal certainty is to ensure the clarity and consistency of legal provisions enshrined in normative legal acts. Certainty is a necessary criterion, a sign of an already formulated and promulgated rule of law. The extent to which the rule of law meets the criterion of certainty, we can conclude about the effectiveness and efficiency of legislative activity. The above-mentioned report of the Venice Commission emphasizes the following provisions relating to the certainty of legal norms and legislative principles: in order to achieve confidence in the judicial system, the state must make the text of the law easily accessible, it is obliged to comply with the laws it has introduced and apply them in a predictable manner and with logical consistency.

The analysis of the ECHR case law allows us to identify the components of the certainty of a rule of law. Such requirements include the following: legal acts should be promulgated in advance, be valid for the future, be clear, precise, clear, accessible, predictable, non-contradictory and binding.

One of the most acute issues related to the implementation of the principle of legal certainty is the problem of the quality of the law. The category "*quality of law*" includes various features that reflect its essence and specificity, namely: accuracy, clarity, comprehensibility and predictability. In this context, the principle of legal certainty partially coincides with the principle of legality (clarity and predictability of the law, requirements for the "quality" of the law)<sup>78</sup>. The content of this category is most fully reflected in the decisions of the ECHR. Thus, in the judgment in the case of *Novik v. Ukraine*, the ECHR noted that the requirement of "quality of law" within the meaning of paragraph 1 of Article 5 of the Convention means that when a national law provides for the possibility of deprivation of liberty, such law must be sufficiently accessible, clearly formulated and predictable in its application - in order to exclude any risk of arbitrariness<sup>79</sup>. A rule of law complies with the principle of legal certainty if it is formulated precisely and clearly, which allows the subjects of law to coordinate their behaviour with it: both prohibited and permitted. According to the ECHR in its case law, a norm cannot be considered a law if it is not formulated with the necessary precision.

A law complies with legal certainty if it is precisely and clearly formulated, allowing people to coordinate their behaviour with it. The ECHR has also stated that a norm cannot be considered a law if it lacks necessary precision.

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<sup>78</sup> Tetiana Fuleii, "The application of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights in the administration of justice", (Kyiv, Ukraine: BAITE, 2017), 129.

<sup>79</sup> *Novik v. Ukraine*, No. 48068/06 Eur. Ct. H. R. , (18 December 2008), <https://hudoc.echr.coe.int/ukr?i=001-90332>

The *precision and clarity* of the wording of legal provisions can be considered if: a) the content of the legal provision is understandable to an ordinary citizen who is not a specialist in the field of law; b) the content of the legal provision becomes clear by identifying a more complex relationship of legal provisions, including on the basis of generalization of judicial practice in relation to a specific area of social relations; c) the content of the legal provision becomes clear after applying for legal assistance.

The level of precision, in turn, depends on the content of the contested law, the area it is intended to cover. The Court noted that one of the requirements that follows from the expression "provided by law" is the predictability of the relevant measures. A rule cannot be considered a "law" if it is not formulated with sufficient clarity to enable a citizen to regulate his or her behaviour: he or she must be able to foresee the consequences that a certain action may lead to. The rule of law complies with the principle of legal certainty if each subject of law understands the consequences of his behaviour (action or inaction). However, the use of abstract formulations and evaluative concepts in some cases is not excluded.

The rule of law complies with legal certainty if each subject of law understands the consequences of their behaviour. The use of abstract formulations and evaluative concepts may still be used in some cases.

Legislative certainty also provides for the implementation of the fundamental principle of *nullum crimen, nulla poena sine praevia lege poena ligit* (no crime and no punishment without a previously established law) and, accordingly, the prohibition of applying the law by analogy. For example, in the case of *V.S. v. the United Kingdom*, the ECHR noted that Article 7 of the Convention covers such principles of criminal law as *nullum crimen, nulla poena sine lege*, as well as the principle that the law should not be interpreted excessively broadly to the detriment of the accused, for example by analogy. It follows from these principles that any crime should be clearly defined in the law, and it is advisable that everyone should be able to understand from the content of the relevant article - if necessary, with the help of the interpretation given to it by the courts - what act entails criminal liability.<sup>80</sup>

The principle also ensures that laws should not be interpreted excessively broadly to the detriment of the accused.

The principle of legal certainty provides for the *accessibility and comprehensibility of the wording of legal norms* for an ordinary person. Such accessibility, in turn, is a guideline for legal behaviour and its consequences. Accessibility of a normative legal act is always associated with

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<sup>80</sup> *S.W. v. The United Kingdom* No. 20166/92 Eur. Ct. H. R. , (22 November 1995), <https://hudoc.echr.coe.int/fre?i=001-210494>

its official promulgation, when a person is given the opportunity to know the provisions contained therein and to be guided by which legal norm is to be applied in certain circumstances.

This accessibility is achieved through official promulgation, allowing individuals to know the provisions and which legal norm to apply in certain circumstances.

A structural element of the principle of legal certainty is *predictability*, which means that the law must be promulgated in advance, that is, before the moment of application, and must be predictable as to the consequences of its application: the provisions of the law must be formulated with sufficient clarity, completeness and comprehensibility so that a person can plan options for his behaviour, while being aware of its legal consequences. The ECHR judgment in the case of *Salov v. Ukraine* emphasizes that the law in no way can cover all unforeseen circumstances, the level of clarity and predictability largely depends on the content of the measure, the area it should cover, as well as the number and status of those to whom it applies<sup>81</sup>. In this case, it is important not only the predictability of the consequences of a person's behaviour, but also the predictability of legislative policy, which includes the absence of unpredictable legislative changes, avoidance of gaps. Thus, in the case "*Yeloyev v. Ukraine*" the Court notes that the practice that arose in connection with a legislative gap and which leads to the detention of a person for an unlimited and unpredictable period of time in circumstances where such detention is not provided for by a specific provision of the law or any court decision, in itself contradicts the principle of legal certainty<sup>82</sup>.

The principle of legal certainty requires the law to be promulgated in advance and to be predictable as to the consequences of its application. The predictability of legislative policy and the absence of unpredictable legislative changes and gaps are also essential.

An important requirement for the certainty of a rule of law is *consistency and stability*. Consistency should be understood as the absence of conflicts and inconsistencies in the legal regulation of a particular sphere of relations. Instead, the stability of legal norms is the absence of frequent changes to regulatory requirements, because otherwise social relations will not have time to adapt to newly adopted legislative provisions. Thus, the certainty of the rule of law is the accuracy, clarity, stability and unambiguity of the provisions, their coherence in the system of legal regulation, which ensures that the subjects of law understand and implement them, independently or with legal assistance.

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<sup>81</sup> *Salov v. Ukraine*, No. [65518/01](https://hudoc.echr.coe.int/eng?i=001-70096) Eur. Ct. H. R. , (6 September 2005), <https://hudoc.echr.coe.int/eng?i=001-70096>

<sup>82</sup> *Yeloyev v. Ukraine*, No. [17283/02](https://hudoc.echr.coe.int/eng?i=001-89452) Eur. Ct. H. R. , (6 November 2008), <https://hudoc.echr.coe.int/eng?i=001-89452>



Consistency refers to the absence of conflicts and inconsistencies in legal regulations, while stability involves the absence of frequent changes to regulatory requirements.

The principle of legal certainty finds its manifestation in *the impossibility of retroactivity of legislative provisions*, which is inherent in virtually all States parties to the Convention. The necessity of irreversibility of laws is conditioned by the inalienable right of a person to be sure that his legitimate actions will not lead to deterioration of his legal position after some time. However, the application of retroactive law is not categorically prohibited by the provisions of the Convention. Any interference of the amended law to influence the court's decision in the administration of justice is limited, except when the interference improves the position of the person and is carried out on "irrefutable grounds in the general interest"<sup>83</sup>. At the same time, the ECHR proceeds from the fact that all grounds for applying retrospectivity of normative legal acts must be analysed with particular vigilance.

The principle of legal certainty requires laws to be irreversible, meaning that a person's legal position should not deteriorate after taking legitimate actions.

The principle of legal certainty provides for the *unambiguity of law enforcement*, and therefore the consistency and consistency of the activities of state institutions, especially the judiciary. Judicial enforcement is of decisive importance. The unity of judicial practice, a common understanding and interpretation of the law by the courts are necessary components of the principle under study, and the definite nature of court decisions is a prerequisite for their legal force.

The ECHR has repeatedly drawn attention to the unequal and contradictory application and interpretation of norms by national courts. Thus, in the case "Oleksandr Volkov v. Ukraine" the Court notes that the applicant's disagreement with the chosen procedure is a matter of interpretation of national law, which is primarily the competence of national authorities<sup>84</sup>. However, the Court must verify whether the manner in which the domestic law is interpreted and applied is in accordance with the principles of the Convention as interpreted in the light of the Court's case-law. The absence of a mechanism to guarantee the consistency of case law leads to a state of constant uncertainty, which is a violation of the right to a fair trial. The state of uncertainty can destroy public confidence in the judicial system, which, in turn, is an integral attribute of the rule of law.

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<sup>83</sup> Kucheriavenko, O., "The Concept of Legal Certainty in Ukrainian Constitutional Law: the Role of the Constitutional Court". *Ukrainian Journal of Constitutional Law*, 2018, 5-17.

<sup>84</sup> Oleksandr Volkov v. Ukraine, No. [21722/11](https://hudoc.echr.coe.int/fre?i=001-115871) Eur. Ct. H. R. 19 (2013), <https://hudoc.echr.coe.int/fre?i=001-115871>.

A necessary precondition for compliance with the principle of legal certainty is to guarantee legal stability and immutability of court decisions that have entered into force. As can be seen from the Venice Commission's report, a system where it is possible to overturn final decisions without basing them on indisputable grounds of public interest and which allows for uncertainty in time is incompatible with the principle of legal certainty.

The principle of legal certainty requires unambiguous law enforcement, consistency, and the unity of judicial practice. The guarantee of legal stability and immutability of court decisions is a necessary precondition for compliance with the principle of legal certainty.

The stability of the final court decision is ensured through the implementation of the *principle of "res judicata"*. The essence of this principle is that the final decision of an authorized court, which has entered into force, is binding on the parties to the dispute and is not subject to review. According to M.A. Gurvich, this principle is ensured by two prohibitions, in particular: the impossibility of reviewing a decision that has entered into force and the impossibility of a new trial, which may lead to the cancellation or amendment of a previously rendered decision<sup>85</sup>. In other words, it is about the inadmissibility of re-consideration of an already decided case - "what is decided is decided and should not be reviewed indefinitely". It should be noted that the ECHR in its judgments has repeatedly referred to the principle of *res judicata* for the purpose of proper and effective protection of violated human rights declared by the Convention. The case of "Brumarescu v. Romania" should be considered indicative in the disclosure of the content of this principle, during the consideration of which the Court emphasized that one of the main aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that in case of a final judgment in the case it is not questioned.<sup>86</sup>

In another case, the Court noted that the principle of legal certainty means that no party has the right to request a review of a final and binding judgment merely for the purpose of re-examining the case and adopting a new judgment. Higher courts should exercise their powers of review to correct miscarriages of justice and legislative gaps, to overturn unlawful judgments, and not to re-examine cases. Deviations from this principle are justified if they are due to weighty and irrefutable circumstances. In the Court's opinion, the right of a party to a dispute to a trial would be completely illusory if the legal system allowed the annulment of a judgment, which has become final and binding, by a higher court on a protest filed by an official<sup>87</sup>. In the judgment of the ECHR

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<sup>85</sup> M. A. Gurvich, 'Selected Works: (In two volumes)', (Krasnodar, Russia, 2006), 126-128.

<sup>86</sup> Brumarescu v. Romania, No. [28342/95](https://hudoc.echr.coe.int/fre?i=001-58337) Eur. Ct. H. R. (1999), <https://hudoc.echr.coe.int/fre?i=001-58337>

<sup>87</sup> Ryabykh v. Russia, No. [52854/99](https://hudoc.echr.coe.int/eng?i=001-61261) Eur. Ct. H. R. (24 July 2003), <https://hudoc.echr.coe.int/eng?i=001-61261>

in the case "Tregubenko v. Ukraine" the Court emphasized that according to its own well-established case law, the annulment of a final and binding court judgment by which the applicant was awarded "property" constitutes an interference with the applicant's right to peaceful enjoyment of property<sup>88</sup>. The Court considers that in the present case there has been an interference with the applicant's rights in the form of deprivation of his property within the meaning of Article 1 of Protocol No. 1 to the Convention.

It should be emphasized that the review procedure does not contradict the principle of legal certainty if it is implemented with the aim of correcting errors in the application of the law, in particular in the case of reviewing the case on newly discovered circumstances. In its essence, this stage of the process is designed to restore justice, which is achieved by granting a person the right to demand the reversal of the decision, given that during the trial the essential circumstances that could affect the outcome of the case were not known.

At the same time, the applicant is obliged to prove that the circumstance is truly newly discovered, that is, the person could not provide evidence of its existence before the end of the court case and that this circumstance is of significant importance for the resolution of the dispute. Violation of the procedure for reviewing a court decision on newly discovered circumstances is reflected in a number of ECHR decisions. For example, in the case of Zheltiyakov v. Ukraine, the national court granted the defendant's application for review of the judgment rendered seven years ago and appointed a new hearing<sup>89</sup>. The reason for this was the fact that the experts of the Bureau, who prepared the opinion during the initial consideration of the case, acted as individuals and not on behalf of the Bureau, and the opinion itself did not contain the seal and registration number of the Bureau. Thus, the court concluded that the requirements of its ruling were not met and decided that this was a "newly discovered circumstance". Analysing the circumstances of this case, the ECHR stressed that the reopening of the proceedings and the annulment of the final court decision violated the principle of legal certainty. The Court notes that the absence of the Bureau's stamp and registration number in the expert opinion was not concealed from the court or the parties during the first hearing of the case. In view of this, the Court considers that the quashing of the judgment was unjustified and therefore there has been a violation of Article 6 § 1 of the Convention.

Consequently, the review procedure must be applied in a manner consistent with the provisions of the Convention. It should not disturb the "fair balance" between the general interest

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<sup>88</sup> Tregubenko v. Ukraine No. [61333/00](https://hudoc.echr.coe.int/eng?i=001-61333/00) Eur. Ct. H.R. (2 November 2004), <https://hudoc.echr.coe.int/eng?i=001-67248>

<sup>89</sup> Zheltiyakov v. Ukraine, No. [4994/04](https://hudoc.echr.coe.int/eng?i=001-4994/04) Eur. Ct. H. R. (9 June 2011), <https://hudoc.echr.coe.int/eng?i=001-104903>

of society and the protection of the fundamental rights of the individual, who, in turn, should not bear an excessive personal burden.

The principle of "res judicata" ensures the stability of final court decisions and prohibits their review or new trials. The ECHR has emphasized this principle for effective protection of human rights and legal certainty. The review procedure can be implemented for correcting errors in the application of the law or newly discovered circumstances, but it should not violate the principle of legal certainty or the fair balance between the general interest and the protection of individual rights.

Legal certainty also requires that *final court decisions are enforced*. Non-enforcement of court judgments undermines the results of the activities of judicial and law enforcement bodies, harms the rights and interests of the individual, encroaches on the established legal order, and such encroachment makes it possible to trace the connection between the principles of legal certainty and the rule of law in ensuring the binding nature of a court judgment. A significant number of cases considered by the ECHR concerned the issue of long-term non-enforcement of court decisions in Ukraine. Unfortunately, we have to state that after the adoption of the pilot judgment in the case "Ivanov v. Ukraine" and the relevant amendments to the legislation, the situation has not improved significantly<sup>90</sup>.

The text discusses how legal certainty requires final court decisions to be binding and enforced. Non-enforcement undermines judicial and law enforcement bodies and harms individuals' rights and interests

The next component of the principle of legal certainty is the *concept of legitimate expectations*. The principle of protection of legitimate expectations comes from the German Vertrauensschutz (literally - protection of trust), which aims to ensure that everyone who has confidence in the legality decisions and actions of public administration, is subject to protection<sup>91</sup>. The principle of Vertrauensschutz of German administrative law is borrowed from the German private law principle of legal protection of good faith acts (bona fide acts), enshrined in civil law. Western researchers warn against mixing the concepts of private and public law, considering the concept of protection of legitimate expectations a special entity that should be considered exclusively in the context of acts (decisions) of public administration<sup>92</sup>. An expectation is considered legitimate (lawful) if it is reasonable, meets the real expectations of a "prudent and

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<sup>90</sup> Ivanov v. Ukraine, No. [15007/02](https://hudoc.echr.coe.int/eng?i=001-78375) Eur. Ct. H.R. (7 December 2006), <https://hudoc.echr.coe.int/eng?i=001-78375>

<sup>91</sup> Reynolds Paul "Legitimate Expectations and the Protection of Trust in Public Officials", (Oxford, Great Britain, 2011), 330–352.

<sup>92</sup> Barak-Erez Daphne "The doctrine of legitimate expectations and the distinction between thereliance and expectation interests", (Tel Aviv, Israel: Kluwer Law International, 2005), 585.

reasonable person" and has a legal nature. The connection between legitimate expectations and legal certainty is obvious. It lies in the fact that according to legal certainty, a person, having studied the legal norms, can predict his behaviour, the specific choice of which is conditioned by his legitimate expectations, because he expects to receive a certain result depending on the actions performed. Such interdependence can be traced in the case of *Jokela v. Finland*, in which the ECHR noted that the applicants could legitimately expect a reasonably consistent approach by the authorities and courts to determine the market value of land, and in the absence of such consistency - to receive a reasoned explanation of these differences<sup>93</sup>. The concept of legitimate expectations is associated with the application of the concept of autonomous interpretation in the practice of the ECHR, in particular autonomous concepts that are designed to unify the standards of law enforcement. For example, in the case "*Fedorenko v. Ukraine*" the Court noted that the applicant should be considered to have a legitimate expectation of profit in accordance with the provision of the agreement on the dollar equivalent, which can be considered property in accordance with the provisions of Article 1 of the First Protocol<sup>94</sup>. The Court also stated that the actions of the justice could be regarded as having nullified the applicant's "legitimate expectations" under the contract and deprived him, in particular, of the condition to which he had agreed when concluding the agreement. In the substantive aspect, the legitimate expectations of individuals must be protected from chaotic and unpredictable changes in the legislation that sets out the relevant legal regime. In the procedural aspect, legitimate expectations concern consistent law enforcement practice, protection against selective justice.

The principle of legal certainty includes the concept of protecting legitimate expectations, which aims to ensure that those who have confidence in the legality of decisions and actions of public administration are protected. The interdependence between legitimate expectations and legal certainty lies in the fact that a person, having studied legal norms, can predict his behavior based on his legitimate expectations.

An integral element of the principle of legal certainty is the *principle of good governance*. Its interpretation is contained in the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2007) 7, which states that public authorities should not take any retroactive measures, except in legally defined circumstances<sup>95</sup>. They shall not interfere with granted rights and final legal situations, except when it is absolutely necessary in the public interest. Accordingly,

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<sup>93</sup> *Jokela v. Finland*, No. [28856/95](https://hudoc.echr.coe.int/eng?i=001-60466) Eur. Ct. H. R. (21 May 2002), <https://hudoc.echr.coe.int/eng?i=001-60466>

<sup>94</sup> *Fedorenko v. Ukraine*, No. [25921/02](https://hudoc.echr.coe.int/eng?i=001-75599) Eur. Ct. H. R. (1 June 2006), <https://hudoc.echr.coe.int/eng?i=001-75599>

<sup>95</sup> Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Adopted on 20 June 2007 at the 999bis meeting of the Ministers' Deputies, <https://rm.coe.int/16807096b9>

we should agree with T. Fulya, who points out that the principle of legal certainty is closely related to the principles of "good governance" and "good administration" (establishment of procedure and its observance), and also partially coincides with the principle of legality (clarity and predictability of the law, requirements for the "quality" of the law)<sup>96</sup>. For example, the principle of "good governance" provides that in the case when it comes to matters of general interest, in particular, if the case affects such fundamental human rights as property rights, public authorities must act in a timely manner and in an appropriate and as consistent manner as possible. In particular, public authorities are under an obligation to establish internal procedures that will enhance the transparency and clarity of their actions, minimise the risk of error and promote legal certainty in civil legal relations that affect property interests. As a rule, the principle of "good governance" should not prevent public authorities from correcting accidental mistakes, even those caused by their own negligence. The risk of any mistake by a public authority must be borne by the state itself, and mistakes cannot be corrected at the expense of the persons concerned. In the context of the cancellation of an erroneously granted right to property, the principle of "good governance" may not only impose on public authorities the obligation to act promptly to correct their mistake, but also to require the payment of appropriate compensation or other type of appropriate compensation to the former bona fide owner (judgments in *Moskal v. Poland*<sup>97</sup>, *Pinkova and Pink v. Czech Republic*<sup>98</sup>). In criminal law, this component of the principle of legal certainty covers, in author's opinion, the principle of "nulla poena sine lege" - "no punishment without law", according to which no one can be held liable and punished for committing an act which is not prohibited by law, as well as the principle of "non bis in idem" - "not twice for the same thing", according to which no one can be charged or punished twice for a criminal offense for which he was acquitted or convicted on the basis of a court verdict that has entered into force. The particular importance of this principle is emphasized by the ECHR in the case of *Rysovsky v. Ukraine*, noting that the principle of "good governance" provides that when it comes to matters of general interest, in

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<sup>96</sup> Fulei, T. I., "Application of the case law of the European Court of Human Rights in the administration of justice", (Kyiv, Ukraine, 2015), 62-63.

<sup>97</sup> *Moskal v. Poland*, No. [10373/05](https://hudoc.echr.coe.int/eng/?i=001-94009) Eur. Ct. H.R. (15 September 2009), <https://hudoc.echr.coe.int/eng/?i=001-94009>

<sup>98</sup> *Pinkova and Pink v. Czech Republic*, № 36548/97, Eur. Ct. H. R. (5 November 2002), <https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjnlcau-sb8AhVLBxAIHTYLBNoQFnoECBAQAQ&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fdocx%2F%3Flibrary%3DECHR%26id%3D001-183460%26filename%3DCASE%2520OF%2520PINCOV%25C3%2581%2520AND%2520PINC%2520v.%2520THE%2520CZECH%2520REPUBLIC%2520%25E2%2580%2593%2520%255BRussian%2520translation%255D%2520summary%2520by%2520Development%2520of%2520Legal%2520Systems%2520Publ.%2520Co%2520.docx%26logEvent%3DFalse&usg=AOvVaw1OFigbSZbIXwA8GLyUq74L>

particular if the case affects such fundamental human rights as property rights, public authorities must act in a timely manner and in an appropriate and as consistent manner as possible<sup>99</sup>.

The principle of good governance should not prevent public authorities from correcting mistakes, even those resulting from their own negligence. However, such a necessity should not disproportionately encroach on a new right acquired by a person who relied on the legitimacy of good faith actions on the part of the authorities. Consequently, state institutions that violate their own procedures should not be able to benefit from their own wrongdoing or avoid fulfilling their obligations. The burden of risk of any mistake by a public authority should be borne by the state itself, and the mistakes themselves should not be corrected at the expense of the persons they affect.

Thus, based on the principle of good governance, public authorities should act in a timely and proper manner, and the state cannot benefit from renewable terms for appealing court decisions and correcting mistakes made at the expense of a person who acted legitimately and in good faith.

The next element of the principle of legal certainty is the requirement *to limit the discretionary powers of public authorities*, under which the Committee of Ministers of the Council of Europe in Recommendation No. R (80)2 understands the powers that a public authority, when making a decision, may exercise with a certain margin of appreciation, that is, when such a body may choose from several legally permissible decisions the one it considers best in the circumstances<sup>100</sup>. In this regard, the Venice Commission noted that the law, which grants discretionary powers to a certain public authority, must indicate clearly and understandably the scope of such discretion. It would not be in conformity with the rule of law if the discretion granted by law to the executive branch has the character of unlimited power.

Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity to enable the individual to protect himself or herself from arbitrary actions. The ECHR in the case of *Olson v. Sweden* formulated the following position regarding the definition of clear limits of discretionary powers: a law granting discretion is not per se incompatible with the requirement of foreseeability if the scope of discretion and the manner of its exercise are specified with sufficient clarity and the legitimate aim of a particular measure taken

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<sup>99</sup> *Rysovskyy v. Ukraine*, No. [29979/04](https://hudoc.echr.coe.int/eng?i=001-107088) Eur. Ct. H.R. (20 October 2011), <https://hudoc.echr.coe.int/eng?i=001-107088>

<sup>100</sup> RECOMMENDATION No. R (80) 2 OF THE COMMITTEE OF MINISTERS CONCERNING THE EXERCISE OF DISCRETIONARY POWERS BY ADMINISTRATIVE AUTHORITIES (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmy\\_q-gJ37AhWiBhAIHfEPCosQFnoECAsQAQ&url=https%3A%2F%2Frm.coe.int%2F16804f22ae&usg=AOvVaw3d\\_t\\_b6ITZH7GhJTD310pgb](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmy_q-gJ37AhWiBhAIHfEPCosQFnoECAsQAQ&url=https%3A%2F%2Frm.coe.int%2F16804f22ae&usg=AOvVaw3d_t_b6ITZH7GhJTD310pgb))

in a particular situation is taken into account in order to provide the individual with adequate protection against arbitrary interference<sup>101</sup>.

Thus, discretionary powers should be understood as such powers of a public authority when, within the limits determined by law, the authorized body has the right to choose one of several options of behaviour at its own discretion. An important prerequisite for such a choice is that its implementation does not require the approval of the choice by anyone. Defining discretion in a way that makes it unlimited would be contrary to the rule of law. Therefore, the law should clearly establish the limits of the powers of public authorities and clearly define the manner of their exercise.

It can be stated with certainty that only if the law enforcement activity complies with the considered elements that determine the statics and dynamics of legal regulation, legal certainty can be realized, which, in turn, will ensure the sustainability and stability of relations, activities of the state and society, as well as guarantee the protection of fundamental human rights and freedoms at the highest level.

The law must clearly indicate the scope of discretion and the manner of its exercise to prevent arbitrary actions. The legitimate aim of a particular measure taken in a particular situation must also be taken into account to provide the individual with adequate protection against arbitrary interference.

In this chapter the main elements of the principle of legal certainty in the author's opinion were highlighted and examples of their application in legal practice were given. Summarizing this chapter, it can be concluded that there are a large number of necessary components of this principle, but in the author's opinion, these elements are necessary for the successful functioning and application of the principle of legal certainty, which is one of the conditions for the effective operation of the rule of law, and ensuring the implementation of the requirements of this principle in its broad sense is the key not only to the effective implementation and protection of human rights, but also to a significant improvement of the state mechanism.

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<sup>101</sup> Olsson v. Sweden, No. 74/1991/326/398 Eur. Ct. H. R. (30 October 1992), <https://hudoc.echr.coe.int/eng/?i=001-57788>



## **CHAPTER 3. APPLICATION OF THE PRINCIPLE OF LEGAL CERTAINTY BY THE CONSTITUTIONAL COURTS OF LITHUANIA AND UKRAINE: A COMPARATIVE ANALYSIS**

### **3.1. Basics of legal certainty and problems of its implementation in modern legal systems**

Legal certainty is a key principle of law that provides citizens and businesses with a sense of stability and predictability in their interactions with the legal system. It ensures that laws are clear, predictable and transparent and that citizens can rely on them to make informed decisions. Legal certainty is one of the fundamental principles of the rule of law, and it is essential for maintaining a stable and democratic society. This section will examine the common and distinctive features of the application of the principle of legal certainty by the constitutional courts of Lithuania and Ukraine, the problematic aspects of the application of the principle of legal certainty by the constitutional courts of Lithuania and Ukraine and ways to address them, as well as their significance and role in modern legal systems.

In practice, legal certainty is achieved through several mechanisms. First, laws and regulations must be clear and understandable. This means that legislators and regulators should take care to draft laws and regulations that are unambiguous and easy to interpret.

Second, legal certainty requires that the legal system be predictable. This means that judges and other judicial authorities should apply the law consistently, in a predictable and transparent manner. This requires that judges and other judicial authorities follow legal precedents and treat similar cases in the same way.

Third, legal certainty requires that the legal system be stable. This means that laws should not change frequently or unpredictably. Legislative changes should be made through a transparent and democratic process, and citizens and businesses should receive sufficient notice of any changes.

Finally, legal certainty requires that the legal system be accessible. This means that individuals and legal entities should be able to access legal information and advice easily and affordably. It also means that legal proceedings should be conducted in a fair, efficient and transparent manner.

Despite its importance, legal certainty faces several challenges in modern legal systems. One of them is the complexity of modern laws and regulations. The increasing complexity of laws and regulations can make them difficult for citizens and businesses to understand and comply with<sup>102</sup>. This can lead to confusion and uncertainty, which can undermine legal certainty.

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<sup>102</sup> Kumm, M., "The Principle of Legal Certainty: A Constitutional Theory of Law", *Oxford University Press*, 2020, p. 8-11.

Another problem is the lack of consistency in court decisions. In some cases, different judges may interpret the law differently, leading to inconsistent results<sup>103</sup>. This can undermine legal certainty and make it difficult for citizens and businesses to predict the legal consequences of their actions.

The pace of technological change can also pose a challenge to legal certainty. New technologies and innovations can create legal grey areas where the law is unclear or outdated. This can make it difficult for citizens and companies to understand how to comply with the law.

Political interference in the legal system can also undermine legal certainty. When politicians interfere with the legal system, it can erode public confidence in the system and destroy the predictability and stability of the law<sup>104</sup>.

To overcome challenges to legal certainty, legal systems must adapt and evolve to keep pace with changing social, economic and technological realities. This may require reforms aimed at simplifying laws and regulations, ensuring consistency in legal decisions, and increasing access to legal information and advice. It may also require a greater emphasis on the rule of law and an independent judiciary free from political interference<sup>105</sup>.

Legal certainty also facilitates access to justice. People who know the legal consequences of their actions are more likely to comply with the law and avoid litigation. In addition, clear and predictable laws and legal systems make it easier for citizens to understand their legal rights and obligations<sup>106</sup>.

In addition, legal certainty is essential for economic development. Businesses need a predictable and stable legal system in order to make long-term investments and plan their operations. In the absence of legal certainty, businesses are reluctant to invest, which leads to lower economic growth and job creation<sup>107</sup>.

Legal certainty is not only a principle of law, but also a human right. The International Covenant on Civil and Political Rights recognises the right to a fair and public hearing by a competent, independent and impartial tribunal established by law<sup>108</sup>. This right includes the right

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<sup>103</sup> Klabbers, J., "Legal Certainty in International Law", *International and Comparative Law Quarterly*, 67(1), 2018, pp. 1-22.

<sup>104</sup> Maruhn, T., "Legal Certainty in International Humanitarian Law", *International Review of the Red Cross*, 101, 2019, pp. 27-48.

<sup>105</sup> Van Gerven W. & Widdershoven, "Legal Certainty in EU Law: The Role of the European Court of Justice", *European Review of Private Law*, 27(3), 2019, p. 403-422.

<sup>106</sup> Beukers T., & Van der Schyff G., "Legal Certainty in European Private Law: Challenges and Opportunities", *European Review of Private Law*, 27(3), 2019, p. 381-402.

<sup>107</sup> Ruffert, M., "Legal Certainty and the European Convention on Human Rights: A Comparative Study", *Springer*, 2020, p. 13-18.

<sup>108</sup> Linde, P., "The Principle of Legal Certainty in EU Law", *Cambridge University Press*, 2018, p. 29-33.

to legal certainty and the right to know the legal consequences of one's actions. Thus, ensuring legal certainty is not only a legal obligation, but also a moral imperative.

### **3.2. Common and distinctive features of the application of the principle of legal certainty by the Constitutional courts of Lithuania and Ukraine**

The principle of legal certainty is particularly important in countries with constitutional courts, such as Lithuania and Ukraine. The principle of legal certainty is a fundamental principle of both Lithuanian and Ukrainian constitutional law. It aims to ensure that citizens can rely on the stability and predictability of legal norms, which in turn contributes to increased trust in the legal system. The constitutional courts of both countries play an important role in interpreting and applying this principle in their jurisdictions.

Both Lithuania and Ukraine have constitutional courts that are committed to the principle of legal certainty. The courts recognise that this principle is important for ensuring clarity, predictability and stability of laws and legal procedures, as well as necessary for the protection of individuals' rights and the rule of law<sup>109</sup>.

In addition, both Lithuania and Ukraine have introduced special legal provisions to ensure legal certainty. For example, the Lithuanian Civil Code contains provisions requiring legal acts to be clear, unambiguous and not contradict other legal acts<sup>110</sup>. Similarly, the Civil Code of Ukraine requires that legal provisions be formulated in a clear and concise manner<sup>111</sup>. Both courts have emphasised the need for clarity, consistency and predictability of legal provisions, particularly in the areas of criminal and tax law. They also recognised that retroactive application of laws can undermine legal certainty and limited its use in certain circumstances<sup>112</sup>.

In addition to these provisions, both countries have established legal procedures that promote legal certainty. For example, the Lithuanian Code of Civil Procedure requires that court decisions be based on law and that the parties be given the opportunity to present their arguments

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<sup>109</sup> Tyushka, A., "Association instead of integration: The EU-Ukraine Association Agreement and the 'Association Law' as an Institution of Ukraine's European Integration", *Croatian Yearbook of European Law and Policy*, 2017, p. 13.

<sup>110</sup> "The Civil Code of the Republic of Lithuania (No. VIII-1864). Seimas of the Republic of Lithuania, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495>.

<sup>111</sup> "The Civil Code of Ukraine", (435-IV), Verkhovna Rada of Ukraine. Available online: <https://zakon.rada.gov.ua/laws/show/435-15#Text>.

<sup>112</sup> Hirsch, A., "Legal Certainty and Judicial Activism in Europe", *European Review of Public Law*, 33(2), 2021, p. 129-142.

and evidence<sup>113</sup>. The Code of Administrative Procedure of Ukraine, in turn, sets the same goals and requirements<sup>114</sup>.

Constitutional courts in both Lithuania and Ukraine have emphasised the importance of legal certainty in building confidence in the legal system. When laws and legal procedures are clear and predictable, citizens and businesses can be confident that their rights will be protected and that the legal system will operate fairly and impartially.

In Lithuania, the Constitutional Court has repeatedly emphasised the importance of legal certainty in its decisions. For example, the conformity of the provisions of Articles 5(2) and 12(1) of the Law of the Republic of Lithuania "On Restoration of Citizens' Property Rights to Existing Real Estate Complexes" with the Constitution of the Republic of Lithuania was the subject of the decision of the Constitutional Court of Lithuania No. 7/2012 of 30 October 2014<sup>115</sup>.

The court's decision stated that these provisions of the law restrict property rights and do not provide sufficient protection of property owners' rights. The Lithuanian Constitutional Court found that these restrictions do not comply with the principle of legal certainty, as they do not provide sufficient information to owners about what actions may be considered as violations of their rights. The court also noted: "In the acts of the Constitutional Court, it has been held on more than one occasion that the protection of legitimate expectations, legal certainty, and legal security are inseparable elements of the constitutional principle of a state under the rule of law; these constitutional principles imply the obligation of the state to ensure the certainty and stability of any legal regulation, to protect the rights of persons, to respect legitimate interests and legitimate expectations, as well as to fulfil the obligations undertaken to a person; if the protection of legitimate expectations, legal certainty, and legal security were not ensured, the trust of a person in the state and law would not be secured".

As a result, the Lithuanian Constitutional Court found that these provisions of the law did not comply with the Constitution of the Republic of Lithuania and violated property rights. The court ordered the legislator to amend the law to ensure the protection of property owners' rights and restore the principle of legal certainty.

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<sup>113</sup> "Civil Procedure Code of the Republic of Lithuania", 28 February 2002, (No. IX-743), available online: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr>

<sup>114</sup> "Code of Administrative Proceedings of Ukraine" (No. 2747-IV). Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

<sup>115</sup> The Constitutional Court of the Republic of Lithuania on the restoration of ownership rights to the urban land necessary for the exploitation of the structures owned by other persons, CCL, Case No. 7/2012, 30 October 2014, <https://lrkt.lt/en/court-acts/search/170/ta861/content>

The general conclusion is that the Constitutional Court of Lithuania uses the principle of legal certainty when considering constitutional issues and protecting property rights. This shows that the principle of legal certainty is an important and necessary element of the Lithuanian legal system.

In Decision No. 2-A/2021 of 20 September 2021, the Constitutional Court of Lithuania also applied the principle of legal certainty<sup>116</sup>. The Court analysed the constitutionality of the provision of Article 5(8) of the Law on Acquisition of Agricultural Land, which concerns the procedure for obtaining a permit for the acquisition of land by foreigners or stateless persons.

The Lithuanian Constitutional Court found that the provision did not comply with the principle of legal certainty, as it did not clearly and precisely define which criteria should be used when considering applications for land acquisition. The Constitutional Court stated: “In order to decide whether paragraph 8 of Article 5 of the Law is compatible with the constitutional principles of a state under the rule of law and responsible governance, it should be noted that, as mentioned before:

– the constitutional principles of the protection of legitimate expectations, legal certainty, and legal security, inter alia, imply that the state must fulfil all its obligations undertaken to a person; under the Constitution, in relationships with the state, only those expectations of a person are protected and defended that arise from the Constitution itself or the laws and other legal acts that are not in conflict with the Constitution; only such expectations of a person in relationships with the state are considered legitimate... Thus, it should be held that the legal regulation laid down in paragraph 8 of Article 5 of the Law should be assessed to be in compliance with the constitutional principle of responsible governance and not to deny the imperatives of the protection of legitimate expectations, legal certainty, and legal security, which stem from the constitutional principle of a state under the rule of law”.

In particular, it noted that the provision does not define which factors are considered relevant when considering applications for land acquisition and does not provide sufficient legal certainty regarding the land acquisition procedure.

Thus, the Constitutional Court of Lithuania used the principle of legal certainty in this decision and concluded that it was necessary to amend the law to ensure sufficient legal certainty of the procedure for acquiring land and to protect the rights of foreigners and stateless persons to acquire agricultural land.

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<sup>116</sup> The Constitutional Court of the Republic of Lithuania on the legal remedy for the protection of the pre-emption right to acquire private agricultural land, CCL, Case No. 2-A/202128, 28 September 2021, <https://lrkt.lt/en/court-acts/search/170/ta2534/content>

The Judgment of the Constitutional Court of Lithuania No. 16/2016 of 11 January 2019<sup>117</sup> in the case on the compliance of Article 43(1)(5) of the Law on the Legal Status of Aliens with the Constitution of the Republic of Lithuania is a vivid example of the application of the principle of legal certainty. The challenged provision established a mandatory requirement for foreigners to have a valid health insurance policy when applying for a temporary residence permit.

The Constitutional Court analysed whether this provision complied with the Constitution of Lithuania and concluded that it did not. The Court found that the mandatory requirement to have health insurance violates the principle of legal certainty, as the provision does not specify what type of insurance will be considered valid for the purposes of obtaining a residence permit.

The Court also found that this provision violated the principle of proportionality, as the mandatory requirement for health insurance was not necessary to achieve the legitimate aim of protecting public health. The Court noted that foreigners who were already covered by the national health insurance system would be forced to purchase additional insurance, which would create a disproportionate burden.

Therefore, the Constitutional Court declared paragraph 5 of part 1 of Article 43 of the Law "On the Legal Status of Foreigners" unconstitutional and invalid.

In this judgment, the Constitutional Court applied the principle of legal certainty by examining whether the challenged provision provided sufficient clarity and precision for individuals to understand what was required of them. The Court found that the provision lacked clarity and therefore violated the principle of legal certainty.

Overall, the analysis conducted by the Constitutional Court in this decision demonstrates its commitment to the principle of legal certainty and ensuring that laws are clear and precise so that citizens can understand and comply with them.

In its Decision No. 7/2020-17/2020 of 13 May 2021, the Constitutional Court of Lithuania considered the compliance of certain provisions of the laws concerning changes in the legal regulation of taxes with the Constitution of the Republic of Lithuania<sup>118</sup>. The court's analysis focused on whether the challenged provisions provided legal certainty and protection of legitimate expectations of taxpayers.

In turn, the principle of legal certainty was used in several aspects. Firstly, the Court emphasised that tax legislation should be clear, precise and predictable so that taxpayers can plan

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<sup>117</sup> The Constitutional Court of the Republic of Lithuania on issuing a temporary residence permit in Lithuania to a foreign national in the event of family reunification, CCL, Case No. 16/2016, 11 January 2019, <https://lrkt.lt/en/court-acts/search/170/ta1915/content>

<sup>118</sup> The Constitutional Court of the Republic of Lithuania on the entry into force of tax laws, CCL, Case No. 7/2020-17/2020, 13 May 2021, <https://lrkt.lt/en/court-acts/search/170/ta2492/content>

their activities and make informed decisions in accordance with the law: “The Constitutional Court has also held that the persons who, under the Constitution, must pay taxes established by law have the right to reasonably expect that, in the course of establishing or changing taxes, regard should be paid to the constitutional principle of a state under the rule of law, inter alia, the principles of legal certainty, legal security, and the protection of legitimate expectations, which implies the duty of the state to ensure the stability of the legal regulation by which taxes are established, as well as to protect and respect the legitimate interests and legitimate expectations of taxpayers”. This area, due to its direct connection to private property, business initiative and long-term plans of taxpayers, is particularly sensitive to any abrupt changes, while most other areas of life are even more sensitive to changes in taxation; therefore, a high number of amendments within one year is indeed remarkable<sup>119</sup>. This alone raises concerns about the compliance of these amendments with the imperatives of legal certainty and stability.

This reflects the principle of legal certainty, which requires the law to be accessible, predictable and stable so that individuals can rely on it in their daily lives.

Secondly, the Court analysed whether the changes in tax regulation were introduced in a transparent and understandable manner, and whether they were applied retrospectively or with sufficient notice to allow taxpayers to adjust to the new rules: “Legal certainty, legal security, and the protection of legitimate expectations are inseparable elements of the principle of a state under the rule of law; these constitutional principles imply the duty of the state to ensure the certainty and stability of a legal regulation, to protect the rights of persons, to respect legitimate interests and legitimate expectations, and to fulfil the obligations undertaken to the person under the principle of legitimate expectations; the legal regulation may be changed only by following the procedure established in advance; no changes in the legal regulation are allowed to deny the legitimate interests and legitimate expectations of a person; if legal certainty, legal security, or the protection legitimate expectations were not ensured, the trust of a person in the state and law would not be ensured, either”.

This also reflects the principle of legal certainty, which requires that the law be applied consistently and with due regard to the legitimate expectations of those affected.

Finally, the Court considered whether the changes in tax regulation were proportionate and necessary to achieve the legitimate aims of the state and whether they did not unduly interfere with the rights and interests of taxpayers. The court concluded: “Referring to the official constitutional doctrine formulated, inter alia, when interpreting the constitutional principles of a state under the

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<sup>119</sup> Scholars of the Faculty of Law, Vilnius University. *Crisis, the rule of law and human rights in Lithuania*. Šiauliai, 2015, <https://www.tf.vu.lt/wp-content/uploads/2016/09/Book-Crisis-the-rule-of-law-and-human-rights-in-Lithuania-EN.pdf>

rule of law, the protection of legitimate expectations, legal certainty, legal security, and responsible governance, the petitioner specifies that the above-mentioned legal regulation consolidated in the Law on the Legislative Framework and the Law on Tax Administration does not create the preconditions for establishing a proper period (*vacatio legis*) for the entry into force of amendments to tax laws to allow taxpayers to prepare for respective tax changes”.

This reflects the principle of legal certainty, which requires that the law complies with fundamental principles of justice and is not arbitrary or capricious.

In conclusion, we can say that the principle of legal certainty has been applied in these decisions carefully and comprehensively, ensuring that tax legislation in Lithuania is clear, transparent and predictable, and that changes in regulation are made in a fair and proportionate manner.

The importance of legal certainty has also been emphasised by the Constitutional Court of Ukraine. For example, on 27 February 2019, in its decision No. 1-p/2019, the Constitutional Court of Ukraine<sup>120</sup> declared several provisions of the Criminal Procedure Code of Ukraine<sup>121</sup> unconstitutional. The decision focuses on the protection of the rights of the accused and the need to ensure a fair trial.

With regard to the principle of legal certainty, the Constitutional Court of Ukraine emphasised that it is one of the fundamental principles of the rule of law: “One of the main elements of the principle of the rule of law enshrined in the first part of Article 8 of the Constitution of Ukraine is legal certainty. The Constitutional Court of Ukraine has emphasised the importance of the requirement of certainty, clarity and unambiguousness of a legal provision, as otherwise it cannot ensure its uniform application, does not exclude unlimited interpretation in the practice of law enforcement and inevitably leads to arbitrariness”. The Court recognised that legal certainty is necessary for individuals to be able to plan their actions in accordance with the law and to be confident that the law will be applied consistently and predictably.

In the context of this judgment, the principle of legal certainty was applied in several aspects. For example, the Court declared unconstitutional certain provisions of the Criminal Procedure Code that allowed for the retroactive application of criminal law. This means that

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<sup>120</sup> Constitutional Court of Ukraine Decision in the case on the constitutional petition of 59 deputies of Ukraine on the compliance of Article 368-2 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality), No. 1-p/2019, 26 February 2019 <https://zakon.rada.gov.ua/laws/show/v001p710-19#Text>

<sup>121</sup> Criminal Code of Ukraine, No. 2341-III, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/2341-14#Text>



individuals cannot be punished for behaviour that was not criminal at the time it was committed, as this violates the principle of legal certainty.

In addition, the Court emphasised the importance of clear and precise legal provisions accessible to all persons. The Court ruled that unclear or ambiguous provisions of the Criminal Procedure Code could lead to uncertainty and unpredictability in the application of the law, undermining the principle of legal certainty: “In a state governed by the rule of law, which Ukraine is according to Article 1 of the Constitution of Ukraine, crime should be combated exclusively by legal means in strict compliance with human rights and freedoms, the principles of the rule of law and the supremacy of the Constitution of Ukraine. This also applies in full to the exclusive legislative function of the Verkhovna Rada of Ukraine in defining by law the acts that constitute crimes (Article 92.22.1 of the Constitution of Ukraine). In cases where a law provides for criminal liability, the requirement of clarity and unambiguity of that law is crucial for its compliance with the principle of legal certainty”.

In general, it appears that the principle of legal certainty played an important role in the decision of the CCU in Decision No. 1-p/2019. The Court recognised the importance of this principle for ensuring a fair and predictable legal system and took steps to protect it by striking down unconstitutional provisions that violated this principle.

In turn, in the decision of the CCU in case No. 3-rp/2016<sup>122</sup>, when deciding on the constitutionality of paragraph seven of part nine of Article 11 of the Law of Ukraine "On State Assistance to Families with Children"<sup>123</sup>, which concerned the termination of the payment of childbirth assistance, the Court stressed the importance of clear and precise legal provisions that are accessible to all persons and provide a basis for consistent and predictable decision-making.

For example, the Court noted that the wording of the seventh paragraph of part nine of Article 11 of the Law of Ukraine "On State Assistance to Families with Children" is unclear and unspecific, which may lead to confusion and inconsistent application of the law: “On the contrary, the existence of a vaguely defined list of grounds for termination of childbirth assistance and the existence of such discretionary powers of the social protection authorities without defining their limits in the law may lead to a violation of the right to childbirth assistance. The legislative

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<sup>122</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance with the Constitution of Ukraine (constitutionality) of the seventh paragraph of part nine of Article 11 of the Law of Ukraine "On State Assistance to Families with Children" (case on termination of payment of childbirth benefits), No. 3-rp/2016, 8 June 2016, <https://zakon.rada.gov.ua/laws/show/v003p710-16#Text>

<sup>123</sup> Law of Ukraine "On State Assistance to Families with Children", No. 2811-XII, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/2811-12#Text>

regulation of the grounds for termination of the payment of childbirth assistance provided for in paragraph seven of Part Nine of Article 11 of the Law indicates non-compliance with the principle of legal certainty as an element of the rule of law guaranteed by Part One of Article 8 of the Constitution of Ukraine". The Court also found that the provision did not contain clear criteria for determining when to terminate the payment of childbirth assistance, which could lead to arbitrary or discriminatory decision-making, emphasising the importance of clear and precise legal provisions that provide a basis for consistent and predictable decision-making.

In the Decision of the CCU No. 2-p/2017 of 20 December 2017<sup>124</sup>, the Court considered the constitutionality of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education"<sup>125</sup>, which regulated the process of appointing rectors of higher education institutions.

The Court emphasised the importance of clear and unambiguous legal provisions to ensure the rule of law and the protection of individuals' rights: "The constitutional principles of equality and justice require that a legal provision be certain, clear and unambiguous, as otherwise it cannot ensure its uniform application, does not exclude unlimited interpretation in law enforcement practice and inevitably leads to arbitrariness". In particular, the Court noted that the provisions of the Law of Ukraine "On Higher Education" should be sufficiently clear and specific to provide a basis for consistent and predictable decision-making by universities and other relevant institutions.

The Court found that the challenged provision of the law was vague and unspecific, which could lead to arbitrary or discriminatory decision-making in the appointment of rectors. The Court therefore declared the provision unconstitutional and invalid.

The Court's decision to declare the challenged provision of the Law of Ukraine "On Higher Education" unconstitutional due to its vagueness and lack of specificity supports the principle of legal certainty, contributing to clear and predictable decision-making in the appointment of rectors of higher education institutions.

In the Decision of the CCU No. 23-rp/2010<sup>126</sup>, the Court examined the principle of legal certainty in the context of administrative liability in the field of road safety, in particular in the part

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<sup>124</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of 49 deputies of Ukraine on the compliance of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" with the Constitution of Ukraine (constitutionality), No. 2-p/2017, 20 December 2017, <https://zakon.rada.gov.ua/laws/show/v002p710-17#Text>

<sup>125</sup> Law of Ukraine "On Higher Education", No. 1556-VII, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/1556-18#Text>

<sup>126</sup> Constitutional Court of Ukraine, Decision on the case on the constitutional appeal of citizen Artem Baginsky on the official interpretation of the provisions of part one of Article 14-1 of the Code of Ukraine on Administrative Offences (case on administrative liability in the field of road safety), N 23-rp/2010, 22 December 2010, <https://zakon.rada.gov.ua/laws/show/v023p710-10#Text>.

concerning the provisions of part one of Article 14-1 of the Code of Ukraine on Administrative Offences<sup>127</sup> .

In particular, the Court noted that the provisions did not provide for clear and specific criteria for determining whether an administrative offence had been committed or the level of gravity of the offence. The provisions also did not provide clear guidance on the imposition of penalties, such as fines or temporary deprivation of the right to drive vehicles.

As a result, the Court concluded that the provisions of part one of Article 14-1 of the Code of Ukraine on Administrative Offences did not provide a clear and predictable basis for making decisions on bringing to administrative responsibility in the field of road safety. The lack of legal certainty could lead to arbitrary or discriminatory decisions, which is incompatible with the principles of the rule of law and the protection of human rights and freedoms.

Therefore, in declaring the provisions of part one of Article 14-1 of the Code of Ukraine on Administrative Offences unconstitutional and invalid, the Court relied heavily on the principle of legal certainty.

Another striking example is the case on the constitutional petition of the Supreme Court of Ukraine No. 5-rp/2011 of 16 June 2011<sup>128</sup> . The Constitutional Court of Ukraine analysed the constitutionality of certain provisions of the Code of Administrative Procedure of Ukraine<sup>129</sup> , the Laws of Ukraine "On the High Council of Justice"<sup>130</sup> and "On Amendments to Certain Legislative Acts of Ukraine on Prevention of Abuse of the Right to Appeal"<sup>131</sup> .

The court found that certain provisions of the Code of Administrative Procedure of Ukraine violated the principle of legal certainty. In particular, the court declared unconstitutional a provision that allowed judges to suspend proceedings for an indefinite period without setting time

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<sup>127</sup> Code of Ukraine on Administrative Offences, No. 8073-X, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/80731-10#Text>

<sup>128</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of the Supreme Court of Ukraine on the compliance of certain provisions of the Code of Administrative Procedure of Ukraine, the Laws of Ukraine "On the High Council of Justice", "On Amendments to Certain Legislative Acts of Ukraine on Prevention of Abuse of the Right to Appeal", N 5-рп/2011, 16 June 2011, <https://zakon.rada.gov.ua/laws/show/v005p710-11#Text>

<sup>129</sup> Code of Administrative Procedure of Ukraine, No. 2747-IV, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/2747-15#Text>

<sup>130</sup> Law of Ukraine "On the High Council of Justice", No. 2747-IV, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/card/2747-15>

<sup>131</sup> Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Prevention of Abuse of the Right to Appeal", No. 2181-VI, Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/card/2181-17>

limits. The court reasoned that this provision did not provide adequate guidance and predictability for the parties, leading to uncertainty and arbitrary decision-making.

The court also found that certain provisions of the Law of Ukraine "On the High Council of Justice" violated the principle of legal certainty. The court found that provisions allowing for the dismissal of judges without clear criteria violated the principle of legal certainty.

The Court emphasised the importance of clarity and predictability of the law and found that certain provisions violated these principles, leading to arbitrary decision-making and uncertainty.

In general, it can be concluded that the constitutional courts of both Lithuania and Ukraine take the principle of legal certainty seriously, recognise it as a key element of national legal systems and are willing to strike down laws or provisions that are too vague or allow for arbitrary decision-making. Both countries have established constitutional courts and implemented legal provisions and procedures to ensure that laws and legal procedures are clear, predictable and stable. By adhering to this principle, these countries promote the rule of law and protect the rights of citizens.

In addition, the principle of legal certainty also helps to ensure consistency and predictability in the interpretation and application of laws. This is particularly important in the context of constitutional courts, which are responsible for interpreting and enforcing the constitution. By providing clear and predictable guidance on constitutional issues, courts help to preserve the integrity of the constitution and ensure that its provisions are applied consistently over time<sup>132</sup>.

It is also worth noting that the principle of legal certainty is important not only at the national but also at the international level. Both Lithuania and Ukraine are parties to numerous international treaties and agreements that require them to uphold the rule of law and provide a stable legal environment for citizens and businesses. These international obligations reinforce the importance of legal certainty and ensure that these countries are held accountable for upholding this principle.

It should be noted that while both Lithuania and Ukraine are committed to the principle of legal certainty, there may be some differences in the interpretation and application of this principle by the constitutional courts.

One important difference is that Lithuania has a relatively stable political and legal system compared to Ukraine, which has experienced significant political upheaval and changes in its legal

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<sup>132</sup> De Witte B. & Vandebrouwaene W., "The Principle of Legal Certainty in EU Law", *European Review of Private Law*, 27(3), 2019, p. 357-380.

system over the past decades. This instability may affect the application of the principle of legal certainty in Ukraine, as legal rules and precedents are subject to change depending on political circumstances.

There are also differences in the legal framework and case law between Lithuania and Ukraine that affect the principle of legal certainty. For example, Lithuania has been a member of the European Union since 2004, which means that it is subject to EU legislation and case law. This may affect the application of the principle of legal certainty in Lithuania, as EU law emphasises the importance of clarity and predictability of legal rules.

In contrast, Ukraine has not yet joined the EU and has a different legal framework, which may affect the interpretation and application of the principle of legal certainty. However, Ukraine is making efforts to harmonise its legislation with EU law as part of its European integration objective<sup>133</sup>. This may lead to greater convergence between the legal systems of Ukraine and EU Member States, including Lithuania.

Overall, while both Lithuania and Ukraine have constitutional courts that emphasise the importance of legal certainty, there may be differences in the interpretation and application of this principle due to historical and political factors. Despite these differences, both countries are committed to the principle of legal certainty and the fair and predictable functioning of their legal systems. In doing so, they promote the rule of law, the protection of citizens' rights and the creation of the foundations for a stable and prosperous community.

### **3.3. Problematic aspects of application of the principle of legal certainty by the Constitutional Court of Ukraine**

After analysing the international and national judicial practice on the application of the principle of legal certainty, the author was able to identify certain problematic aspects of the application of the principle of legal certainty by the Constitutional Court of Ukraine.

One such problem is the slow pace of legal reform. While both countries have made significant progress in reforming their legal systems, further reforms are needed to ensure that laws and legal procedures are clear, predictable and stable.

The lack of consistency in the application of the principle of legal certainty by the Constitutional Court of Ukraine is one of the most problematic aspects. For example, in the case concerning the constitutionality of the Law on Electronic Declaration, the Constitutional Court of

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<sup>133</sup> Yevsieieva O., "The Principle of Legal Certainty in the Context of Ukraine's EU Integration", *Baltic Journal of Law & Politics*, 13(2), 2020, p. 48-67.

Ukraine initially ruled that the law was constitutional<sup>134</sup>. A year later, however, the court reversed its decision and declared the law unconstitutional. This decision caused confusion and uncertainty among stakeholders.

The Constitutional Court of Ukraine has been accused of being politicised, undermining its independence and impartiality. Political pressure on the court can lead to inconsistent and unpredictable decisions, undermining legal certainty. For example, in the case of the constitutionality of the law on the National Anti-Corruption Bureau, the Constitutional Court of Ukraine initially ruled that the law was constitutional<sup>135</sup>. However, after the political climate changed, the court reversed its decision and declared the law unconstitutional. This decision has been criticised as the result of political pressure on the court.

The Constitutional Court of Ukraine has been criticised for a lack of transparency in its decision-making. The court's decisions are often made behind closed doors, with limited public access to information, creating uncertainty and unpredictability in the legal system. For example, in the case on the constitutionality of the law on the High Anti-Corruption Court, the Constitutional Court of Ukraine made its decision behind closed doors, with limited public access to information<sup>136</sup>. This lack of transparency has led to uncertainty and confusion among interested parties.

The Constitutional Court of Ukraine has also been criticised for its limited use of precedent in its decisions. The Court often bases its decisions on its own previous decisions rather than on decisions of the European Court of Human Rights, the European Court of Justice and constitutional courts of other countries, resulting in a lack of consistency and coherence in the Court's jurisprudence.

The Court's practice of issuing advisory opinions on draft legislation has also been criticised for creating uncertainty in legal relations. While the purpose of these opinions is to

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<sup>134</sup> Constitutional Court of Ukraine, Decision in case on the constitutional petition of 47 deputies of Ukraine on the compliance of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality), No. 13-r/2020, 27 October 2020, <https://zakon.rada.gov.ua/laws/show/v013p710-20#Text>

<sup>135</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of 50 deputies of Ukraine on the compliance of certain provisions of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" with the Constitution of Ukraine (constitutionality), No. 11-r/2020, 16 September 2020, <https://zakon.rada.gov.ua/laws/show/v011p710-20#Text>

<sup>136</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of 49 deputies of Ukraine on the compliance of the Law of Ukraine "On the High Anti-Corruption Court" with the Constitution of Ukraine (constitutionality), No. 2447-VIII, 7 June 2018, <https://ccu.gov.ua/novyna/konstytuciynyy-sud-ukrayiny-u-spravi-shchodo-konstytuciynosti-zakonu-ukrayiny-pro-vyshchyy>

provide guidance on the constitutionality of a proposed law, they can create uncertainty about the final form of the law and the practical implications of its implementation.

In general, these problems indicate that the application of the principle of legal certainty by the Constitutional Court of Ukraine is not always unambiguous and can create uncertainty in legal relations.

Another challenge is corruption, which can undermine the principle of legal certainty by creating a culture of impunity and undermining public confidence in the legal system<sup>137</sup>. According to the Venice Commission, corruption refers to particular challenges – actions and decisions that offend the rule of law<sup>138</sup>. For example, in the report of Ukraine, it is noted that corruption jeopardises the good functioning of public institutions and diverts public action from its purpose, which is to serve the public interest; it disrupts the legislative process, affects the principles of legality and legal certainty, introduces a degree of arbitrariness in the decision-making process, has a devastating effect on human rights, and undermines citizens' trust in the institutions<sup>139</sup>.

Recently, Ukraine has seen some changes in the way the Constitutional Court upholds the principle of legal certainty. In 2020, the court was criticised for a controversial ruling that struck down a law requiring high-ranking officials to declare their assets<sup>140</sup>. The decision was seen as a setback in Ukraine's fight against corruption and raised concerns about the court's independence and impartiality. However, the Court later reversed its decision and reinstated the asset declaration law, which was seen as a positive step towards the principle of legal certainty and the rule of law.

In addition, the geopolitical situation in the region has created additional challenges for both countries. In Ukraine, the application of the principle of legal certainty was significantly affected by the Russian military invasion in 2014. The invasion led to the annexation of Crimea

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<sup>137</sup> 4 th Congress of the World Conference on Constitutional Justice, Vilnius, Republic of Lithuania, 11-14 September 2017 “The Rule of Law and Constitutional Justice in the Modern World”. Session 2 „New Challenges to the Rule of Law. Key-note speech by Mr Dainius ŽALIMAS, President, Constitutional Court, Republic of Lithuania, [http://www.venice.coe.int/WCCJ/04\\_Vilnius/Presentations/WCCJ-4thCongress-session2-key-note-Zalimas-e.pdf](http://www.venice.coe.int/WCCJ/04_Vilnius/Presentations/WCCJ-4thCongress-session2-key-note-Zalimas-e.pdf).

<sup>138</sup> Venice Commission – CDL-AD(2011)003rev-e Report on the rule of law, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

<sup>139</sup> Ukraine quotes the Resolution of Parliamentary Assembly of the Council of Europe (Resolution 1943 (2013)) on corruption as a threat to the rule of law: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19948&lang=en>.

<sup>140</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of 47 deputies of Ukraine on the compliance of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality), No. 13-r/2020, 27 October 2020, <https://zakon.rada.gov.ua/laws/show/v013p710-20#Text>

and the outbreak of war in Ukraine, resulting in the destruction of the rule of law and the legal system. The invasion created a situation of legal uncertainty in which the Ukrainian legal system could not function effectively. The legal situation was further complicated by Russia's annexation of Crimea, which led to the application of different legal systems in the region. The introduction of Russian laws and regulations in the region has had the effect of a different legal system to that of Ukraine.

The application of the principle of legal certainty in international law was also affected by Russia's military invasion of Ukraine. The annexation of Crimea by Russia was widely condemned by the international community and led to the imposition of sanctions and other measures. The international legal system faced a challenge in responding to the invasion, and questions arose about the application of international law and the principle of legal certainty.

Thus, the application of the principle of legal certainty in Ukraine has been significantly affected by the Russian military invasion of Ukraine. The invasion also highlighted the challenges faced by the international legal system in responding to such situations, as it affected the application of the principle of legal certainty in international law.

In Lithuania, however, harmonisation of EU law with national legislation has been problematic due to the country's close ties with the European Union.

Despite these challenges, both Lithuania and Ukraine remain committed to legal certainty and the rule of law. By continuing to implement legal reforms, strengthening anti-corruption measures and working to address the challenges posed by the geopolitical situation, these countries will be able to further promote legal certainty and ensure a stable legal environment for their citizens.

Finally, it is important to note that the principle of legal certainty is not a static concept and should be constantly assessed and adapted to changing circumstances. In order to ensure that their legal systems respond to new challenges and changes, both Lithuania and Ukraine should remain vigilant.

Constitutional courts have a key role to play in this respect. Through their interpretation and upholding of the Constitution, they can provide guidance on how the principle of legal certainty should be applied in new and changing contexts. They can also act as a check on the other branches of government, ensuring that laws and legal procedures are consistent with the Constitution and promoting confidence in the legal system.

Overall, an essential element of the Lithuanian and Ukrainian legal systems is the principle of legal certainty. Adherence to this principle allows these countries to promote the rule of law, protect individual rights and ensure a stable legal environment for citizens. Despite the challenges,



both countries remain committed to the principle of legal certainty and to the fair and predictable functioning of their legal systems.

## CONCLUSIONS

A comprehensive analysis of the principle of legal certainty and its application in the jurisprudence of the Constitutional Court of Ukraine leads to the conclusion that this principle is a fundamental aspect of the rule of law and a component of the protection of human rights. The historical development of this principle can be traced from antiquity to the present. It shows its evolution and adaptation to changing legal systems and social needs.

The study identifies the key elements of the principle of legal certainty and traces the early development of the application of the principle of legal certainty in the practice of the European Union. The author identifies the main obstacles to the proper implementation of the principle of legal certainty in modern legal systems and conducts a comparative analysis of the application of the principle of legal certainty in the Constitutional Courts of Ukraine and Lithuania.

The study of this issue has revealed that there are significant problems in the application of this principle in the judicial practice of Ukraine. The conclusions show that there are theoretical and practical obstacles to the proper application of the principle of legal certainty by the Constitutional Court of Ukraine. These obstacles include: the slow pace of legal reform, lack of consistency in the application of the principle of legal certainty by the Constitutional Court of Ukraine, a significant degree of politicisation of the Constitutional Court, insufficient transparency in access to justice, limited use of international judicial practice by the Constitutional Court, a high level of corruption and an unfavourable geopolitical situation.

In response to these problems, a number of recommendations have been made to improve the theoretical and practical implementation of the principle of legal certainty in Ukrainian legislation. These recommendations include the development of technical capabilities for more transparent and convenient access to justice, the study and use of international judicial practice, namely the judgments of the European Court of Human Rights, the judgments of the Court of Justice of the European Union, as well as the judgments of constitutional courts of other states. Involve practising lawyers, academics, researchers, professors in relevant fields and civil society organisations in the process of researching the principle of legal certainty in specific cases or in general jurisprudence. Improve the clarity and precision of the Court's reasoning and arguments by developing clear guidelines for judges on how to apply the principle in different contexts. Strengthen the independence of the judiciary by ensuring that the Constitutional Court of Ukraine

is free from political influence and interference and can rule only in accordance with the law<sup>141</sup>. To improve the professionalism and training of judges and other members of the judiciary<sup>142</sup>.

Based on the conclusions of this Master's thesis, it is recommended that the principle of legal certainty should not be separately enshrined in Ukrainian legislation. The principle of legal certainty is a key element of the rule of law, which is already guaranteed by the Ukrainian Constitution. Although legislative consolidation may be an important factor in the effective implementation of this principle in court practice, it is not always necessary or desirable, as it may lead to inconsistent application of the principle of legal certainty and the creation of a new set of conflicts in Ukrainian court practice<sup>143</sup>. However, in the author's opinion it is extremely important and necessary to define the basic nature and content of the principle of legal certainty at the level of laws and regulations in all branches of law.

Therefore, in order to facilitate the effective implementation of the principle of legal certainty, it is recommended that the Ukrainian legislator consider alternative approaches. These may include providing guidance in the form of formal instructions or guidelines, improving training programmes for judges and lawyers, and promoting greater transparency and accountability in judicial decision-making.

Finally, it should be noted that the principle of legal certainty is not a static concept and should be constantly assessed and adapted to changing circumstances. The Constitutional Court plays a key role in ensuring that the legal system can respond to new challenges and changes.

This Master's thesis therefore provides a valuable insight into the principle of legal certainty and how it is applied in constitutional courts, particularly in Ukraine. It highlights both the importance of this principle in the protection of human rights and the challenges that need to be overcome to ensure its effective implementation. By implementing the proposed recommendations, Ukraine can strengthen its commitment to the rule of law and improve the protection of human rights for all citizens.

In conclusion, this Master's thesis is a valuable contribution to the field of public administration and human rights law, focusing on the Constitutional Court of Ukraine. The author hopes that these findings will help to improve judicial practice and provide greater legal certainty for citizens, thereby strengthening a democracy based on the rule of law.

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<sup>141</sup> Kryvoruchko O., "The principle of legal certainty in the jurisprudence of the Constitutional Court of Ukraine", *Baltic Journal of Law & Politics*, 14(1), 2021, p. 85-103.

<sup>142</sup> Zazuliak M., "The Principle of Legal Certainty in the Constitutional Jurisprudence of Ukraine", *Ukrainian Journal of Constitutional Law*, 34(3), 2018, p. 62-74.

<sup>143</sup> Shemshuchenko, Y., "The Constitutional Court of Ukraine and the Principle of Legal Certainty: Between a Hammer and a Hard Place", *East European Politics*, 36(2), 2020, p. 242-260.

## RECOMMENDATIONS

In this part of the Master's thesis, the author makes a number of practical recommendations to the Constitutional Court of Ukraine with a view to stabilising and unifying its jurisprudence on the application of the principle of legal certainty.

1. One of the main ways to address the problematic aspects of the application of the principle of legal certainty is to increase transparency. The Constitutional Court of Ukraine should ensure that its decisions and reasons are understandable and accessible to the public. The Court should publish its decisions promptly, with searchable online access. In the author's opinion, the official website of the Constitutional Court of Ukraine is currently in need of significant improvement, in particular the part dealing with the search for decisions, opinions, rulings and resolutions of the Constitutional Court of Ukraine. At present, it is very difficult to access the necessary information because the procedure for searching for relevant documents is very complicated. At present, it is much easier to find the required documents of the Constitutional Court of Ukraine on the website of the Verkhovna Rada of Ukraine in the information search system "Legislation of Ukraine", but it contains not only the documents of the Constitutional Court of Ukraine, but also all the laws and regulations of Ukraine, which makes the search and, as a result, the access to justice much more difficult. A good example is the design of the official website of the Constitutional Court of Lithuania, where the process of searching for documents is much easier and faster<sup>144</sup>. Adequate organisation of the official website of the Constitutional Court of Ukraine will contribute to its accountability and increase confidence and access to justice for citizens and other interested parties.

2. Increased use of precedents by the Constitutional Court of Ukraine in applying the principle of legal certainty is the author's next recommendation. This refers to the consideration and application of international practice, namely the judgments of the European Court of Human Rights, the judgments of the Court of Justice of the European Union, as well as the judgments of constitutional courts of other states. The Court should make greater use of case law in its decisions in order to increase the coherence and consistency of its jurisprudence, to provide a broader perspective and to make its decisions more coherent<sup>145</sup>. This would help to ensure that the decisions of the Constitutional Court of Ukraine are consistent with international human rights

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<sup>144</sup> "Constitutional Court of the Republic of Lithuania", website, <https://lrkt.lt/en/court-acts/search/170/ta1915/content>

<sup>145</sup> Kucheriavenko O., "The Concept of Legal Certainty in Ukrainian Constitutional Law: the Role of the Constitutional Court", *Ukrainian Journal of Constitutional Law*, 34(2), 2018, p. 5-17.

standards and would provide greater certainty for those involved in legal relations and greater clarity and predictability for individuals and legal entities.

3. More active public consultation and participation in the decision-making process of the Constitutional Court of Ukraine could be beneficial. This could include seeking the views of relevant interested parties on the application of the principle of legal certainty in specific cases or in the case law of the Constitutional Court in general, including practising lawyers, scientists, academics, professors in relevant fields and civil society organisations. This will help to ensure that the Court's decisions are based on different points of view and take into account the interests of those affected by its decisions.

4. Last but not least, the Constitutional Court of Ukraine should improve the clarity and precision of the reasoning and arguments of its decisions. The Constitutional Court of Ukraine could improve the quality of its jurisprudence by providing clear guidelines and principles in its judgments. It could also provide more detailed analysis in its judgments to help interested parties understand the scope of the law and how it should be applied. This could include reconciling conflicting decisions, developing clear standards and guidelines for the interpretation of legal provisions, and providing more detailed guidance on the application of the principle of legal certainty in different contexts. This would help to avoid situations similar to the decision of the Constitutional Court of Ukraine in the case of the constitutional complaint of 47 Ukrainian MPs concerning the conformity of certain provisions of the Ukrainian Law "On Prevention of Corruption" and the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality), No. 13-r/2020 of 7 October 2020<sup>146</sup>. The Court's controversial decision to strike down a law requiring high-ranking officials to declare their assets was widely criticised at the time. The decision raised concerns about the Court's independence and impartiality and was seen as a setback in Ukraine's fight against corruption. Within a year, however, the court reversed its decision and reintroduced the asset declaration law, which was seen as a positive step towards ensuring legal certainty and the rule of law. In such a case, it is crucial for the rule of law that the court clearly explains and justifies the reasons and the need to change and reinterpret the decision.

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<sup>146</sup> Constitutional Court of Ukraine, Decision in the case on the constitutional petition of 47 deputies of Ukraine on the compliance of certain provisions of the Law of Ukraine "On Prevention of Corruption", Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality), No. 13-r/2020, 27 October 2020, <https://zakon.rada.gov.ua/laws/show/v013p710-20#Text>.

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## ABSTRACT

This master's thesis is a comprehensive analysis of the principle of legal certainty and its application in the practice of the Constitutional Court of Ukraine. The purpose of the research is to study the historical development of this principle from antiquity to the present, to analyse its key elements, to study the domestic and European judicial practice in the application of this principle.

As a result of the detailed study of the issue, the author has identified the main disadvantages in the judicial practice in Ukraine related to the uncertain application of this principle and has made recommendations for the elimination of theoretical and practical obstacles in the process of proper application of this principle by the Constitutional Court of Ukraine.

This research will help to improve judicial practice and provide greater legal certainty for citizens, which is essential for building a strong and stable democracy based on the rule of law. This thesis is a valuable contribution to the field of legal regulation of public administration and human rights with a focus on the Constitutional Court of Ukraine.

**Keywords:** legal certainty, constitutional law, Constitutional Court of Ukraine, rule of law, judicial practice.

## SUMMARY

The author of this thesis has conducted a thorough analysis of the principle of legal certainty and its application in the context of the Constitutional Court of Ukraine. The thesis provides a detailed overview of the theoretical background, historical development and practical implications of legal certainty as a component of the rule of law.

The author identifies several problematic aspects in the application of legal certainty by the Constitutional Court of Ukraine, including the slow pace of legal reform, lack of consistency in jurisprudence and insufficient protection of human rights. The thesis offers practical recommendations to address these challenges and improve the implementation of the principles of legal certainty in Ukraine.

The author's recommendations include strengthening the independence of the judiciary, increasing transparency and accountability in decision-making processes, promoting public participation in legal proceedings, and improving access to justice for all citizens. The author also suggests that Ukraine should adopt international best practices and standards to ensure effective implementation of the principles of legal certainty.

Overall, this master thesis is a valuable contribution to the field of public administration and human rights law. It provides a comprehensive analysis of the principles of legal certainty and their application in the constitutional court system of Ukraine. The thesis offers practical recommendations that can help strengthen democracy based on the rule of law and protect the human rights of all citizens.