Social Policy & Society (2024) 23:3, 687–702
 doi:10.1017/S1474746422000446

Security, Social Policy, Agency and Work of the Courts in Relation to Ukrainian Internally Displaced Persons

Kateryna Krakhmalova

Centre of Migration Research, University of Warsaw, Warsaw, Poland
Email: k.krakhmalova@uw.edu.pl

The following article is dedicated to the empirical case study from Ukraine and focuses on the work of Ukrainian courts resolving the cases of internally displaced persons in the realm of social policy. Based on interviews and secondary sources in terms of data, it explains the problem area of the legal regulations and administrative practices applicable to internally displaced Ukrainians in the sphere of social rights, and it analyses selected decisions of the courts in the cases brought by them, including the courts' approaches, motivations and limitations, all while doing so from the combined perspective of security, law and internal migrants' agency.

Keywords: Ukraine, internally displaced persons, agency, securitisation, desecuritisation.

Introduction

Update: This article was prepared based on the materials and situation before 24 February 2022. On 24 February 2022, the Russian Federation launched a full-scale war against Ukraine, forcing every third Ukrainian to flee his or her home (UNHCR, 2022). Their agency and resilience, as well as social policy towards them, will be studied when the aggression ends and this article portraying the situation just before the full-scale war will potentially serve as an important base for the future comparative studies.

This article presents an empirical case study about internally displaced persons in Ukraine and selected state practices in the field of social policy in relation to them, in light of the theoretical concepts of agency (understood as capacity to act), securitisation and desecuritisation. The choice of a case study is based on the fact that current internal displacement in Ukraine is one of the most massive – yet one of the most underreported – in the world (see CARE, 2020). This internal displacement is also a war-induced one, which raises a number of complex dilemmas related to the mechanisms of ensuring social protection for those affected in terms of both their human rights and security. It also allows us to see examples of how state practices imposed by legislation controlling or limiting internally displaced persons (IDPs) can be challenged in the courts, the ways in which the courts react and the arguments being used.

In structural terms, the article consists of six sections: (1) this introduction, which is followed by (2) the background for the empirical case study section, (3) the literature

review and theoretical framework section, (4) the section on the data and methods used, (5) the main research findings and discussion and (6) the conclusions.

Background for the empirical case study: internal displacement in Ukraine

On 20 February 2014, the Russian Federation started military aggression against Ukraine, which has been ongoing for eight years now, claiming more than 13,000 lives and displacing another 1,5 million, resulting in the occupation of Crimea in the south of Ukraine and parts of the Donbas region in the east and transforming the geopolitics of Europe (MFA, 2021).

While aggression itself is not the main subject matter of this article, it is important as a background and factor that influences the design of social policy in Ukraine. Of particular relevance is the fact that the war is hybrid and is thus conducted with both traditional and non-traditional means, has different stages – some more active and others more latent – and targets not only military objectives but also social cohesion and the flow of information (in the wider context, see European Parliament, 2016; Vasylenko *et al*., 2020; Zarembo and Solodkyy, 2021).

War-induced internal displacement in Ukraine, in addition to currently being one of the world's largest, is also peculiar in terms of its sociodemographic characteristics: according to the Ministry of Social Policy of Ukraine's database of registered internally displaced persons, analysed by the UNHCR, out of approximately 1,5 million IDPs in Ukraine, 50 per cent are pensioners, 14 per cent are children and approximately 59 per cent are women (UNHCR, 2020). While bearing in mind the difficulties in collecting reliable statistical information on this displacement (also due to the specificity of certain legislative provisions, discussed in detail in Section 5), the cited numbers indicate that for a large share of Ukrainian IDPs, their vulnerability, stemming from the fact of being displaced, may be additionally exacerbated by their age and gender characteristics. This makes the issue of the social payments for them even more crucial.

Literature review and theoretical framework

A study undertaken by an international group of scholars in 2017-8 on the needs of Ukrainian IDPs, which also took into account legislative developments related to their status, highlighted the risks of their marginalisation and social exclusion that had to be addressed (Kuznetsova *et al.,* 2018: 4). Otherwise, they could negatively affect the IDPs' agency and security in their human dimension (Monastyrskyi, 2021: 31).

While understandings of the term "social exclusion" vary and there are multiple aspects that can be taken into account, including the mechanisms that may cause it and the actors that counteract it (Khan, 2012: 4), this article focuses particularly on the legal mechanisms and the role of the courts in this regard. As such, it joins the wider debate on the limits of social change in the work of the courts and whether such change first occurs in society and the courts' decisions subsequently reflect it, or rather the courts' decisions pave the way for social change. Taking into account the limitations that the courts face even in common law countries such as those described in the literature, e.g. Australia or

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

the United States, where the place of the judiciary is more prominent (see, for example, Sackville, 2005; Rosenberg, 2008; Neier, 2012), one would expect the courts in Ukraine, a civil law country (where statutes are the main source of law), to be even more restrained, especially considering that limitations on the IDPs' rights are done in the name of national security. However, as examples in the empirical Section 5 show, this is not the case. To explore why, this article examines different aspects of the interrelationship between migrant agency and security as reflected in the law.

Agency in this article is understood in accordance with L. Näre's, L. Hunt's and V. Squire's works as 'capacity and capability to act' (Hunt, 2008; Näre, 2014: 225, 229), which is terms of its outcomes may constitute an 'act' (successful change because of agency being exercised) or an 'intervention' (without such change) (Squire, 2017: 265–8).

Migrant agency as a capacity to act is viewed here in relation to the state practices of securitisation in the sphere of social policy (understood as both relating to the design of the system of social payments to the IDPs and the realisation of these payments). Securitisation is defined as 'the process whereby an issue is moved from normal politics into the realm of security politics, … where the issue in question is dealt with by using security measures,' and desecuritisation is defined as the 'unmaking of securitisation, … termination of security language and security measures' (Floyd, 2019: xvi–ii).

It is also worth noting that, according to T. Balzacq, securitisation is rather a concept elaborated on by several theories and may have different features in particular cases (Balzacq, 2015). Agency in the current context is viewed in terms of resistance to securitising practices and measures. The sphere in which the resistance in this case study takes place is that of the law, serving as an instrument of securitisation and being challenged by IDPs in the courts.

Among the numerous ways to approach the law, agency and security nexus, this article was inspired by D. Cole (2004), A. W. Neal (2012), E. Guild (2014) and S. Scheel (2020), with particular reference to Neal in terms of the concept of executive deterrence and the limited role of the judiciary in the context of the laws adopted in the face of security threats. First, due to the specificity of time, their adoption is expected by the public to be fast, while 'unmaking' by the courts due to, *inter alia,* unconstitutionality, violating the higher laws in the hierarchy, occurs slowly (Neal, 2012). Second, the judiciary is not even with the executive branch in accessing (and assessing) security-related knowledge (which is true for both national and international courts) (Neal, 2012). Guild in particular has written on such knowledge being unable to be tested in the courtroom in the same way as other claims (Guild, 2014). Cole emphasises an understanding of the importance of judicial review of the actions of the executive branch in times of crisis and in relation to the limitations of individuals' rights, which usually apply to the most vulnerable (Cole, 2004). Finally, Scheel points out the difficulty of challenging security knowledge from the 'outside' (Scheel, 2020), potentially indicating the unlikelihood of IDPs being able to mount a successful challenge to the unfavourable legal provisions in the courts. Nevertheless, he also shows the potential for change and desecuritisation in his study, in which the visa applicants subjected to security practices resorted to coping strategies, and security professionals employed the 'trickster narrative' in relation to them, but the resulting 'culture of suspicion' was uncomfortable for both sides (Scheel, 2020: 14–22).

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

The agency of Ukrainian IDPs in resolving social issues has already formed the subject of empirical research in a survey report from 138 NGO representatives combatting the social consequences of forced displacement in Ukraine (Kuznetsova and Mikheieva, 2018). One of the recent issues of the Europe-Asia Studies journal was dedicated to the internal displacement and war in Ukraine (*Europe-Asia Studies*, 72, 3, in particular Bulakh, 2020; Rimpiläinen, 2020; Sasse, 2020). However, in both of these examples, the legal point of view was absent. On the other hand, there has been a separate project of the Council of Europe in Ukraine, focusing in its publications also on the legal issues and/or agency of IDPs (CoE, 2021a), or separate legal publications on social policy matters (see, e.g. Venher, 2018) that did not combine legal and security perspectives.

Therefore, it is this article's intent to bridge this gap and to look at Ukrainian social policy towards its IDPs through the combined lenses of migrant agency, security and law. In doing so, it will also rely on two publications that do not focus on Ukraine but nonetheless provide useful concepts for analysing agency in law: the concept of shifting legislative frames used by J. Lemaitre and K. Bergtora Sandvik in relation to the legal mobilisation of internally displaced women in Colombia (Lemaitre and Bergtora Sandvik, 2015) and the humanitarian and case file logic of the courts set out by A. Kubal in relation to external migrants' experiences in Russian courts (Kubal, 2018).

Data and methods used

This article made use of both primary and secondary data gathered throughout a research project exploring the securitisation and desecuritisation of migration and migrant agency in Ukraine (and another part of the project in Poland) in 2019-21. This was done to identify the administrative practices in the sphere of social policy in relation to internally displaced persons in Ukraine, to see how they are challenged in the courts and to explore whether and how the security considerations limit the outcomes.

The secondary data collected and analysed during the desktop research stage involved academic publications, legal and policy documents, and media articles on the subject of mass internal displacement in Ukraine from 2014 until 2021. After understanding the wider context, the analysis of secondary data was narrowed down to explore the key legal challenges facing IDPs, prominent examples of which relating to social policy are analysed in the next section.

The primary data included a series of qualitative in-depth interviews conducted with experts and IDPs in Ukraine from February 2020 to January 2021, from which the ten most relevant interviews were selected. They served as an important supplementary source for understanding the nuances of these policies from both sides – those who design or implement them and those whom they directly affect.

The list of interviews is provided in the Annex, with two specific points of note:

1. The interviews with respondents in Ukraine were conducted, per the interviewee's preference, in Ukrainian or Russian. None of them contains the exact equivalent of the term 'agency'; therefore, a descriptive definition had to be used.
2. The characteristic of being an internally displaced person is a protected one under Ukrainian law (e.g. Parliament of Ukraine, 2014: Art. 14) and could not have been disclosed if the respondent did not wish to do so. Thus, the invitations for the

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

interviews were addressed to those who had already publicly identified themselves as IDPs and/or had become known through other members of the IDP community, organisations or networks with the help of referrals. The design of the project focused on people who, in the words of C. Mainwaring, have 'more agency' – even though it is hardly 'measurable' (Mainwaring, 2016: 291). The status of being an IDP, expert and/or official sometimes overlapped, i.e. some of the interviewees were both IDPs and experts or IDPs and officials. In such cases (and because being an IDP is a protected characteristic in Ukrainian law), the interview was classified according to the preferred role in which the person spoke, respecting his or her wishes.

Social policy in relation to IDPs in Ukraine and their agency: resisting limits and the limits of resistance

Regulations and state practices in relation to IDPs' social payments

According to Ukrainian legislation, there are two types of social payments that internally displaced persons receive: pensions and social assistance payments, which differ in their legal nature. While pensions are protected at the level of a constitutional right, social assistance payments are the obligations of the state over which it has discretion to foresee conditions (Venher, 2018: 103). Nevertheless, both types of payments were joined in legislation, and a number of 'qualifications' were introduced in order for IDPs to receive them (the use of 'qualifications' in this article is based on analysis of legislation and a number of scholarly materials, including Krakhmalova, 2017, 2019; Venher, 2018; Bulakh, 2020 and the project's interviews). Such 'qualifications' relate to four dimensions:

1. the person qualified to receive them should have official IDP status/registration;
2. the place where both the official status and payment may be obtained must be within government-controlled territory;
3. a time limit, during which a person may be absent from government-controlled territory without forfeiting IDP status;
4. state control measures, i.e. verifications and potential suspensions of payments.

Internally displaced persons, in order to receive social payments in Ukraine, have to officially register as such and receive the IDP certificate (Parliament of Ukraine, 2014: Art. 4). While this requirement allows the state to gather statistics and form respective policies, it has also been criticised for imposing an additional administrative burden on IDP pensioners, who should be eligible for their pensions due to meeting the general requirements for them and being citizens of Ukraine. It also arguably pushes those people affected by the conflict, who probably otherwise would not apply for the official IDP status, to register and potentially become targets of the 'genuine' and 'fake' IDPs discourses (see, e.g. Rimpiläinen, 2020).

The registration requirement is connected with the second dimension, the movement and space 'qualification'. As a result of the aggression against Ukraine and the occupation of two areas (parts of Donbas in the east and Crimea in the south), these areas are temporarily not under government control. While it is possible to move between the government-controlled and nongovernment-controlled areas (GCA and NGCA) through checkpoints on the so-called 'contact' or 'separation' line in the east and the 'administrative border' with occupied Crimea in the south, this movement is subject to regulations

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

and restrictions (CMU, 2015 on checkpoints with Crimea; and CMU, 2019 on checkpoints with temporarily occupied areas of Donbas). This is also the movement to or from the hostilities zone (in spite of the ceasefire agreements, security incidents from the Russian side are regularly reported – see, e.g. OSCE, 2021), and it poses potential danger to life and health (see OCHA, 2019: 9). While reasons for the movements between the GCA and NGCA are various, including care provision for family members, maintaining property there or deciding to return, the legislative provision that the IDP status may be officially obtained only on government-controlled territory of Ukraine, and access to state social protection is possible only there, creates an additional incentive to move.

The time, i.e. for how long the person may be outside the government-controlled territory of Ukraine without losing the official status of an IDP (and consequently access to social payments), is limited. It is necessary to inform the local authorities about any absence from the place of living in government-controlled areas for more than sixty and up to ninety days (according to Parliament of Ukraine, 2014: Art. 12, Part 1).

While the set of three qualifications above is concerned with limitations that are more static in nature, there is also a fourth, which is dynamic in character. This is the possibility of subsequent verifications and checks (when social payments are already being disbursed) and their suspension. The procedure for this was introduced by the Cabinet of Ministers' Resolution in June 2016 (modified, but in force until now), foreseeing that all IDPs, in addition to military service members and government and local self-government employees, are subject to verifications of their actual place and conditions of living and/or physical identification in the state bank 'Oschadbank'. Verifications may result in appointing (renewing) social payments to them, refusal to appoint (or renew), or withdrawal of the IDP certificate (CMU, 2016). While in general the right of the state to control and verify to whom social payments are being disbursed is not in dispute even among the IDPs themselves (Interview 1), the manner in which it was applied to them was problematic and concerning in terms of its intrusion into personal and family life, freedom of movement and a number of other legal problems (as established by courts' decisions analysed below). Additionally, the Ukrainian case is complex, because those limitations were imposed during the war, and national security considerations are usually a legitimate aim for human rights restrictions (see, for example, Council of Europe, 2021b [1950]: Art. 8). War-related security rationales for social payments restrictions were presented, for example, by Interviewee 2, explaining the need of the state to know whether, in the occupied territories, all recipients of the payments were alive and that the social payments money was used in accordance with its purpose. At the same time, in Interview 3, a direct connection with security was denied, stating that "(...) procedure of controlling [social] payments is state-wide, regulated by the laws, and for the internally displaced there are additional legal acts, because the social and pension payments are dependent on and 'tied' to the IDP certificate (...)" (however, the Interviewee did not explain why they were 'tied' or why those additional legal acts for the IDPs were adopted in the first place). Interviewees 4 and 5 also spoke of economic reasons. As Interviewee 5 put it, "(...) IDP [issue] is something on what money clearly can be saved on", as it would not cause a big social uproar, while explaining why the discontinued IDPs payments were not repaid faster.

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

The connection of security and social policy may be illustrated by the sequence of events, leading up to the adoption of verifications and checks in their most restrictive form in 2016 (this particular point most frequently appeared in the interviews and analysed materials).

In February 2016, the Security Service of Ukraine gave a public presentation about criminal cases being opened for fraud in social payments, where internally displaced persons were being used, with money diverted for the financing of unlawful armed groups in NGCAs (SSU, 2016). The then-Minister of Social Policy, on at least two occasions, confirmed that the Ministry had for several months been working with the SSU to fight fraudulent schemes and embezzlement of the state budget and had suspended social payments to more than 150 thousand people (Rozenko *et al.*, 2016, interview and Rozenko, 2016, a public Facebook post). The Ministry issued a letter to local social protection divisions on strengthening the controls regarding IDP registration, asking to 'properly react' to information regarding the actual place of living 'coming from the Ministry of Internal Affairs, National Police, SSU, Border Guard Service and alike,' and to temporarily halt social payments to persons living outside the place where the payments were being received until it was confirmed that person actually resided in that place (MSP, 2016; NGOs and Initiatives, 2016). Subsequently, in the summer of 2016, the Cabinet of Ministers of Ukraine introduced the above system of controls over IDPs' place of residence by enacting *CMU Resolution No. 365*, which in practice has caused the stoppage of social payments for a significant portion of displaced people (although the exact numbers are not known, 2,5 million applications for assignment or renewal were subsequently made; see the governmental report on ICESCR, Government of Ukraine, 2019: 3, 4).

State practices of strengthened controls (here in the sphere of social payments), applied to IDPs in Ukraine as a group, have already been named in terms of securitisation, in particular by T. Bulakh, who has also described IDPs' reactions to such practices in the categories of withdrawal and rejection (Bulakh, 2020: 471, 474–5). However, this article regards such an approach as incomplete, since it misses examples of internally displaced persons' active challenging of such practices. The realm in which contestation and resistance take place was indicated in Paragraph 19 of *Resolution No. 365* itself, stating that all disputes arising from it are to be resolved in the courts.

Actions taken by IDPs in the legal sphere and their analysis and outcome

There have been at least three different legal strategies employed by IDPs in protecting their social payment rights during the imposition of the limitations, and three examples of cases for each of them are analysed below. The cases have been chosen on the basis of the author's review for being decisive in terms of their legal essence, consequences, prominence and publicity level. Additionally, there is prior research that states that the higher the level is, 'the more likely a judicial decision will be determinative, and ... the more pressure judges may feel to uphold the governments' actions' (Cole, 2004: 2582). Therefore, examining the decisions of higher courts has been especially interesting.

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

The first legal strategy

This was challenging the validity of the bylaws imposing limitations in relation to social payments for IDPs in the administrative courts.

An example of this can be found in the decision of the Kyiv Administrative Court of Appeal (2018) in case No. 826/12123/16 from July 2018, in which the appellate court upheld the decision of the court of the first instance in favour of an IDP claimant against the Cabinet of Ministers of Ukraine. The claimant in the case asked to declare invalid (in full or part) three Cabinet of Ministers bylaws[1] related to the (1) checks of the IDPs' place of living/residence and (2) physical identification at the bank that IDPs had to undergo to receive social payments (including pensions). Both of these procedures were additionally introduced only for the IDPs. In relation to the first part of the claim, the problem stemmed from the fact that those bylaws added new grounds for termination of (or refusal to renew) pension payments for the IDPs not foreseen in the Pension Law (Parliament of Ukraine, 2003) by the entity not foreseen in it either (Commission for Appointing (Renewing) Social Payments to the IDPs instead of the territorial branch of the Pension Fund of Ukraine). The court has also examined the case from the human rights perspective and concluded that checks of the IDPs' place of living violated the constitutional guarantee of freedom of movement and equality and led to indirect discrimination towards the IDPs (as pensioners and other social payment recipients, who were not IDPs, were not subjected to such checks). The aim the state tried to reach was achieved by means that were not proportional, and the balance between the societal interests and individual rights according to the jurisprudence of the ECtHR (in particular, the Trosin v. Ukraine case) was not kept. However, in relation to the second part of the claim – the requirement of physical identification of the IDP clients of the bank – it was found to be in accordance with the legislation and left in force (Kyiv Administrative Court of Appeal, 2018, case No. 826/12123/16, 2018).

Here, we do not see an example of deterrence to the executive but rather the opposite: the judicial branch at least partially invalidating something done by the executive. However, even when the decision comes into force, the victory is not final. As a lawyer–interviewee stated in one of the interviews, this was more akin to a merry-go-round situation: the court invalidates the bylaw, the executive branch creates another one, and that is valid until it is challenged and invalidated once again:

> . . . the main problem here is that when we reach the level of the appellate court, the norm is changed by the Cabinet of Ministers, which places it in the other legal act . . . and in this way we have to start the process from the very beginning . . . And this is the . . . circle that we had. (Interview 4).

This example illustrates two theoretical observations on the topic. One is from A. W. Neal, about the difference in the timing of legislation adopted under security concerns, speedy in adoption but slow to change (Neal, 2012). Another is the concept of 'shifting frames', meaning '. . . instability of both laws and their normative references in violent contexts,' as set out by J. Lemaitre and K. Bergtora Sandvik in describing the legal mobilisation among displaced Colombian women in their adaptation and/or resistance to

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

changing legal frameworks (Lemaitre and Bergtora Sandvik, 2015: 10, 11, 21). The difference between the Colombian context and that in Ukraine is that while the displacement in Ukraine is also caused by war/violence, the majority of its territory – where IDPs defend their rights before the courts – is under government control and secure.

The second legal strategy

This was the potentiality of the case to reach the Supreme Court of Ukraine and be recognised as an exemplar. On 3 May 2018, the Supreme Court of Ukraine delivered a decision in such an individual exemplar case (meaning that there were more cases to be resolved similarly). The applicant in it was a pensioner who became internally displaced and registered as such within the government-controlled territory of Ukraine. After receiving information from the State Security Service of Ukraine that the applicant did not reside in the government-controlled territory, the Pension Fund (according to the relevant Cabinet of Ministers resolutions) temporarily suspended payment of the pension until the issue could be clarified. The applicant sued the Pension Fund, seeking to renew the payment, and won the case. The Supreme Court approached this legal problem from three angles:

1. Right to pension is connected with the obligation of the state towards its citizens, who have gained this right. Therefore, it may be terminated only according to the exhaustive list of grounds foreseen in the law. In this case, grounds for suspension of the payment were foreseen in the Cabinet of Minister's act (bylaw) – not in the law. The Cabinet of Ministers should have neither encroached in something reserved to be exclusively regulated by the laws and the Parliament of Ukraine nor contradicted it.
2. There are decisions of both the Constitutional Court of Ukraine and the European Court of Human Rights (ECtHR), for example, in the Pichkur v. Ukraine case, in which payment of the pension shall not be conditional on the person's place of living due to freedom of movement and antidiscrimination concerns.
3. The termination of social payments may also constitute interference with the right to property in the meaning of Art. 1 of Protocol 1 of the ECHR, and in this case, it was not done in accordance with the law (as explained in the first argument).

Resolution of the Pension Fund regarding the suspended pension of the applicant was cancelled as unlawful, payments of the pension had to be renewed, and the Pension Fund had to report compliance with the Court's final decision within a month. The case was exemplary, as 226 other typical cases had already been submitted to the (other) court (Supreme Court of Ukraine, decision in the case No. 805/402/18, 2018).

This decision has opened a way forward for IDPs in similar situations. Nevertheless, its impact must be evaluated while also considering the length of the judicial process, the resources necessary for it (including in terms of legal representation), the execution of the decisions and various potential obstacles thereto.

At the same time, this legal strategy leaves much less room for manoeuvring in terms of its execution, as it is more tailored to a particular individual case, yet the victory of one claimant in the exemplar case does in some way represent a victory for the group of IDPs as a whole.

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

The third legal strategy

This was to address the issue of social payments framed in terms of the European Convention of Human Rights, to which Ukraine is a party, before the ECtHR. There is an example of such a claim, which also stands aside from the usual Court's practice because the state involved in it won against IDPs: the case of Tsezar and Others v. Ukraine (ECtHR, 2018; as a commentary to it, see Krakhmalova, 2020b). While the decision did not become final until July 2018, the claims of the seven IDP applicants (framed in terms of access to court in Ukraine, right to property, discrimination and decreased standard of living) were submitted in 2014-5 and resulted in the inadmissibility of three claims and no violation being found in relation to the access to the court part of the claim (ECtHR, 2018). The applicants asked to evaluate the solutions adopted by Ukrainian authorities in terms of ensuring rights in conditions of hostilities, and the ECtHR referenced the margin of appreciation concept (ECtHR, 2018). The idea that the state is better suited than an international (or regional) court to fully evaluate and assess such things on the ground reflects here the theoretical conclusions of E. Guild and A. W. Neal on the challenge that courts face when asked to evaluate the limitations imposed for security reasons, which they have restricted capacity to assess and which take place in the context of 'reactive' legislation that is adopted in response to security threats (Neal, 2012; Guild, 2014).

In terms of the security considerations limiting the agency's outcomes, the three examples above are different at the level of national courts (where the IDPs won, with the courts not showing any deterrence to the executive in the given cases, although there is still the need to execute the decision after it has been delivered) and the ECtHR (where the restricted possibility of the international court to inquire into a situation is connected with the margin of appreciation concept). Therefore, in the case of internal displacement, security considerations do not always limit the outcome of IDP agency in court.

Unlike the Russian court in A. Kubal's research on the external migrants' cases, Ukrainian courts applied what she calls 'the humanitarian logic' instead of the 'case file logic', raising human rights considerations and relying on international instruments, thus enhancing the claimants' possibility of success (Kubal, 2018: 92, 93).

In terms of the factors influencing the outcomes of Ukrainian IDPs' agency and potential future developments, there are also a few other additional important considerations.

First, the issue of social payments to Ukrainian IDPs has received attention at the UN level, with reporting on the International Covenant on Economic, Social and Cultural Rights, to which Ukraine is a party (OHCHR, 2021). From this source, we know of approximately 2,5 million applications, submitted in June 2016-July 2019 for the assignment (or renewal) of social benefits (which indicates that some people likely submitted multiple applications), with slightly more than 85 per cent of decisions made being positive ones and approximately 15 per cent (including on pensions) being negative (Government of Ukraine, 2019: 3, 4). Consequently, more than 85 per cent of IDPs got their payments back via the governmental/administrative procedure, leaving approximately 15 per cent of the cases for resolution by other means, including judicial means.

Second, several important developments from both the executive and legislative branches were subsequently made. The Cabinet of Ministers of Ukraine declared the possibility of paying for the period in which social payments were stopped, and relevant

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

procedures were adopted in November 2021 (CMU, 2018: Par. 2 Sec. 1 and Par. 2 Sec. 2; CMU, 2021). It was also permitted for social payments to be disbursed by any bank carrying out operations within government-controlled areas (CMU, 2017) (previously, only one bank was allowed to maintain greater control over the process). At least two Ukrainian COVID-related laws took into account closures of the checkpoints and envisaged that all social payments appointed to IDPs prior to the pandemic should continue to be paid (for the time of quarantine, during COVID-related limitations and thirty days after their lifting) even without identification and verification (Parliament of Ukraine, 2020a: Par. 3 of the Final Provisions; Parliament of Ukraine, 2020b: Par. 4, Final and Transitory Provisions; see also Krakhmalova, 2020a).

The last consideration comes from the interviews and relates to the ability of state officials to closely relate to the plight of IDPs. There are IDPs who are claimants and who are judges or policy-makers. For example, in one of the ministries engaged in drafting IDP policies, it was noted that many people working there were indeed internally displaced persons themselves. As one interviewee explained, '. . . because these are very important issues for them. They choose the job in order to resolve the problems, which they know from their own experience' (Interview 3). Even though at times there were particular examples of IDPs' agency being assessed as 'inflated' (Interview 6) or counterproductive (Interview 7), in general, both as a matter of good will and legislative requirements, during the interviews in Ukraine, examples were cited of state cooperation with IDP organisations, empathy in the case of unfortunate solutions adopted and planned liberalising steps in the policy regarded as a work in progress (Interviews 3, 5, 8, 9). This may be an additional factor behind Ukrainian courts deciding cases differently and may create further room for desecuritisation, as hoped for in S. Scheele's findings.

While the war in Ukraine remains ongoing and the situation of its internally displaced persons difficult, with verifications and checks in the social sphere possibly restricting their agency in other spheres, including electoral rights (Interviewee 10), a new Electoral Code that lifts the limitations not only for IDPs but also for other voters in a similar situation recently was adopted in Ukraine, thanks to a great deal of effort on the part of IDPs (Interview 1). Although the nature of these limitations, the sphere in which they apply and the actions required to lift them differ, they may serve as an inspiring example of change.

Conclusions

The present article has focused on the regulations applicable to Ukrainian internally displaced persons in the sphere of social rights, selected court cases involving IDPs challenging the restrictive legal provisions imposed upon them, and the work of the courts, including their motivations and limitations (looked at from the combined perspective of security, law and internal migrants' agency).

It has brought into the debate the limits of courts' work in terms of the social change perspective of a civil law country – Ukraine, in an empirical case study in which three examples of cases (two national cases, in the Appellate Court and the Supreme Court, and one international case, in the ECtHR) were analysed. These cases provide illustrations of three different legal strategies that could have been employed to ascertain whether and to what extent security considerations would limit the possibility of a successful outcome for

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

the IDPs in the courts. In the two national examples, despite the restricted possibility of the judiciary to evaluate the security matters concerned, the courts overcame possible deterrence by the executive and decided the cases in favour of IDPs while applying humanitarian logic and human rights arguments. Among the possible contributing factors identified were: the ability of the decision-makers to more deeply relate to the plight of internally displaced people (as may not have been true in the case of the external migrants); international attention devoted to the matter; temporary COVID-related liberalisation; and the recent victory of IDPs in terms of their electoral rights, indicating latitude for some partial desecuritisation, to the extent possible in light of the conflict that remains ongoing.

Acknowledgements

This research has received contribution from the project funded by the National Science Centre, Poland, "Securitisation (de-securitisation) of migration on the example of Ukrainian migration to Poland and internal migration in Ukraine" (Project nr 2018/31/B/HS5/01607).

The empirical examples given here and the securitisation-desecuritisation concept in relation to Ukraine were discussed at the presentation at the European Consortium of Political Research (ECPR) General Conference in August 2020, and the draft of this article was presented at the internal seminar at the University of Warsaw's Centre of Migration Research in June 2021.

I would like also to thank all of my interviewees for sharing their knowledge and experiences, my colleagues for their comments (in particular, colleagues from the Project, as well as Dr Marta Kindler, Prof. Dr hab. Pawel Kaczmarczyk and Dr hab. Magdalena Lesinska from the Centre of Migration Research) and the anonymous reviewers for their work.

Note

1 In particular, Sec. 7, 8, 9 and 13 of the Order of Appointment (Renewal) of Social Payments to IDPs and the Order of Control of Realization of Social Payments to IDPs in Their Place of Factual Residence (both approved by the *CMU Resolution No. 365*, dated 8 June 2016), alongside Sec. 6, 7 and 8 of the CMU Resolution 'On Realization of Social Payments to IDPs', No. 637 dated 5 November 2014.

References

Balzacq, T. (2015) 'The 'essence' of securitization: theory, ideal type, and a sociological science of security', *International Relations*, 29, 1, 103–13.

Bulakh, T. (2020) 'Entangled in social safety nets: administrative responses to and lived experiences of internally displaced persons in Ukraine', *Europe-Asia Studies*, 72, 3, 455–80.

Cabinet of Ministers of Ukraine (CMU) (2015) *Resolution 367: On Approving the Procedure of Entrance into the Temporarily Occupied Territory of Ukraine and Exit from It*, 4 June 2015, https://zakon.rada.gov.ua/laws/show/367-2015-%D0%BF#Text [accessed 24.05.2021].

Cabinet of Ministers of Ukraine (CMU) (2016) *Resolution 365: Certain Aspects of Realization of Social Payments to the Internally Displaced Persons*, 8 June 2016, https://zakon.rada.gov.ua/laws/show/365-2016-%D0%BF [accessed on 10.03.2020].

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

Cabinet of Ministers of Ukraine (CMU) (2017) *Resolution 689: On Introduction of Changes to Some Resolutions of the Cabinet of Ministers of Ukraine*, dated 13 September 2017, https://zakon.rada.gov.ua/laws/show/689-2017-%D0%BF#Text [accessed 11.08.2020].

Cabinet of Ministers of Ukraine (CMU) (2018) *Resolution 335: On Introducing Changes to Resolution of Cabinet of Ministers of Ukraine No. 365, dated 8 June 2016*, 25 April 2018, https://zakon.rada.gov.ua/laws/show/335-2018-%D0%BF#n2 [accessed 23.03.2020].

Cabinet of Ministers of Ukraine (CMU) (2019) *Resolution 815: On Approving the Procedure of Entrance of the Persons, Movement of the Goods on the Temporarily Occupied Territories of Donetsk and Luhansk Regions and Exit of the Persons, Movement of the Goods from such Territories,* 17 July 2019, https://zakon.rada.gov.ua/laws/show/815-2019-%D0%BF#Text [accessed 24.05.2021].

Cabinet of Ministers of Ukraine (CMU) (2021) *Resolution 1165: On Approving the Procedure of Paying Pension (Monthly Lifelong Support) Not Paid Before the Month of Its Renewal to the Internally Displaced Persons and Persons Who Refused to Receive the Internally Displaced Person Certificate, Registered Place of Living and are Permanently Living on the Controlled by Ukraine Territory According to the Paragraph 1 Section 1 of the Law Of Ukraine "On Ensuring the Rights and Freedoms of the Internally Displaced Persons"*, 10 November 2021, https://zakon.rada.gov.ua/laws/show/1165-2021-%D0%BF#Text [accessed 22.11.2021].

CARE (2020) 'The 10 most under-reported humanitarian crises of 2020', https://www.care-international.org/news/press-releases/new-care-report-the-10-most-under-reported-humanitarian-crises-of-2020 [accessed 09.02.2021].

Cole, D. (2004) 'Judging the next emergency: judicial review and individual rights in terms of crisis', *Michigan Law Review*, 101, 8, 2565–94.

Council of Europe (CoE) (2021a) 'Internal displacement in Ukraine: building solutions', *Council of Europe Office in Ukraine*, https://www.coe.int/en/web/kyiv/idps2 [accessed 15.03.2021].

Council of Europe (CoE) (2021b [1950]) *European Convention on Human Rights*, The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, official text as amended by the Protocol No. 15 in force from 1 August 2021, https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 22.11.2021].

European Court of Human Rights (ECtHR) (2018) (Fourth Section Chamber) Judgement from 13 February 2018 (final 2 July 2018) in the case of *Tsezar and Others v. Ukraine* (applications Nos. 73590/14, 73593/14, 4635/15, 5200/15, 5206/15 and 7289/15), http://hudoc.echr.coe.int/eng?i=001-180845 [accessed 19.10.2020].

European Parliament (2016) 'Ukraine and the Minsk II agreement. On a frozen path to peace?', January briefing, https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573951/EPRS_BRI(2016)573951_EN.pdf [accessed 15.03.2021].

Floyd, R. (2019) *The Morality of Security. A Theory of Just Securitization*, Cambridge: Cambridge University Press.

Government of Ukraine (2019) *Seventh Periodic Report Submitted by Ukraine under Articles 16 and 17 of the Covenant*, Report on the International Covenant on Economic, Social and Cultural Rights (ICESCR), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUKR%2f7&Lang=en [accessed 10.03.2020].

Guild, E. (2014) 'Does European human rights law capture war on terror activity? On whose evidence?', *Nijmegen Migration Law Working Paper Series*, 2014/09, http://hdl.handle.net/2066/131818 [accessed 10.03.2021].

Hunt, L. (2008) 'Women asylum seekers and refugees: opportunities, constraints and the role of agency', *Social Policy and Society*, 7, 3, 281–92.

Khan, S. (2012) *Topic Guide on Social Exclusion*, University of Birmingham, International Development Department, The Governance and Social Development Research Centre.

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

Krakhmalova, K. (2017) 'Administrative-legal provision of status of the internally displaced persons in Ukraine', PhD dissertation, V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Kyiv.

Krakhmalova, K. (2019) 'Internally displaced persons in pursuit for access to justice: Ukraine', *International Migration*, 57, 5, 309–22.

Krakhmalova, K. (2020a) 'Coronavirus test for Ukraine: mobility restrictions, IDPs and social payments', *CMR Spotlight*, 12, 18, 12–5.

Krakhmalova, K. (2020b) '"Everything in their power": a gloss to the European Court of Human Rights' judgement in the case of Tsezar and Others v. Ukraine', *Opolskie Studia Administracyjno-Prawne*, 18, 4, 139–50.

Kubal, A. (2018) 'In search of justice. Migrants' experiences of appeal in the Moscow City Court', in M. Kurkchiyan and A. Kubal (eds.), *A Sociology of Justice in Russia*, Cambridge: Cambridge University Press, 92–117.

Kuznetsova, I. and Mikheieva, O. (2018) *NGO Representatives' View of the Social Consequences of Forced Displacement in Ukraine. On-line survey of experts on IDPs*, https://idpukraine.com/2018/05/16/results-of-survey-of-ngos-in-ukraine-working-with-internally-displaced-people/ [accessed 15.03.2021].

Kuznetsova, I., Mikheieva, O., Gulyieva, G., Dragneva, R. and Mykhnenko, V. (2018) *The Social Consequences of Population Displacement in Ukraine: The Risks of Marginalization and Social Exclusion,* Policy brief, https://zenodo.org/record/1217838#.WtBw3xiZOt8 [accessed 02.12.2021].

Kyiv Administrative Court of Appeal (2018) *Kyiv Court of Appeal Resolution of 4 July 2018*, 826/12123/16, Ukraine: Appeal Courts, 4 July 2018, https://youcontrol.com.ua/catalog/court-document/75172804/ [accessed 06.08.2020].

Lemaitre, J. and Bergtora Sandvik, K. (2015) 'Shifting frames, vanishing resources, and dangerous political opportunities: legal mobilization among displaced women in Colombia', *Law and Society Review*, 49, 1, 5–38.

Mainwaring, C. (2016) 'Migrant agency: negotiating borders and migration controls', *Migration Studies*, 4, 3, 289–308.

Ministry of Foreign Affairs of Ukraine (MFA) (2021) *Foreign Ministry Statement on Seven Years Since the Beginning of Russia's Armed Aggression Against Ukraine*, published on 19.02.2021, https://mfa.gov.ua/en/news/foreign-ministry-statement-seven-years-beginning-russias-armed-aggression-against-ukraine [accessed 11.03.2021].

Ministry of Social Policy of Ukraine (MSP) (2016) 'On strengthening control regarding the registration of the internally displaced persons', № 672/o/10-16/081, 16 February 2016, http://donbasssos.org/22022016_pravo/ [accessed on 10.03.2020].

Monastyrskyi, Y. (2021) '(Ne)vydymi: bezpeka marginalizovanych spilnot v Ukraini (VPO, LGBTQI+, Romy)' [(In)visible: security of the marginalized communities in Ukraine (IDPs, LGBTQI+, Roma)], in S. Bahlai, A. Bobrova, H. Herasym, Y. Kazdobina, B. Kormych, T. Maliarenko and Y. Monastyrskyi (authors), O. Mikheeva, S. Olijnyk (eds.) *Bezpeka lyidyny. Osoblyvosti i mozhlyvosti vprovadzhennia v Ukraini* [Human security. Particularities and possibilities of implementing it in Ukraine], Kyiv: Heinrich Boell Stiftung, 31–47.

Näre, L. (2014) 'Agency as capabilities: Ukrainian women's narratives of social change and mobility', *Women's Studies International Forum*, 47, part B, 223–31.

Neal, A. W. (2012) 'Terrorism, lawmaking, and democratic politics: legislators as security actors', *Terrorism and Political Violence*, 24, 3, 357–74.

Neier, A. (2012) *Only Judgement: The Limits of Litigation in Social Change*, New York: International Debate Education Association.

Non-Governmental Organisations (NGOs) and Initiatives (2016) 'Collective appeal regarding the information about mass cancellation of the internally displaced persons' certificates to the President of Ukraine, Parliamentary Ombudsman, Head of the Parliament of Ukraine, Head of the Parliamentary

Committee on Human Rights, National Minorities and Interethnic Relations, Heads of the Parliamentary Fractions, Prime-Minister of Ukraine, Minister of Social Policy of Ukraine, United Nations (UN) agencies in Ukraine, Council of Europe's Office in Ukraine, UN Human Rights Monitoring Mission in Ukraine, Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission', published 22 February 2016, https://www.donbasssos.org/22022016_pravo/ [accessed 02.03.2021].

Office of the High Commissioner for Human Rights (OHCHR) (2021) Ukraine, International Covenant on Economic, Social and Cultural Rights ratification status, *Status of Ratification Interactive Dashboard*, https://indicators.ohchr.org/ [accessed 25.05.2021].

Organization for Security and Cooperation in Europe (OSCE) (2021) *Daily and Spot Reports from the Special Monitoring Mission to Ukraine*, https://www.osce.org/ukraine-smm/reports [accessed 24.05.2021].

Parliament of Ukraine (2003) *On Mandatory State Pension Insurance*, Law No. 1058-IV, 9 July 2003, https://zakon.rada.gov.ua/laws/show/1058-15#Text [accessed 01.12.2021].

Parliament of Ukraine (2014) *On Ensuring the Rights and Freedoms of the Internally Displaced Persons*, Law No. 1706-VII, 20 October 2014, https://zakon.rada.gov.ua/laws/show/1706-18 [accessed 10.03.2020].

Parliament of Ukraine (2020a) *On Introducing Changes to Certain Legislative Acts of Ukraine, Aimed at Prevention of the Appearance and Spread of the Coronavirus Illness (COVID-19)*, Law No. 530-IX, 17 March 2020, https://zakon.rada.gov.ua/laws/show/530-20#Text [accessed 25.05.2021].

Parliament of Ukraine (2020b) *On Introducing Changes to Certain Legislative Acts of Ukraine, Aimed at Ensuring Additional Social and Economic Guarantees in Connection to Spread of the Coronavirus Illness (COVID-19)*, Law No. 540-IX, 30 March 2020, https://zakon.rada.gov.ua/laws/show/540-20#Text [accessed 25.05.2021].

Rimpiläinen, E. (2020) 'Victims, villains, or geopolitical tools? Representations of Donbas displacement in Ukrainian and Russian government media', *Europe-Asia Studies*, 72, 3, 481–504.

Rosenberg, G. N. (2008) *The Hollow Hope. Can Courts Bring About Social Change?*, Chicago: University of Chicago Press.

Rozenko, P. (2016) Public Facebook post on termination of social payments, 19 February, https://www.facebook.com/pavlo.rozenko/posts/1078163052246008 [accessed 15.06.2021].

Rozenko, P., Kotliar, A. and Samaieva, I. (2016) 'P. Rozenko: "We have avoided social revolts"', interview, *Dzerkalo tyzhnia. Ukraina*, 12 February, https://zn.ua/ukr/social_secutity/pavlo-rozenko-mi-uniknuli-socialnih-buntiv-_.html [accessed 15.06.2021].

Sackville, J. R. (2005) 'Courts and social change', *Federal Law Review*, 33, 3, 373–90.

Sasse, G. (2020) 'War and displacement: the case of Ukraine', *Europe-Asia Studies*, 72, 3, 347–53.

Scheel, S. (2020) 'Reconfiguring desecuritization: contesting expert knowledge in the securitization of migration', *Geopolitics*, DOI: doi.org/10.1080/14650045.2020.1774749.

Security Service of Ukraine (SSU) (2016) *Abuse in Realization of Social Payments for the Internally Displaced Persons from the Temporary Occupied Territories*, presentation, 25 February, https://www.slideshare.net/ServiceSsu/ss-58704527 [accessed 10.03.2020].

Squire, V. (2017) 'Unauthorised migration beyond structure/agency? Acts, interventions, effects', *Politics*, 37, 3, 254–72.

Supreme Court of Ukraine (2018) *Decision in case No. 805/402/18 (No. Пз/9901/20/18)*, dated 03.05.2018, https://supreme.court.gov.ua/supreme/inshe/zrazkovi_spravu/zr_rish_805_402_18 [accessed 06.08.2020].

United Nations High Commissioner for Refugees (UNHCR) (2020) 'Registration of internal displacement', based on the *Ministry of Social Policy of Ukraine Database* data as of 27 October 2020, IDP categories, interactive map, https://app.powerbi.com/view?r=eyJrIjoiY2RhMmExMjgtZWRlMS00YjcwLWI0MzktNmEwNDkwYzdmYTM0IiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 [accessed 15.03.2021].

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press

United Nations High Commissioner for Refugees (UNHCR) (2022) *Ukraine Situation: Flash Update No. 11*, 5 May, https://data2.unhcr.org/en/documents/details/92542 [accessed 08.05.2022].

United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (2019) *Ukraine: 2019 Humanitarian Response Plan (HRP)*, 31 January, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ukraine_2019_humanitarian_response_plan_en.pdf [accessed 20.10.2020].

Vasylenko, V., Kabakaiev, S., Aleksiieva, O. and Morozov, F. (2020) *Military Aggression of the Russian Federation Against Ukraine. Participation of the Military Forces of Russian Federation in Hostilities on the Territories of Donetsk and Luhansk Regions during March 2014–February 2015, Report of the NGO "Safety and Cooperation in Ukraine"*, https://ca-scu.org/sites/default/files/news_pdf/%D0%90%D0%B3%D1%80%D0%B5%D1%81%D1%96%D1%8F%20%D0%A0%D0%A4%20%D0%BF%D1%80%D0%BE%D1%82%D0%B8%20%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8.pdf [accessed 21.02.2021].

Venher, V. (2018) 'The right to the social protection of citizens in conditions of the armed conflict in Eastern Ukraine: legislative challenges', *Kyiv-Mohyla Law and Politics Journal*, 4, 99–118.

Zarembo, K. and Solodkyy, S. (2021) 'The evolution of Russian hybrid warfare: Ukraine', https://cepa.org/the-evolution-of-russian-hybrid-warfare-ukraine/ [accessed 19.02.2021].

Annex: List of the semi-structured in-depth interviews used

Interview 1: Civil society leader, online, September 2020.
Interview 2: Former governmental official, expert in social policy, Kyiv, September 2020.
Interview 3: Two governmental officials, experts in IDP policy, Kyiv, September 2020.
Interview 4: Nongovernmental organisation employee, Kyiv, February 2020.
Interview 5: Governmental official, expert in social policy-1, Kyiv, September 2020.
Interview 6: Expert in IDP policy, Kyiv, September 2020.
Interview 7: Governmental official, expert in IDP and legal policy, Kyiv, September 2020.
Interview 8: Governmental official, expert in social policy-2, Kyiv, September 2020.
Interview 9: Governmental official, expert in social policy-3, Kyiv, September 2020.
Interview 10: Nongovernmental organisation employee and expert-2, Kyiv, September 2020.

https://doi.org/10.1017/S1474746422000446 Published online by Cambridge University Press