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ACCESS TO JUSTICE IN EASTERN EUROPE

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AJEE is an English-language journal which covers issues related to access to justice and the right to a fair and impartial trial. AJEE focuses specifically on law in eastern European countries, such as Ukraine, Poland, Lithuania, and other countries of the region, sharing in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE allows its contributing authors, especially young legal professionals, and practitioners, to present their articles on the most current issues.

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Editor-in-Chief's Note

ON ISSUE 2 AND SUSTAINABLE ACADEMIC PUBLISHING

Sustainability is no longer a distant goal — it is an urgent necessity that must be integrated into every aspect of human life, particularly academic publishing. At Access to Justice in Eastern Europe, we fully recognize our responsibility as part of the global scholarly ecosystem and are committed to contributing meaningfully to the United Nations Sustainable Development Goals (SDGs).

In 2025, AJEE and our publishing partner, Academic Insight Press, proudly joined the SDG Publishers Compact. This step marked a conscious shift toward aligning our editorial and publishing practices with the principles of environmental responsibility, equity, and accessibility. Since then, we have undertaken a number of measures — many of which are ongoing — to gradually embed sustainability into our editorial policy, production workflows, and engagement with our academic community.

We are especially proud to prioritize SDG 16 – Peace, Justice, and Strong Institutions, which lies at the heart of our journal's mission. We support and encourage our authors to incorporate sustainability into their research and to reflect on the broader societal impact of their work. However, our commitment to sustainability extends beyond the content we publish. We are actively revising our editorial guidelines to promote inclusive and bias-free language, ensure accessible design, and support diverse authorship.

We encourage submissions that highlight the practical implications of legal research for communities, policymakers, and practitioners. We have always been attentive to the needs of our audience, and we are committed to offering diverse formats — including original research articles, case studies, and "notes from the field" — to ensure the accessibility and relevance of our content. These formats allow us to focus on specific case law, draft legislation, and reforms that matter to both academic and professional readers across the region.

Over the past few years, equity, diversity, and inclusion (EDI) have become central to our strategy. We are restructuring our Editorial Board with fixed-term memberships to ensure broader representation and topic diversity. We provide flexible support for authors from underrepresented regions and backgrounds, and we actively promote tools and resources — including those developed by EASE — to assist non-native English speakers. We are pleased to expand our reach to include high-quality research from Central Asia, the Arab region, and the Balkans. We also support our authors and reviewers through training and workshops, building stronger bridges between editors and contributors.

During the SDG assessment process, we discovered just how much more we can — and must — do. From digital sustainability and data hygiene to travel practices and public engagement, the journey toward responsible publishing is complex, yet deeply rewarding. Personally, I had never heard of the CONSIDER statement or realized how closely EDI intersects with travel, accessibility, and even decisions like paper sourcing. This journey has been a powerful learning experience.

All of these efforts would not be possible without the dedication and shared vision of our wonderful editorial team — our managing editors, section editors, and technical staff — who work with great care and commitment to advancing our sustainability goals. Together, we are building not just a journal, but a responsible and inclusive scholarly community.

We are proud to be part of the EASE initiative on Sustainable Academic Publishing and are inspired by the collective efforts of editors and publishers worldwide. AJEE will continue to serve not only as a platform for high-quality legal scholarship but also as a space for ethical, inclusive, and forward-thinking academic dialogue.

That is why I want to highlight two key areas of action:

> **We need training.** Editors, reviewers, and publishers should have access to capacity-building programs on sustainability in publishing. This knowledge is vital to make informed, responsible decisions in our daily operations.
>
> **We need recognition.** National journal rankings and international indexing systems should begin to reflect sustainability criteria. Even small changes can create systemic improvements — especially when they are valued and rewarded.

Let us treat this not as a challenge, but as a shared opportunity — to shape a more responsible, sustainable future for scholarly publishing.

In this spirit of responsibility and forward-looking scholarship, we are pleased to present a selection of articles in this issue that reflect the journal's commitment to meaningful, timely, and impactful research — including topics that resonate with broader sustainability goals, such as transparency, rights protection, and the governance of emerging technologies.

This issue features a timely and thought-provoking article by **Gintarė Makauskaitė-Samuolė**, *"Transparency in the Labyrinths of the EU AI Act: Smart or Disbalanced?"* The study critically explores the EU's approach to AI transparency, offering a unique framework

of "transparency zones" and revealing inconsistencies within the current legislative draft. This insightful analysis is especially relevant as legal scholars and policymakers continue to assess the implications of AI regulation for human rights and public accountability. A must-read for anyone interested in the evolving intersection of law, technology, and governance.

Among the notable contributions in this issue is the article by **Mervete Shala** and **Xhavit Shala**, *"The Establishment of an Administrative Court: A Necessity for Resolving Administrative Disputes in the Republic of Kosovo."* This important piece offers a well-founded argument for strengthening judicial control over public administration through the creation of a dedicated administrative court system in Kosovo. With a robust comparative approach and empirical grounding, the article provides practical recommendations to support institutional reform and foster greater public trust in governance.

This issue also features an insightful and timely article by **Iryna Soldatenko**, **Olena Chub**, and **Olena Kopina**, *"Journalism and the Right to Information as Tools for Combating Corruption in Ukraine."* The authors explore the essential role of investigative journalism in promoting transparency and holding anti-corruption authorities accountable, particularly under the constraints of wartime. Their analysis of key Ukrainian institutions highlights the need for stronger communication practices and offers concrete steps to improve access to public information and reinforce trust in state institutions.

Another compelling contribution comes from **Boldizsár Szentgáli-Tóth**, whose article *"Central and Eastern Europe's Constitutional Review During Public Health Emergencies"* offers a much-needed overview of constitutional jurisprudence during the COVID-19 pandemic. Drawing on the ConstCovid database, the study identifies key regional trends and gaps in constitutional responses to public health crises. This comprehensive and comparative analysis sheds light on the evolving relationship between emergency powers, rights limitations, and judicial review in Central and Eastern Europe — a topic of lasting relevance for future governance and legal resilience.

As always, I would like to express my heartfelt thanks to our dedicated editorial team, managing editors, reviewers, and authors — without your commitment, precision, and enthusiasm, none of this would be possible. Each issue is the result of our shared effort to maintain high-quality, relevant, and responsible academic publishing. I encourage our readers to explore the full contents of this issue, engage with the ideas presented, and continue contributing to the growing community around *Access to Justice in Eastern Europe*. Let us move forward with curiosity, courage, and a commitment to justice — together.

Iryna Izarova
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RESEARCH ARTICLE

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Research Article

JOURNALISM AND THE RIGHT TO INFORMATION AS TOOLS FOR COMBATING CORRUPTION IN UKRAINE: ASSESSMENT OF MEDIA ACCESS TO ANTI-CORRUPTION AUTHORITIES

Iryna Soldatenko*, Olena Chub and Olena Kopina

ABSTRACT

Background: *Since 2014, Ukraine has made significant progress in establishing its anti-corruption framework. However, the communication channels of the country's anti-corruption agencies remain limited, preventing the open and accessible dissemination of information regarding their activities. Transparency, as a critical feature of information openness, guarantees that civil society can access relevant governmental data. In this context, investigative journalism has proven to be a vital tool for exposing corruption and holding authorities accountable. This paper examines the role of journalism in combating corruption in Ukraine, emphasising its importance as a tool for ensuring government accountability and transparency. It provides an overview of Ukraine's anti-corruption policies and institutions, exploring theoretical models of media-government-society relations. Considering the 'Public Watchdogs' Right to Access Information, the article addresses the complexities surrounding the right to access information under wartime conditions and analyses whether investigative journalism can lead to the exposure of corrupt officials that prompt state anti-corruption bodies to take action.*

Methods*: This article applies McQuail's theory of democratic participation to examine the role of journalism in reporting corruption cases and promoting transparency. To investigate the current state of transparency in Ukraine's anti-corruption efforts, it employs content analysis of the websites of three key institutions: the National Agency on Corruption Prevention, the National Anti-Corruption Bureau, and the High Anti-Corruption Court of Ukraine, including its Appeals Chamber. The analysis highlights challenges related to the openness and accessibility of the information provided by these institutions.*

Results and Conclusions: *Findings indicate that while state anti-corruption agencies formally provide access to information through their websites, journalists encounter significant barriers to timely and systematic access. The research highlights the impact of martial law on information access, emphasising the state's discretion in balancing security concerns with transparency obligations. The study concludes with recommendations for improving the communication strategies of anti-corruption bodies, proposing measures to enhance transparency and public trust.*

1 INTRODUCTION

Effective corruption control remains a significant challenge for many countries worldwide. The COVID-19 global pandemic highlighted how numerous governments struggled to manage emergencies transparently and accountably. In Ukraine, corruption has dominated the political agenda since the country's declaration of independence in 1991. Following the 2014 Maidan protests, which demanded stronger anti-corruption control measures, Ukraine once again directed reforms aimed at reducing corruption among state officials and improving governance.

Several key reforms are important to mention. One of the most significant reforms was decentralisation, which transferred greater power and financial resources to local authorities. By reducing the concentration of corruption at the central level, this shift made local authorities more accountable to the electorate.[1] Another crucial reform involved implementing digital technology to enhance transparency. The expansion of e-governance minimised human intervention in bureaucratic processes, reducing the risk of bribery and making public services more efficient and transparent, reducing the risk of human factors.[2] The establishment of anti-corruption bodies further strengthened Ukraine's efforts to combat corruption. These institutions were created to ensure a more robust supervision and control.[3] At the same time, legal and judicial reforms aimed to reinforce anti-corruption measures by introducing new legislation and improving the judiciary's role in tackling corruption-related cases.[4] The final implementation was the

1 Cabinet of Ministers of Ukraine, 'Decentralization Reform' (*Government Portal*, 2024) <https://www.kmu.gov.ua/reformi/efektivne-vryaduvannya/reforma-decentralizaciyi> accessed 16 October 2024.

2 Federico Plantera, 'The Path Towards E-Governance in Ukraine' (*E-Governance Academy EGA*, 17 March 2021) <https://ega.ee/success_story/path-towards-egovernance-ukraine/> accessed 16 October 2024.

3 Organisation for Economic Co-operation and Development, 'Anti-Corruption Network for Eastern Europe and Central Asia' (*OECD*, 2024) <https://www.oecd.org/en/networks/anti-corruption-network-for-eastern-europe-and-central-asia.html> accessed 16 October 2024.

4 Pavlo Petrenko, 'The Cabinet of Ministers has Approved the Principles of Reforming the Judicial System with a Complete Reboot of the Entire System' (*Ministry of Justice of Ukraine*, 21 October 2015) <https://minjust.gov.ua/news/ministry/kabinet-ministriv-shvaliv-printsipi-reformuvannya-sudovoi-sistemi-z-povnim-perezavantajennyam-usiei-sistemi---pavlo-petrenko-22147> accessed 16 October 2024.

activation of processes ensuring transparency in government decision-making and public control. The development of open data systems and the active participation of civil society organisations and citizens under the authorities' supervision are factors that enhance anti-corruption efforts.[5]

These five initiatives introduced above were designed to build a better and more effective infrastructure for corruption control, recognising that addressing corruption requires participation of not only law enforcement agencies, but society. Journalism plays an important role in this process by drawing public attention to corruption issues and ensuring oversight in developing anti-corruption institutions.

In this paper, we examine whether journalists have access to information at different levels of the state anti-corruption structure in Ukraine, with a focus on the socio-legal nature of the study. This analysis will help determine whether the state's efforts to combat corruption are transparent.

To do this, we first provide an overview of the state policy and existing methodology of fighting corruption in Ukraine, explore the theoretical and practical directions of media-government relations, and highlight the importance of transparency for anti-corruption efforts. In the empirical section, we assess the investigative journalists' effectiveness in controlling corruption in Ukraine and conduct an analysis of the major Ukrainian anti-corruption authorities' websites to evaluate their openness and the accessibility of information for journalists in light of our theoretical framework.

The findings will serve as the basis for drawing conclusions on the limitations of journalists' operational access to anti-corruption information. Ultimately, we provide recommendations for Ukrainian anti-corruption bodies on the steps needed to reach better transparency.

2 CORRUPTION IN UKRAINE

Ukraine has followed an institutional approach to fighting corruption and has developed an advanced infrastructure for corruption control. The launch of anti-corruption reform was a turning point for Ukraine in 2014. The following six mechanisms of the Ukrainian State Anti-Corruption Policy (or National Anti-Corruption Strategy) for 2014-2017 were presented to the country as a methodology of corruption control:

1. The anti-corruption body will prepare and present annual reports on the state of the fight against corruption to the Parliament and conduct a public education campaign to eradicate tolerance towards corruption, including commercial bribery.

5 Cabinet of Ministers of Ukraine, 'Transparency and Openness in Executive Bodies are Reality' (*Government Portal*, 2024) <https://www.kmu.gov.ua/gromadskosti/dostup-do-publichnoyi-informaciyi/rezultati-anketuvannya-organiv-vikonavchoyi-vladi-ta-monitoringu-oficijnih-veb-sajtiv/prozori-ta-vidkriti-organi-vikonavchoyi-vladi-ce-realnist> accessed 16 October 2024.

2. Rules for financing political parties and election campaigns to all councils and for the post of the President will be unified. Disclosure of all campaign donations and of political party expenses and revenues will be required; parties' financial reports will be subject to periodic and pre-election audits by certified independent auditors.
3. The statute on lobbying will introduce legitimate methods of lobbying and sanctions for violations, and it will require disclosure of whose interests are being lobbied.
4. Tests of government officials' integrity will be allowed. They will not be viewed as a provocation of bribery (and thus as grounds for criminal prosecution) where the official had a pre-existing intention to give or accept an illegal benefit.
5. Whistleblowers will be encouraged to report acts of corruption and protected from persecution, with tip-offs reworded to protect their identity. Legal entities and state bodies will be required to implement whistleblower hotlines and anti-corruption action plans.
6. Companies and/or officers convicted of corruption will be disbarred from public tenders and access to public finances.[6]

The above policy was an important step towards reducing corruption in Ukraine. However, achieving long-term change will require both time and the involvement of specific groups within civil society, such as Reform Platforms, in addition to broader societal efforts. One of the key drivers of this progress is the Reanimation Package of Reforms, which brings together more than 300 experts, activists, journalists, scientists, and human rights advocates from the 50 most influential Ukrainian think tanks and non-governmental organisations. Participants in the Reanimation Package of Reforms collaborate on drafting laws, lobbying for their adoption, and monitoring the implementation of reforms.[7] The National Agency for the Prevention of Corruption (NAPC) led the development of an anti-corruption strategy for 2021-2025. In November 2020, the strategy was passed by the Verkhovna Rada, but only on 10 July 2022 did the Anti-Corruption Strategy of Ukraine become law.[8]

In response to Ukrainian plans to control corruption, in early 2022, Transparency International Ukraine proposed five specific recommendations which, if implemented, could significantly improve Ukraine's performance in the annual survey. They are as follows: first, the necessity of conducting the tender and election of professional, independent and trustworthy leaders for the anti-corruption ecosystem infrastructure (namely, the Specialized Anti-Corruption Prosecutor's Office, the Agency for Investigation and Management of Assets and the National Anti-Corruption Bureau). Second, the adoption of a national anti-corruption strategy and implementation

6 Mariana Marchuk, 'Ukraine: The State Anti-Corruption Policy for 2014–2017' (*Global Compliance News*, 11 November 2014) <https://www.globalcompliancenews.com/2014/11/11/ukraine-the-state-anti-corruption-policy-for-2014-2017> accessed 14 October 2024.

7 'Reanimation Package of Reforms' (*Reform Platforms*, 2015) <https://platforma-reform.org/reanimation-bulletin-our-updates-in-english-реанімаційний-пакет-реформ> accessed 26 October 2024.

8 'Law on Ukraine's Anti-Corruption Strategy for Period until 2025 Takes Effect' (*Interfax-Ukraine*, 10 July 2022) <https://interfax.com.ua/news/general/845026.html> accessed 16 October 2024.

programme. Third, a reform of constitutional justice based on the conclusions reached by the Venice Commission. Fourth, the transparent accounting of state property and an increase in privatisation. Fifth, minimising the risks of passing laws that would take procurement out of Ukraine's Law on Public Procurement.[9]

At the end of January 2023, Transparency International Ukraine claimed that none of these recommendations have been implemented fully, four have been implemented partially, and one has not been implemented at all.[10] Moreover, Law 7662, signed by Volodymyr Zelenskyy on 20 December 2022, contains significant risks and contradicts the updated opinion of the Venice Commission. Consequently, experts assessed it as a failure of the Constitutional Court reform.[11]

Research from Transparency International Ukraine reveals that in 2022, Ukraine scored 33 out of 100 points in the Corruption Perception Index (CPI),[12] ranking 105th out of 180 countries. While Ukraine saw a significant improvement with a three-point increase in 2023, it lost some ground in the fight against corruption in 2024.[13]

In both 2022 and 2023, Ukraine's state authorities became the centre of Ukrainian and international media's attention because of major corruption scandals involving the Deputy Minister of Defence,[14] the Chairman of the Supreme Court,[15] and other officials.

Despite the launched reforms and the established system of anti-corruption bodies, their work is also influenced by corruption schemes. The main feature of the corruption system

9 'Corruption Perceptions Index 2021' (*Transparency International Ukraine*, 25 January 2022) <https://ti-ukraine.org/en/research/corruption-perceptions-index-2021> accessed 16 October 2024.

10 'Corruption Perception Index 2022' (*Transparency International Ukraine*, 31 January 2023) <https://www.transparency.org/en/cpi/2022> accessed 16 October 2024.

11 Draft Law of Ukraine no 7662 'On Amendments to Certain Legislative Acts of Ukraine Regarding the Improvement of the Selection Process for Candidates for the Position of Judge of the Constitutional Court of Ukraine on a Competitive Basis' (2022) <https://itd.rada.gov.ua/billInfo/Bills/Card/40213> accessed 11 March 2025.

12 'Corruption Perceptions Index 2021' (n 9). The Corruption Perceptions Index (CPI) aggregates data from a number of different sources that provide perceptions by business people and country experts of the level of corruption in the public sector.

13 'Corruption Perception Index 2023' (*Transparency International Ukraine*, 30 January 2024) <https://ti-ukraine.org/en/research/corruption-perceptions-index-2023> accessed 16 October 2024; 'Corruption Perception Index 2024' (*Transparency International Ukraine*, 11 February 2025) <https://ti-ukraine.org/en/research/corruption-perceptions-index-2024> accessed 14 February 2025.

14 Yurii Nikolov, 'Paper Pushers from the MoD "Syphon Off Money" on Food for the Armed Forces More than During Peaceful Life' *Dzerkalo Tyzhnia* (Kyiv, 23 January 2023) <https://zn.ua/eng/paper-pushers-from-the-mod-syphon-off-money-on-food-for-the-armed-forces-more-than-during-peaceful-life-.html> accessed 16 October 2024.

15 Vinicious Madureira, 'Ukraine Detains Head of Supreme Court over Corruption Allegations' (*OCCRP: Organized Crime and Corruption Reporting Project*, 22 May 2023) <https://www.occrp.org/en/daily/17654-ukraine-detains-head-of-supreme-court-over-corruption-allegations> accessed 16 October 2024.

in Ukraine is the close connection between politics and oligarchic business.[16] Since the early 2000s, oligarchs and politicians in Ukraine have become dependent on each other and have been constantly adapting their strategies to create powerful coalitions.[17] This merge of politicians and oligarchs does not allow state anti-corruption bodies to be independent and do their job of preventing, controlling, and punishing public officials.

3 ANTI-CORRUPTION BODIES IN UKRAINE

After the Revolution of Dignity in 2014, provoked mainly by systemic corruption and the crisis of power, Ukraine began the development of a full-fledged anti-corruption infrastructure and the creation of new specialised anti-corruption bodies. It was a logical component of the movement towards entering the EU and NATO. Ukraine adopted a comprehensive anti-corruption package of laws and created new specialised institutions: the National Agency on Corruption Prevention (NACP), the National Anti-Corruption Bureau of Ukraine (NABU), the Specialized Anti-Corruption Prosecutor's Office (SAP) and others.[18] The activities of these organisations are aimed at performing various tasks around corruption reduction through a variety of measures, including prevention, investigation, and punishment.

In addition to state anti-corruption bodies, legislative and executive authorities in Ukraine are also part of the anti-corruption system. Thus, anti-corruption agencies are directly involved in the development and monitoring of anti-corruption policy, investigation and consideration of corruption cases regarding officials and large amounts of funds that require specialised expertise and resources. The anti-corruption agencies can also carry out several anti-corruption measures within their power and strengthen the anti-corruption system, helping to make anti-corruption activities more ambitious and effective.[19]

The National Agency on Corruption Prevention is a state anti-corruption body created to form a policy in the field of anti-corruption prevention. Among the tasks of this organisation are: verification of electronic declarations and reports of political parties related to the conflict of interests; development of the Anti-Corruption strategy drafts and a State program for its implementation; coordination of anti-corruption programs with

16 Heiko Pleines, 'Oligarchs and Politics in Ukraine' (2016) 24(1) Demokratizatsiya: The Journal of Post Soviet Democratization 105.

17 Serhiy Kudelia, 'Corruption in Ukraine: Perpetuum Mobile or the Endplay of Post-Soviet Elites?' in Henry E Hale and Robert W Orttung (eds), *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine* (Stanford UP 2016) 61, doi:10.11126/stanford/9780804798457.003.0004.

18 OECD, *Anti-Corruption Reforms in Ukraine: 4th Round of Monitoring of the Istanbul Anti-Corruption Action Plan* (Fighting Corruption in Eastern Europe and Central Asia, OECD Publ 2017) doi:10.1787/dd48148b-en.

19 *National Agency on Corruption Prevention (NACP)* <https://nazk.gov.ua/en/> accessed 16 October 2024.

other bodies; preparation of administrative protocols on the corruption-related offences by officials; anti-corruption check of draft laws and acts of the Cabinet of Ministers of Ukraine.

The NACP performs these tasks in cooperation with the major legislative body in Ukraine, the Verkhovna Rada, which plays a crucial role in passing laws related to the Anti-Corruption Strategy, conducting thematic parliamentary hearings, and performing anti-corruption expertise on draft laws. The Cabinet of Ministers of Ukraine, the highest executive authority, is responsible for approving the State Program for the implementation of the Anti-Corruption Strategy. Additionally, the Ministry of Justice of Ukraine, which is in charge of implementing regulatory legal acts and conducting anti-corruption expertise, also collaborates in the NACP's activities. In parallel, the NACP actively participates in the state anti-corruption policy development.

Three state anti-corruption bodies are authorised to do this:

1. The National Anti-Corruption Bureau of Ukraine (NABU) is a state law enforcement agency. Its task is to investigate corruption crimes involving high-ranking officials or large amounts of public funds.[20]
2. The Specialized Anti-Corruption Prosecutor's Office (SAP) is an independent division of the Office of the General Prosecutor. Its tasks are the procedural guidance implementation and the public prosecution support in the Supreme Anti-Corruption Court.[21]
3. The National Agency of Ukraine for the Identification, Search and Management of Assets Obtained from Corruption and Other Crimes (ARMA).[22]

The activities of these organisations are carried out in cooperation with the National Police of Ukraine, the State Bureau of Investigation, the Security Service of Ukraine, and the Prosecutor's Office, which strengthen and complement the capabilities to identify and investigate corruption crimes.

Another important level of the state's anti-corruption system is its specialised judicial bodies. The High Anti-Corruption Court[23] serves as Ukraine's highest specialised court within the judicial system. It began operating a year after the adoption of the Law "On the Supreme Anti-Corruption Court". Its tasks include reviewing proceedings on corruption crimes investigated by the NABU, acting as a court of first instance and an appellate body. The Supreme Anti-Corruption Court operates in cooperation with general courts at the local and appellate levels, as well as with the Supreme Court.[24]

20 *National Anti-Corruption Bureau of Ukraine (NABU)* <https://nabu.gov.ua/en> accessed 16 October 2024.

21 Tetiana Oliynyk, 'Ukraine's Specialised Anti-Corruption Prosecutor's Office Becomes Independent Body' *Ukrainska Pravda* (Kyiv, 21 March 2024) <https://www.pravda.com.ua/eng/news/2024/03/21/7447567> accessed 16 October 2024.

22 *Asset Recovery and Management Agency (ARMA)* <https://arma.gov.ua/en> accessed 16 October 2024.

23 *High Anti-Corruption Court of Ukraine (HACC)* <https://first.vaks.gov.ua> accessed 16 October 2024.

24 OECD (n 18).

In assessing Ukraine's anti-corruption framework, it is evident that since 2014, Ukraine has made significant progress in establishing an institutional framework for fighting corruption, including the development of an Anti-Corruption Strategy and the creation of specialised anti-corruption bodies. However, corruption remains a serious problem in Ukraine, and the country continues to rank low on Transparency International's Corruption Perceptions Index. Key structural issues include the close links between politics and oligarchic business interests, which undermine the independence and effectiveness of anti-corruption bodies. The complex structure of the anti-corruption system may hinder civil society's attempts to control state-led anti-corruption efforts. This is where the journalists are often seen as the necessary element to mediate the information exchanges.

4 MEDIA, GOVERNMENT AND SOCIETY: THE THEORIES

The relationships between the media and society are often viewed as the connection between elites, the media, and the public.[25] The normative theories of the press contain ideas about political systems and public administration, defining the role of the media in each type of state. Traditionally, four normative theories are distinguished: the authoritarian, the libertarian, the social responsibility theory, and the Soviet media theory.[26]

The authoritarian theory states that the media depend on the government; the fulfilment of the media's functions is related to the government's influence on society.[27] According to this theory, the functioning of the media is possible only when journalists maintain a loyal or even friendly attitude toward the government, be it authoritarian or democratic states.

The libertarian theory, or the theory of the free press, claims that the press operates in a free market of ideas where journalists are independent of the government, politics, and various social institutions.[28] This theory describes the conditions of interaction between the government, the media, and society as the most favourable environment for journalists to exercise public control over corrupt actions by authorities.

The theory of social responsibility represents a compromise between government control and complete press freedom. Denis McQuail stated its basic principles in 1983.[29] Its core argument is that the media performs important functions in society, especially in relation

25 Serhii Kvit, *Mass Communications: Textbook* (Kyievo-Mohylianska Akademiia 2008).

26 Marius Rohde Johannessen and Lasse Berntzen, 'The Transparent Smart City' in Manuel Pedro Rodríguez Bolívar (ed), *Smart Technologies for Smart Governments: Transparency, Efficiency and Organizational Issues* (Public Administration and Information Technology 24, Springer Cham 2018) 67, doi:10.1007/978-3-319-58577-2_5.

27 Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* (University of Illinois Press 1956) doi:10.5406/j.ctv1nhr0v.

28 Denis McQuail, *Mass Communication Theory an Introduction* (Sage 1983).

29 ibid.

to democracy. The media must commit to performing these functions, mainly in disseminating information and providing a platform for expressing different points of view.

Over time, all normative theories have been criticised for their dependence on the social and political structure of the state and their inattention to the progressive development of media technologies. In the wake of this criticism, Denis McQuail proposed two more theories: media development theory and democratic participation theory (participatory theory).

The theory of media development suggests the media should support the government until the country reaches a sufficient level of development, at which the media can operate independently.[30] However, it is impossible for journalists to perform the control function over the authorities in such a model of interaction between the authorities and the media.

The theory of democratic participation emphasises the needs and expectations of active consumers of information. It upholds the right to receive the necessary information, respond, and use communication tools to engage within small communities, interest groups, or subcultures. This theory rejects introducing homogeneous, centralised, expensive, overly professionalised, neutralised and state-controlled media. It presupposes diversity, locality, deinstitutionalisation, interchangeability of sender-recipient roles, horizontal communication links at all levels of society, and the free expression of interests.[31]

Projecting this theory to the context of 2024 and contemporary media landscapes, we observe profound relevance and application, especially with the advent of digital and social media technologies. Today's media ecosystem thrives on diversity, with content available from a wide range of sources, cultures, and perspectives.

Denis McQuail points out the importance of the media as a social institution for modern societies, emphasising its function as an intermediary in modern societies.[32] First, the media function as a window, offering a broad view of societal experiences and enabling individuals to observe events without external interference, thus broadening their perspectives. They also function as a mirror, reflecting societal events—though sometimes with inversion or distortion—due to the limitations imposed by the perspectives and choices of those who control the media. Additionally, the media operate as a filter or guardian, selecting certain experiences for emphasis while excluding others, whether intentionally or not. This selective process shapes the public's understanding and awareness of societal events.

30 Denis McQuail, *McQuail's Mass Communication Theory* (Sage 2012).

31 György Túry, 'Leftist vs (Neo)Liberal Scripts for the (Media) Future: Enzensberger's 'Constituents of a Theory of the Media'. (2015) 18(6) International Journal of Cultural Studies 613, doi:10.1177/1367877914544731.

32 McQuail (n 30).

Furthermore, the media serve as a forum or platform for disseminating information and ideas, facilitating engagement and potentially allowing for public response or reaction. This role underscores the media's function in fostering dialogue and debate within society. As a distributor, the media ensures that information reaches a wide audience, democratising access to knowledge and information. Lastly, they act as an interlocutor or conversational partner, engaging in a quasi-interactive exchange of views and responding to public inquiries, thus contributing to an ongoing societal dialogue.

The theory of democratic participation states that the media acts as an intermediary, transmitting information from the state while also being perceived by society as a means of holding the government accountable.

A transparent and accountable system of governance is very important in tackling corruption. In 1988, Robert Klitgaard argued that unfavourable conditions for the development of corruption are disaggregation of power, accountability, control, a high-quality justice system and clearly defined roles and responsibilities, norms, and restrictions, as well as a democratic culture, competition, and access to information.[33] This discussion is still relevant today. In the age of information technologies, transparency of authorities is a fundamental feature of informational openness, guaranteeing information accessibility for civil society.

The multi-layered and complex definition of transparency at both theoretical and practical levels has prompted experts to identify several types of transparency. Johannessen and Berntzen identified six types of transparency in the activities of public administration entities: transparency of documentation, transparency of negotiations, processes transparency, comparative analysis transparency, decision-makers transparency, and disclosure transparency—the right to ask questions and receive information that is not contained in documents or is not the content of public negotiations.[34]

All of these transparency types apply to government activities and should be used by external agents, such as journalists, to inform the public about government activities. However, this is possible if government institutions provide access through authorised information sources, including press information, websites, social media and platforms like the Prozorro system.[35] Fragmented access to information results in corruption crimes being committed and investigations being disrupted in a quiet manner.

Independent investigative journalism and civil society play an important role in exposing corruption. However, recent attempts to limit the transparency of public procurement in the defence sector could create new opportunities for corruption. Overcoming corruption

33 Robert Klitgaard, *Controlling Corruption* (University of California Press 1988).
34 Johannessen and Berntzen (n 26).
35 *Prozorro* <https://prozorro.gov.ua> accessed 16 October 2024.

in Ukraine requires long-term comprehensive efforts at various levels—institutional, legal, and social—to ensure government accountability, dismantle ties between politics and business, and actively engage citizens and the media in controlling state bodies.

Our study critically examines the right to access information from government and anti-corruption state bodies in Ukraine, the right to respond to media coverage of corruption cases, and the right to report and investigate corruption crimes, and so on.

5 MEDIA, GOVERNMENT AND SOCIETY: THE PRACTICES IN UKRAINE

In the 1990s, journalists in Ukraine often tried to investigate the undercurrents and connections between hitmen and representatives of state sectors who stood to benefit from alleged accidental murders and the non-transparent actions of the authorities. At the time, there was no transparent system of civilian supervision over the authorities, making journalistic exposés particularly shocking to the public.[36]

Several journalists conducted high-profile investigations that exposed corruption at the highest levels of power in Ukraine. One notable figure is Georgiy Gongadze, journalist and founder of the online media outlet *Ukraiinska Pravda*, which opposed then-President Leonid Kuchma (1999-2000). Gongadze actively exposed the anti-democratic nature of the referendum held on 16 April 2000, the criminal activities of Interior Minister Yuriy Kravchenko, and other cases. On 16 September 2000, Gongadze disappeared. His decapitated body was discovered on 2 November of the same year. Articles and investigations by and about Georgi Gongadze remain available on the *Ukraiinska Pravda* website.[37]

Since its founding, *Ukraiinska Pravda* reporters have continuously conducted anti-corruption investigative work. Leonid Amchuk initiated journalistic investigations into the status and behaviour of President Viktor Yushchenko's son,[38] while Serhiy Leshchenko exposed the removal of Mezhyhirya (President Viktor Yanukovych's residence) from state ownership.[39]

One of Ukraine's most infamous corruption scandals, *Boyko's vyshk*i (Boyko's towers), has become a symbol of large-scale corruption within the government. According to the General Prosecutor's Office of Ukraine, a scheme was set up in 2010 by Viktor Yanukovych

36 Oles Nikolenko, '5 Most High-Profile Journalistic Investigations in Ukraine' (*Suspilne Novyny*, 6 June 2020) <https://suspilne.media/38952-5-najgucnisih-zurnalistskih-rozsliduvan-ukraini/> accessed 16 October 2024.

37 'Articles by Gongadze and about Gongadze' *Ukrainska Pravda* (Kyiv, 25 September 2000) <https://www.pravda.com.ua/news/2000/09/25/2981062/> accessed 16 October 2024.

38 Leonid Amchuk, 'Andriy Ushenko is the son of God?' *Ukrainska Pravda* (Kyiv, 19 July 2005) <https://www.pravda.com.ua/articles/2005/07/19/3011786/> accessed 16 October 2024.

39 Serhii Leshchenko, 'Secrets of Mezhigiriya' *Ukrainska Pravda* (Kyiv, 9 November 2011) <https://www.pravda.com.ua/articles/2011/11/9/6742106/> accessed 16 October 2024.

to embezzle funds from the main state oil and gas provider, Naftogaz of Ukraine, under the pretence of purchasing drilling rigs. After the purchase, the funds were transferred to controlled accounts and distributed among all accomplices of an organised criminal group. Yurii Nikolov and Oleksii Shalaiskyi co-authored an article in the *Dzerkalo Tyzhnia* newspaper, which first exposed this corruption scam in 2011.[40]

Combating and preventing corruption in Ukraine has become even more critical in light of increased foreign aid received both during the war and in preparation for the country's post-war reconstruction. The ambassadors of G7 countries underscored this priority, meeting at the end of January 2023 to discuss the issue.[41]

In addition, in June 2022, Ukraine was granted candidate status for EU membership, just four months after Russia's full-scale invasion. The requirements for EU membership include the rule of law and progress in the fight against corruption. However, despite numerous efforts in recent years, Ukraine still ranks among the lowest globally in corruption indices.

Vitalii Portnikov, a journalist from *Radio Svoboda*, highlights that for more than 10 years, all high-profile cases have been covered by the press until the trial. However, many of these cases are subsequently forgotten, lost by law enforcement or anti-corruption structures, frozen, or suspended. In some instances, accused individuals even manage to retain their positions and are elected to Parliament.[42]

According to Klitgaard's methodology, a single "fried fish," where a high-ranking official is held truly accountable for corruption—has never occurred in the entire history of independent Ukraine. This assessment is supported by investigative journalists from Bihus.info, who analysed high-profile corruption cases in Ukraine in recent years. They note: "Over the past 10 years, there have been many high-profile corruption cases in Ukraine. These include the "diamond prosecutors", the "amber case", and the investigations into Roman Nasirov, Nikolay Chaus and Ihor Kolomoisky. These cases were significant and, at one moment, were symbols of the effectiveness of law enforcement agencies. However, five to nine years have passed since the start of the investigations in some of them, and there are still no verdicts."[43]

40 Yurii Nikolov and Oleksii Shalaiskyi, 'Tower for Boyka' *Dzerkalo Tyzhnia* (Kyiv, 27 May 2011) <https://zn.ua/ukr/internal/vishka_dlya_boyka.html> accessed 16 October 2024.

41 'G7AmbReformUA' (*Twitter*, 27 January 2023) <https://twitter.com/G7AmbReformUA/status/1619068645531090944?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1619068645531090944%7Ctwgr%5E86e04a1c8dbf9bec47c9c0b73068cd62ce897d10%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.eurointegration.com.ua%2Fnews%2F2023%2F01%2F28%2F7155060%2F> accessed 16 October 2024.

42 Vitalii Portnikov, 'Ukraine: War and Corruption' (*Radio Svoboda*, 7 February 2023) <https://www.svoboda.org/a/ukraina-voyna-i-korruptsiya-efir-v-20-30-/32258924.html> accessed 16 October 2024.

43 Svitlana Stetsenko, 'TOP Corruption Cases: What's Happening with Rosenblatt, Nasirov, Chaus, and Others?' (*Bihus.Info, YouTube*, 18 May 2024) <https://www.youtube.com/watch?v=vWXEjGu0iHs> accessed 16 October 2024.

In recent years, investigative journalism—especially in the anti-corruption field—has gained significant popularity and support in Ukraine. Several journalistic and legal organisations stand out for their contributions to anti-corruption efforts, assisting those looking to conduct investigative journalism and utilising gathered information to expose corrupt practices.

One notable initiative is the Anti-Corruption Centre (ANTAC) project, which actively forwards investigative journalism findings to law enforcement agencies. This demands deciphering corruption schemes and pushing for the prosecution of those responsible.

Another influential entity, Bihus.info, consists of an independent team of anti-corruption journalists and lawyers dedicated to effective change. The organisation's project, *Nashi Groshi* (Our Money) with Denis Bigus, began airing in November 2013 on the ZIK television channel as a television counterpart to the *Nashi Groshi* (Our Money) website. However, it quickly evolved into a fully investigative platform, establishing a separate editorial office. Today, Bihus.info maintains editorial independence, regardless of the broadcasting channels that air its content. Its "We Impact" section highlights the tangible outcomes of its investigations, including the dismissal of corrupt officials, the cancellation of fraudulent tenders, and the disruption of corruption schemes. Additionally, the investigative journalism program *Skhemy: koruptsiia v detaliah* (Schemes: Corruption in Detail)—a collaboration between Radio Svoboda (Radio Freedom) and the UA Pershyi (UA First) TV channel—offers a platform for widespread exposure of corruption cases. Interested individuals can contribute by submitting information through its website's "I am a reporter" section.

A wide international network of donors supports the activities of these investigative journalism organisations, including the US Government, the EU, private international foundations, donations from individuals and legal entities, the European Commission, the EU Anti-Corruption Initiative in Ukraine, the International Renaissance Foundation, the National Endowment for Democracy (NED), the European Endowment for Democracy (EED) of the Kingdom of Netherlands, the OCCRP Journalism Development Network and others. Notably, not a single state organisation in Ukraine established to counteract corruption is mentioned as supporting these journalistic projects or organisations.

In 2021, journalists from Radio Svoboda investigated a loan from a state-owned bank in Ukraine to a businessman operating in the DNR (the Russian-occupied region of Ukraine). Their video published by the journalists led to the dismissal of the bank's head and the obstruction of the loan,[44] demonstrating the direct impact of investigative journalism on anti-corruption efforts.

44 'How to Destroy a Reputation in 15 Minutes: The Case of Ukreximbank' (*NV New Voice*, 10 October 2021) <https://biz.nv.ua/ukr/economics/ukreksimbank-napav-na-zhurnalistiv-facebook-ne-vporavsya-z-problemami-skandali-groshi-tizhni-50188547.html> accessed 16 October 2024.

Media investigations often force law enforcement agencies and anti-corruption institutions to intensify their activities. For example, when journalist Yuri Nikolov published an exposé on corruption in the army during the war in the widely respected *Dzerkalo Tyzhnia* (an outlet with 17,000 Facebook subscribers and more than 58,000 subscribers on Telegram), his article triggered government action—not the other way around.[45]

Time and again, journalistic investigations take the lead in exposing cases of corruption in government and are often ahead of state anti-corruption bodies in identifying and publicising corruption cases.

Since 2022, several high-profile corruption charges in Ukraine have been successfully pressed by the initiative or with the participation of journalists, demonstrating the power of media-driven accountability in the country's ongoing anti-corruption efforts. During the full-scale invasion, Ukraine's Specialized Anti-Corruption Prosecutor's Office (SAPO) launched a criminal case against the head of Dnipropetrovsk Region, Valentyn Reznichenko,[46] after reports revealed his ties to a company that the regional military administration allocated billions of hryvnias to. Law prosecution opened a criminal case after public disclosure of two private investigations conducted by *Radio Svoboda* (the Scheme project) and *Ukrayinska Pravda*. Detectives of the National Anti-corruption Bureau of Ukraine[47] were assigned to carry out the investigation. However, at the time of this research (June 2023 – March 2024), no updates on its progress could be found on either the NABU website or on the website of the Specialized Anti-Corruption Court.

In early 2023, Yurii Nikolov, an investigative journalist and founder of *Nashi Groshi* (Our Money), published an exposé in *Dzerkalo Tyzhnia* that gained widespread national coverage.[48] His findings revealed that with the outbreak of war, the Ministry of Defence had been operating with minimal oversight, leading to highly inflated costs for military supplies. The revelations triggered a strong public reaction, not only by Ukrainians but also by the international public, ultimately leading to the resignation of several high-ranking officials in the military department.[49] However, Minister of Defence Oleksiy Reznikov remained in office, and President Volodymyr Zelenskyy has not dismissed him. Meanwhile, the dismissed deputy minister, accused of corruption, has denied all charges.

45 Nikolov (n 14).

46 'Reznichenko Valentyn Mykhailovych' (*LB.ua*, 24 January 2023) <https://lb.ua/file/person/3050_reznichenko_valentin_mihaylovich.html> accessed 16 October 2024.

47 Ostap Kramar, 'SAP Starts Prosecution of Dnipropetrovsk Region's Head after Publication of Journalistic Investigations' (*Hromadske*, 3 November 2022). <https://hromadske.ua/posts/u-sap-pochali-rozsliduvannya-shodo-golovi-dnipropetrovshini-pislya-publikaciyi-zhurnalistskih-rozsliduvan#tag=zhurnalistski-rozsliduvannia> accessed 16 October 2024.

48 Nikolov (n 14).

49 Iryna Balachuk, 'Deputy Minister Resigns Over Food Procurement Scandal' *Ukrainska Pravda* (Kyiv, 24 January 2023) <https://www.pravda.com.ua/eng/news/2023/01/24/7386229/> accessed 16 October 2024.

In February 2024, the Government of Ukraine, in response to security concerns, implemented a number of changes to defend procurement procedures.[50] The most radical of these changes was the closure of data on bidders/winners on the Prozorro government platform. Now, expected costs and purchase volumes are hidden, supposedly to prevent intelligence leaks to Russia. While the military continues to hold auctions in a special closed module of the platform, the lack of public oversight raises serious risks of collusion and corruption. The new system applies not only to military uniforms but also to fuel, food supplies for the Ministry of Defence, and multibillion-dollar drone purchases.[51] As a result, external observers, journalists, and the public can no longer verify whether bidding processes are fair, competitive or transparent.

Concerning these examples, our research interest is whether Ukrainian society truly functions as an "information consumer" in line with the theory of democratic media participation. Specifically, we examine the transparency of the official platforms of the bodies of policy-making (the National Agency on Corruption Prevention), the level of detection and investigation of corruption (the. National Anti-Corruption Bureau), and the level of sentencing and punishment (the Anti-Corruption Court of Ukraine and the Appeals Chamber of the High Anti-Corruption Court).

6 WEBSITE ANALYSIS METHODOLOGY

To address the research question—whether the information resources of anti-corruption bodies are accessible to journalists and contribute to the transparency of state anti-corruption organisations—we analysed the structure and content of the selected state anti-corruption bodies' websites (as of July 2023). The coding of the selected state anti-corruption agencies was examined:

1. The National Agency on Corruption Prevention.[52]
2. The National Anti-Corruption Bureau.[53]
3. The High Anti-Corruption Court of Ukraine and the Appeals Chamber of the High Anti-Corruption Court.[54]

50 Public Relations and Media Department, 'Transparent, Competitive, and Security-Conscious: Government Improves Defense Procurement Processes' (*Ministry of Economic Development*, 1 February 2024) <https://www.me.gov.ua/News/Detail?lang=uk-UA&id=5b74d130-4555-4980-a24a-21826a92db35&title=Prozoro-Konkurentno> accessed 16 October 2024.

51 Yurii Nikolov and Kateryna Zvierieva, 'Top Tenders of the Week: The Government Makes Defense Procurements Partially Shadowed, Showcasing Risks on the Example of Belts from the Ex-Controller of Ukrzaliznytsia' (*Nashi Groshi*, 5 February 2024) <https://nashigroshi.org/2024/02/05/top-tendery-tyzhnia-uriad-vyvodyt-oboronni-zakupivli-v-chastkovu-tin-pokazuiemo-ryzyky-na-prykladi-remeniv-vid-eks-smotriashcheho-ukrzaliznytsi/> accessed 16 October 2024.

52 NACP (n 19).

53 NABU (n 20).

54 HACC (n 23).

The units of analysis for these anti-corruption bodies included the availability of a website, the regularity of updates, the availability of press office details on the website (including press secretary/PIO contacts), availability of feedback forms, the functionality of the information search function, and media relations regulations. These units of analysis were evaluated through the lens of government transparency theory[55] and social responsibility theory.[56]

7 RESULTS AND DISCUSSION

Our study revealed that while all three websites contain press office information, none provide direct contact for press secretaries. Additionally, the presentation and content across the sites show significant inconsistency. For example, Website 2 offers a comprehensive structure promoting the values and principles through various headings, topical subjects, and links to portals with additional information. In contrast, Website 3 focuses more on content relevant to the direct work of anti-corruption courts.

The websites also differ in terms of user convenience and search functionality for media. Website 2 is the most functional, with press office details and social media links readily available on the homepage. On the other hand, Websites 1 and 3 bury these details under additional headings, making them harder to find and requiring more effort and time.

All three websites are regularly updated with current events and contain explanatory and awareness-raising content. Website 1 provides the greatest search capabilities, although the organisation's social media, namely Telegram feeds and Facebook pages, are more convenient for news searches. Websites 2 and 3 contain information on the media relations principles, communication regulations, and guidelines for interacting with the media, from principles to forms of requests and compliance with memo protocols. All websites provide links to their social media platforms, and Websites 1 and 2 offer English-language versions with information on the organisations' activities.

However, journalists are primarily interested in obtaining information about ongoing investigations and court proceedings on corruption cases rather than general organisational information. Our analysis revealed that the relations between journalists and bodies like the NABU are regulated by the "General Principles of External Communication between the National Anti-Corruption Bureau of Ukraine and the Specialized Anti-Corruption Prosecutor's Office."

The NABU website outlines its role in implementing these communication principles and lists the types of official information released to the media. The contents of the agreed press releases or joint statements, which are possible for public disclosure, are indicated.

55 Johannessen and Berntzen (n 26).
56 Túry (n 31).

Additionally, it identifies types of information that must not be disclosed to the media, including 1) facts of petitions being prepared and sent for approval to the Specialized Anti-Corruption Prosecutor's Office, as well as the decisions on the petitions; 2) facts of preparation and submission of draft reports on suspicion to Specialized Anti-Corruption Prosecutor's Office, as well as the review results; 3) the number and composition of the detectives and operatives group; 4) the facts and content of prosecutor's instructions to detectives; and 5) the personal details of suspects before they are notified of suspicion—except in cases when the suspect is a public figure and has openly demonstrated their probable involvement in criminal proceedings, in which case the pre-trial investigation is conducted by National Security Service of Ukraine detectives under the procedural supervision of the Specialized Anti-Corruption Prosecutor's Office prosecutors.[57]

The High Anti-Corruption Court's (HACC) website outlines communications principles that emphasise openness, consistency, coordination, and timeliness. However, a technical issue prevented access to documents in the "Sample Documents" section, including the rules of conduct in the meeting room, a sample permission for shooting, and a media memo.

A general overview of ways for journalists to access the websites of anti-corruption organisations reveals that the websites' role as representatives is more evident than their functionality. The websites are more likely to be used by the media as data aggregators or archives, primarily for reporting on the results of completed work. However, this significantly differs from the type of information gathering required to cover corruption cases. Thus, the content on these websites does not fully comply with the professional ethics principles—such as truthfulness, accuracy and fact-based communications, independence, objectivity, impartiality, fairness, respect for others and public accountability—as these apply to the gathering, editing and dissemination of newsworthy information, not only to the public by journalists but also by public authorities.

During the website analysis, we found that the transparency of the analysed organisations is only partially supported by their websites. The websites have complicated navigation, and there are prescribed restrictions for journalists seeking information about the progress of corruption investigations. Additionally, the register of corrupt officials is closed to third-party access. This confirms the limited opportunities for journalists to gather information on the progress of investigations and bring corrupt officials to justice.

Under such conditions, journalists, fulfilling their social function of civil control, are forced to seek alternative ways of accessing information, resorting to investigative journalism and public activity. Investigative reports play an important role in ensuring transparency and accountability in Ukraine and other countries, as they can help improve

57 NABU and SAPO, 'Unified Principles of External Communication between the National Anti-Corruption Bureau of Ukraine and the Specialised Anti-Corruption Prosecutor's Office' (2023) <https://nabu.gov.ua/press/yedyni-pryncypy-zovnishnoyi-komunikaciyi-mizh-nacionalnym-antykorupciynym-byuro-ukrayiny-ta/> accessed 16 October 2024.

the situation in various spheres of public life. In Ukraine, investigative reports are an important tool for detecting corruption, human rights violations, and other matters of public significance. They can touch upon different spheres, including politics, business, environment, healthcare, and more. Several independent media organisations and publishing houses in Ukraine are active in investigative projects. Independent media organisations and reporters operating in the regions have also significantly contributed to the development of Ukrainian journalism.

According to Transparency International,[58] anti-corruption journalistic investigations are pivotal in tackling corruption by uncovering the mechanisms through which considerable sums are diverted from natural resources and state coffers. These investigations not only bring light to the identities of those directly involved in corrupt activities, including the facilitators and the existing loopholes that enable the illegal movement of funds, but they also initiate the necessary reforms in nations where corruption impedes progress. Furthermore, by advocating for justice, these journalistic efforts promote accountability, good governance, and sustainable development, ensuring that the fight against corruption leads to tangible improvements in society.

8 PUBLIC WATCHDOGS' RIGHT TO ACCESS INFORMATION HELD BY STATE AUTHORITIES IN WARTIME

The legislation of Ukraine on the right of access to socially significant information has recently undergone significant changes. This area of social and legal relations is regulated by the Laws of Ukraine "On Information" of 2 October 1992 No. 2657-XII, edition of 15 November 2024, and "On Access to Public Information" of 13 January 2011 No. 2939-VI, edition of 8 October 2023. Subsequent editions tended to increase guarantees of openness and accessibility of information in the possession of public authorities for each person. The new Law of Ukraine "On Media" dated 13 December 2022 No. 2849-IX[59] in this field of legal regulation replaced a number of laws, which became invalid with its adoption, in particular, the laws of Ukraine on print media (press) in Ukraine (1993), on television and radio broadcasting (1994), on news agencies (1995), the National Council on Television and Radio Broadcasting (1997), on the procedure for covering the activities of state authorities and local self-government bodies in Ukraine by the mass media (1997), and on the protection of public morality (2004). The new edition sets out the Law of Ukraine "On State Support of the Media, Guarantees of Professional Activity and Social Protection of Journalists" dated 23 September 1997 No. 540/97-VR, as amended on 31 March 2023; Law of Ukraine "On Prevention of Corruption" dated 14 October 2014 No. 1700-VII, revised on

58 'Investigative Journalism' (*Transparency International*, 2024) <https://www.transparency.org/en/advocacy/investigative-journalism/> accessed 16 October 2024.

59 Law of Ukraine no 2849-IX 'On Media' [2023] Official Gazette of Ukraine 3/205.

1 January 2025; Law of Ukraine "On Personal Data Protection" dated 1 June 2010 No. 2297-VI, amended on 18 January 2025, Law of Ukraine "On the Legal Regime of Martial Law" dated 12 May 2015 No. 389-VIII, amended on 8 February 2025.

It is widely known that the right of access to information is not absolute. It is one of the first rights to be limited following the Law on the Legal Regime of Martial Law. In accordance with the Decree of the President of Ukraine, "On the Introduction of Martial Law in Ukraine",[60] approved by Law No. 2102-IX of 24 February 2022, in connection with the introduction of martial law in Ukraine, the constitutional rights and freedoms of a person and a citizen provided by Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine may be temporarily restricted, for the period of the legal regime of martial law.

If the function of the right of access to information is to ensure that a person receives information directly from state authorities and local self-government bodies about their activities and information about themselves (i.e. access to official information), as well as certain information held by private legal entities, the purpose of freedom of information consists in providing the possibility of free search and receipt of any information from publicly available sources, obtaining information about the actions of the authorities, but already in the interpretation of media representatives.[61] The popular concept of militant democracy (not necessarily in wartime) refers to the legal restriction of democratic freedoms to isolate democratic regimes from the threat of overthrowing by lawful means.[62]

Although democracy is not mentioned in the Constitution of Ukraine as an object of protection when applying restrictions to the implementation of fundamental rights and freedoms, and given that freedom of expression is commonly expected to be subject to limitations during wartime, historical examples demonstrate that it is possible to maintain a "cool head" on the issue of guaranteeing fundamental rights and freedoms.[63]

Since 24 February 2022, public access to most registers, information systems—both national and local—and the Unified Open Data Portal has been restricted. The Resolution of the Cabinet of Ministers of Ukraine, dated 12 March 2022, No. 263, established that for the period of martial law, ministries, other central and local executive authorities, state and municipal enterprises, institutions, and organisations belonging to the sphere of their

60 Decree of the President of Ukraine no № 64/2022 'On the Introduction of Martial Law in Ukraine" [2022] Official Gazette of Ukraine 46/2497.

61 Oksana Nesterenko, 'Constitutional Right of Access to Information: Essence, Content and Scope' (*Human Rights in Ukraine: The Information Portal of the Kharkiv Human Rights Protection Group*, 9 April 2008) <https://khpg.org/1207743167> accessed 16 October 2024; Tetiana M Slinko and Oksana V Nesterenko (2024) 'Access to Public Information' in Yurii G Barabash and others (eds), *Great Ukrainian Legal Encyclopedia*, vol 4: Constitutional Law (Pravo 2024) 216.

62 Yurii Barabash and Hryhorii Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9(3) TalTech Journal of European Studies 5, doi:10.1515/bjes-2019-0019.

63 ibid 7.

management, should ensure the proper functioning of information and electronic communication systems, public electronic registers, the owners (holders) and/or administrators of which they are, and protect information processed in them. These authorities were permitted to suspend and restrict the operation of electronic communication systems, as well as public electronic registers. The amended version of this Resolution, effective from 9 May 2023, clarified that such restrictions apply to territories of active hostilities and temporarily occupied territories.

By the Order of the Ministry of Justice of Ukraine dated 31 January 2023 No. 423/5, the publication of information in the form of open data, which is managed by the Ministry of Justice of Ukraine, was resumed—with the exception of information from the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations, the Unified State Register of Persons Subject to the provisions of the Law of Ukraine "On the Purification of Government", and the State Register of Certified Judicial Experts. At the same time, in practice, this restriction is not comprehensive, and paradoxically, the possibility of paid access to USR data, as well as access through external services and products that use this data, is reported.[64]

According to the DEJURE study on access to public information under martial law in Ukraine, administrators now decide by their bylaws whether to publish some information or withhold it from websites, registers and other resources. This is due to the absence of a legislative list specifying which information is restricted in access, which raises doubts about whether it is possible to provide such information upon request. The same issues apply to access to open data.[65] This concerns, first of all, the publication on the official websites of public authorities of information on decisions made, adopted regulatory legal acts, and the publication of the document accounting system. The openness of such information is not systemic and is rather an exception than an everyday norm.[66] The cultural and historical heritage of the secrecy of information continues to be reflected in the realities of modern life in Ukraine.[67]

64 Nadiia Babynska, 'Public Information in the Form of Open Data under Martial Law: Specifics, Paradoxes, Tips' (*Dostup do Pravdy*, 15 May 2023) <https://dostup.org.ua/blogs/publications/publichna-informatsiia-u-formi-vidkrytykh-danykh-v-umovakh-voiennoho-stanu-spetsyfika-paradoksy-porady> accessed 15 February 2025.

65 Khrystyna Burtnyk, *Access to Public Information and Challenges for the Judiciary in Wartime* (*DEJURE Foundation*, 9 January 2023). <https://dejure.foundation/dostup_do_publichnoyi_informaciyi_ta_vyklyky_dlya_sudovoyi_vlady_v_umovax_vijny/> accessed 15 February 2025.

66 Iryna Berezovska, 'Topical Issues of Citizens' Access to Public Information and the Problems of Application of the Law of Ukraine "On Access to Public Information"' (2016) 855 *Bulletin of Lviv Polytechnic National University, Series: Juridical Sciences* 26.

67 Liubov Palyvoda and others, Existing Mechanisms of Cooperation Between Public Authorities and Civil Society Organizations in the Context of the Implementation of the National Strategy for Promoting Civil Society Development in Ukraine 2016-2020 (Vaite 2016).

According to the results of parliamentary control in 2023, the Verkhovna Rada Commissioner for Human Rights received 3,957 appeals (5,557 notifications) regarding violations of the right of access to public information. Among the main recorded violations of the right to information are unreasonable inclusion of information to the one with limited access, failure to provide information, restriction of access to information, non-publication of information on the official websites of the authorities, and delay in satisfying requests.[68] The results of the UNDP assessment indicate a decrease in the level of disclosure by managers of public information related to the introduction of the legal regime of martial law on their official websites compared to 2022, a decrease in ensuring its completeness, relevance and navigational accessibility. It was also noted that there is no unified approach to the structure and content of official websites, with many lacking a separate section for publishing administrative documents.[69]

Ukraine is a party to the Council of Europe Tromsø Convention on Access to Official Documents (2009), which was ratified by the Parliament of Ukraine on 20 May 2020.[70] This Convention was meant to be the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralistic.[71] This agreement echoes the ECHR, listing the aims of possible limitations on access to state-owned information (Article 3).

The ECtHR thus considers that, apart from the press, the capacity of a watchdog extends to NGOs, as well as to academic researchers and authors of literature on matters of public concern, and warrants a high level of protection under Article 10 of the Convention. It also notes that the function of bloggers and popular users of social media may also be assimilated to that of "public watchdogs" insofar as the protection afforded by Article 10 is concerned, given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information in general (*Magyar Helsinki Bizottság v. Hungary*, 2016).[72] The Court has furthermore extended this role to an election

68 Dmytro Lubinets, 'Information Rights' in *Annual Report on the State of Observance and Protection of Human and Civil Rights and Freedoms in Ukraine in 2023* (Ombudsman of Ukraine 2024) ch 9 <https://ombudsman.gov.ua/report-2023/rozdil-9-informatsiini-prava> accessed 15 February 2025.

69 Tetiana O Oleksiiuk and Oleksii M Kabanov, *Report on Monitoring the State of Ensuring Information Rights under Martial Law in 2023* (Ombudsman of Ukraine 2023) <https://www.undp.org/uk/ukraine/publications/zvit-pro-monitorynh-stanu-zabezpechennya-informatsiynykh-prav-v-umovakh-voyennoho-stanu-2023-roku?fbclid=IwAR1amjPjJrAhLWFVsTbr2b4dDA_AK7U9BVCnAUjXvbeoTY0p3G1SPnID1TM> accessed 15 February 2025.

70 Council of Europe Convention on Access to Official Documents (Tromsø, 18 June 2009) CETS 205; Law of Ukraine no 631-IX 'On Ratification of the Council of Europe Convention on Access to Official Documents' [2020] Official Gazette of Ukraine 48/1512.

71 'Details of Treaty no 205' (*Council of Europe Treaty Office*, 2020) <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205> accessed 15 February 2025.

72 *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016) <https://hudoc.echr.coe.int/fre?i=001-167828> accessed 15 February 2025.

observer (*Timur Sharipov v. Russia*, 2022).[73] On the other hand, lawyers have not been considered to come under this category (*Studio Monitori and Others v. Georgia*, 2020).[74] An NGO exercises a "public watchdog" role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (*Magyar Helsinki Bizottság v. Hungary*, 2016; *Margulev v. Russia*, 2019; *Association Burestop 55 and Others v. France*, 2021).[75] One example is the refusal to allow an NGO access to intelligence information despite a binding decision directing disclosure (*Youth Initiative for Human Rights v. Serbia*, 2013).[76]

Current legislation does not provide an exhaustive list of information of public interest. In each case, information that is the subject of public interest can be recognised as socially necessary. Thus, the concept of public interest is evaluative. The right to know and its correlation with probable harm are determined in each specific case. According to the Laws of Ukraine "On Access to Public Information" and "On Information", information of public interest is socially necessary, in particular: ensuring the implementation of constitutional rights, freedoms and duties; on the state of the environment, the quality of food products and household items, accidents, catastrophes, dangerous natural phenomena and other emergency events, that have occurred or may occur and threaten the health and safety of citizens; on the state of law and order, education and culture of the population; which indicates a threat to state sovereignty, territorial integrity of Ukraine; on illegal actions of state authorities, local self-government bodies and their officials; on the disposal of budget funds, possession, use or disposal of state, municipal property, conditions for obtaining these funds or property; information specified in the declaration of property, income, expenses and financial liabilities, drawn up in the form and in the manner established by the Law of Ukraine "On Prevention of Corruption".

9 CONCLUSIONS

Formally, access to information is provided through the websites of state anti-corruption bodies in Ukraine, but operational access to this information is complicated by a number of restrictions, which means spending additional time to fill out questionnaires, gain access, search for contacts of press secretaries and obtain information through informal channels.

73 *Timur Sharipov v Russia* App no 15758/13 (ECtHR, 13 September 2022) <https://hudoc.echr.coe.int/fre?i=001-219096> accessed 15 February 2025.

74 *Studio Monitori and Others v Georgia* App nos 44920/09 and 8942/10 (ECtHR, 30 January 2020) <https://hudoc.echr.coe.int/spa?i=001-200435> accessed 15 February 2025.

75 *Magyar Helsinki Bizottság v Hungary* (n 72); *Margulev v Russia* App no 15449/09 (ECtHR, 8 October 2019) <https://hudoc.echr.coe.int/eng?i=001-196480> accessed 15 February 2025; *Association Burestop 55 and Others v France* App nos 56176/18, 56189/18, 56232/18 et al (ECtHR, 1 July 2021) <https://hudoc.echr.coe.int/eng?i=001-210768> accessed 15 February 2025.

76 *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013) <https://hudoc.echr.coe.int/fre?i=001-120955> accessed 15 February 2025.

There are public resources in Ukraine with data on tenders and income declarations of public officials, which are essential for journalists to cover corruption.[77] However, processing this data requires time and special competencies in database analysis. The websites of state anti-corruption organisations in Ukraine function as presentation platforms, archives or aggregators of information that these organisations themselves are willing to share rather than providing the specific information journalists are seeking.

The development of investigative journalism in Ukraine has proven to be a powerful tool in combating corruption, providing much-needed public oversight, and helping to hold government officials accountable. This is confirmed by the number of subscribers and followers of the most popular anti-corruption journalism projects: The Anti-Corruption Action Centre has 331,000 followers on Facebook, over 19,000 followers on Instagram, and over 15,000 followers on Telegram; Bihus.info has 459,000 readers on Facebook, over 64,500 followers on Instagram, over 29,000 followers on Telegram, 1.05 million subscribers on YouTube; Radio Svoboda has 1.7 million followers on Facebook, 234,000 followers on Instagram, over 94,000 followers on Telegram, 1.63 million followers on YouTube; and Project Nashi Groshi has 30,000 followers on Facebook, 153,166 on X. The wide audience reach of anti-corruption investigations has great potential for controlling the authorities and shaping opposition moods in society.

Journalists investigating corruption in Ukraine play a crucial role in advocating for the impeachment and resignation of corrupt officials, as well as prompting formal investigations. Despite President Zelenskyy's claims of an effective anti-corruption system,[78] the reality is that this system cannot function effectively without journalists. Moreover, wartime conditions have further created new opportunities for corruption within the government, and the lack of legal solutions to major corruption cases signals the ineffective handling of corruption in public authorities. The case involving corruption within Ukraine's highest judicial body (established after the judicial reform)[79] demonstrates genuine steps towards implementing anti-corruption reform and actions to reduce corruption. Our research concludes that Ukrainian journalists have limited opportunities to promptly and systematically receive information from state anti-corruption bodies about ongoing cases and investigation outcomes. Therefore, investigative journalism is the only way for Ukrainian media to fulfil its role in civil control and hold authorities accountable.

77 'Transparency and Openness in Executive Authorities are Reality' (*Government Portal*, 2024) <https://www.kmu.gov.ua/gromadskosti/dostup-do-publichnoyi-informaciyi/rezultati-anketuvannya-organiv-vikonavchoyi-vladi-ta-monitoringu-oficijnih-veb-sajtiv/prozori-ta-vidkriti-organi-vikonavchoyi-vladi-ce-realnist> accessed 16 October 2024.

78 Tetiana Lazovenko, 'Anti-Corruption System in Ukraine is Among Most Powerful in Europe – Zelenskyy' *Ukrainska Pravda* (Kyiv, 17 February 2023) <https://www.pravda.com.ua/eng/news/2023/02/17/7389817> accessed 16 October 2024.

79 Inna Vedernikova, 'The King is Dead. Long Live the King!' *Dzerkalo Tyzhnia* (Kyiv, 1 June 2023) <https://zn.ua/eng/the-king-is-dead-long-live-the-king.html> accessed 16 October 2024.

Optimising the communication activities of public anti-corruption authorities through the six types of transparency highlighted by Johannessen and Berntzen[80] will significantly increase their credibility and improve the effectiveness of anti-corruption activities by enabling public oversight. Ensuring transparency in anti-corruption authorities requires the following steps.

- **Transparency of documentation:** Establish and maintain a unified digital platform and registry for access to public documents related to anti-corruption procedures, available through the websites of anti-corruption organisations.
- **Transparency of negotiations**: Involve the public and media representatives in the decision-making process on key anti-corruption issues and provide information about the results of such negotiations through press conferences and media statements.
- **Transparency of processes:** Publish anti-corruption procedures and methods of work with detailed descriptions, allowing citizens to understand how decisions are made, what information is available and which is classified. This also requires establishing guidelines for working with journalists, ensuring that they have prompt access to information. Open access of journalists to the press secretary and press service has to be ensured, and the regular updating of information on the websites and social networks of the organisations is mandatory.
- **Transparency of the comparative process**: Ensure the publication of activity reports and annual reviews assessing the effectiveness of anti-corruption measures, including cases brought to court and those sentenced.
- **Transparency in clarifying information**: Establish specialised services for submitting requests for information and provide public access to FAQs through the organisations' communication resources.

These recommendations aim to increase the level of transparency and openness in the activities of public authorities, contributing to public confidence and enhancing the effectiveness of anti-corruption efforts in Ukraine.

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80 Johannessen and Berntzen (n 26).

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЖУРНАЛІСТИКА ТА ПРАВО НА ІНФОРМАЦІЮ ЯК ІНСТРУМЕНТИ БОРОТЬБИ З КОРУПЦІЄЮ В УКРАЇНІ: ОЦІНКА ДОСТУПУ ЗМІ ДО АНТИКОРУПЦІЙНИХ ОРГАНІВ

Ірина Солдатенко*, Олена Чуб та Олена Купіна

АНОТАЦІЯ

Вступ: *Із 2014 року Україна досягла значного прогресу у створенні своєї антикорупційної структури. Проте канали комунікації антикорупційних органів країни залишаються обмеженими, що перешкоджає відкритому та доступному поширенню інформації про їхню діяльність. Прозорість, як критична характеристика інформаційної відкритості, гарантує, що громадянське суспільство може отримати доступ до відповідних урядових даних. У цьому контексті журналістські розслідування виявилися важливим*

інструментом для викриття корупції та притягнення влади до відповідальності. У статті досліджується роль журналістики у боротьбі з корупцією в Україні, підкреслюючи її функцію як важливого інструменту для забезпечення підзвітності та прозорості уряду. У цій роботі було надано огляд антикорупційної політики та інституцій України, досліджено теоретичні моделі відносин між медіа, урядом та суспільством. Розглядаючи права журналістів-розслідувачів на доступ до інформації, автори статті аналізують труднощі, пов'язані з правом на доступ до інформації в умовах воєнного часу та можливості журналістських розслідувань у викритті корумпованих посадовців, що спонукають державні антикорупційні органи до дій.

Методи: *У статті застосовано теорію демократичної участі (МакКвейл) для дослідження ролі журналістики у висвітленні випадків корупції та сприянні прозорості. Щоб дослідити теперішній стан прозорості в антикорупційних зусиллях України, у роботі було проаналізовано (метод контент-аналізу) вебсайти трьох ключових інституцій: Національного агентства з питань запобігання корупції, Національного антикорупційного бюро, Вищого антикорупційного суду України та Апеляційної палати Вищого антикорупційного суду. Аналіз показує проблеми, пов'язані з відкритістю та доступністю їхньої інформації.*

Результати та висновки: *Результати дослідження свідчать, що хоча державні антикорупційні агенції формально забезпечують доступ до інформації через свої вебсайти, журналісти стикаються зі значними перешкодами для своєчасного та систематичного доступу. У статті підкреслюється вплив воєнного стану на доступ до інформації, увагу було зосереджено на дискреції держави щодо балансування між вимогами безпеки та зобов'язаннями щодо прозорості. Дослідження завершується рекомендаціями щодо вдосконалення комунікаційних стратегій антикорупційних органів, пропонуючи заходи для підвищення прозорості та суспільної довіри.*

Ключові слова: *корупція, журналістське розслідування, державні антикорупційні органи, прозорість влади, право на інформацію, надзвичайний стан, суспільний нагляд, суспільний інтерес, легітимність, обмеження, оприлюднення, ініціативна публікація.*

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Research Article

TRANSPARENCY IN THE LABYRINTHS OF THE EU AI ACT: SMART OR DISBALANCED?

Gintare Makauskaite-Samuole

ABSTRACT

Background: *Complete transparency in artificial intelligence is impossible to achieve.*[1] *In the interdependent technological context, the scope of artificial intelligence transparency and the logic behind the values that outweigh transparency are unclear. Legislation on artificial intelligence, such as the European Union Artificial Intelligence Act (hereinafter the EU AI Act), tries to define the true meaning and role of AI transparency.*

Methods: *The author applies doctrinal research and comparative analysis methods to assess AI transparency in the EU AI Act; a framework of distinct transparency zones is established. Doctrinal research helps to define the scope of transparency obligations and examine their limitations and interaction within the EU AI Act, while comparative analysis highlights inconsistencies, such as an unexplained difference between transparency duties in distinct zones or different requirements for open source and proprietary AI.*

Results and conclusions: *The findings reveal a fragmented and uneven framework of artificial intelligence transparency in the EU AI Act, shaped by many exemptions, exceptions, derogations, restrictions, and other limitations. The zero-transparency zone (established by Article 2) is too broad, with much discretion given to stakeholders. In contrast, the basic transparency zone (set by Article 50) is too narrow, posing risks to fundamental human rights. The next zone, the moderate transparency zone (Chapter V), struggles with responsibility sharing between AI providers and downstream deployers. Meanwhile, the high transparency zone (provided in Chapter III) privileges law enforcement. Lastly, the hybrid transparency zone highlights complications in managing interactions between different risk-level AI systems.*

1 Mona Sloane and others, 'Introducing Contextual Transparency for Automated Decision Systems' (2023) 5 Nature Machine Intelligence 188, doi:10.1038/s42256-023-00623-7.

The author concludes that the EU AI Act is progressive but needs more fine-tuning to function as a coherent and solid transparency framework. The scales between public interest in artificial intelligence transparency, individual and societal rights, and legitimate interests risk being calibrated post-factum.

1 INTRODUCTION

The European Union (EU) faces distinct challenges in the field of artificial intelligence (AI). Member States have been slow to reach the targets set by the Digital Agenda,[2] and only a few European AI startups, such as Mistral AI, can compete with their non-European counterparts, making Europe a *terra nullius* market for non-European AI companies. According to estimates from the European Commission, 70% of AI systems in the EU pose minimal risk[3] and are not bound by transparency obligations under the EU AI Act.[4] This limited outlook raises the question of whether humans will control AI or AI will control humans.

Transparency, as outlined in Recital 9 of the EU AI Act, is one of its rationales "to strengthen the effectiveness of such existing rights <..> by establishing <..> obligations <..> in respect of transparency".[5] Its primary objective is to establish a balance between innovation and the protection of human rights. However, this regulatory compromise inherently reflects the EU's fundamental values. The problem is that the regulatory compromise is often a dangerous trade-off.

The challenge lies in the extent to which transparency is limited by legislative choices—determining what is visible and where scrutiny is directed. While the lack of AI transparency may stimulate innovation development in the short term, in the long run, inadequate transparency may deepen the gap between expectations and reality. This imbalance could have a wide effect on society and human rights.

2 European Commission, 'Second Report on the State of the Digital Decade calls for Strengthened Collective Action to Propel the EU's Digital Transformation: Press Release' (2 July 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3602> accessed 5 August 2024.

3 European Commission, *Commission Staff Working Document: Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, SWD/2021/84 final (21 April 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021SC0084> accessed 5 August 2024.

4 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) PE/24/2024/REV/1 [2024] OJ L 235/1 <http://data.europa.eu/eli/reg/2024/1689/oj> accessed 5 August 2024.

5 Luca Holst and others, 'The Impact of the EU AI Act's Transparency Requirements on AI Innovation' (19th International Conference on Wirtschaftsinformatik (WI), Würzburg, Germany, September 2024) <https://eref.uni-bayreuth.de/id/eprint/90313/> accessed 17 November 2024.

EU AI Act's adoption for Member States is costly,[6] even if the effect is partially complemented by the compliance of GDPR and other digital acquis. Uneven and slow digitalisation within the EU calls for simplification, verticalisation, or deregulation of AI.[7] Faced with variable and stringent "Brussels effect" [8], Eastern European candidate countries double-track laws[9] for future compliance, end in weak enforcement or misuse exemptions for nondemocratic reasons.[10] A solid transparency framework would minimise the mentioned side effects and bring internal and external clarity about the EU's values.

Systemic, generalised analysis of AI transparency in light of substantive limitations and constraints is not often discussed in the academic literature. Scholars concentrate on specific aspects of transparency, such as trust and accountability, high-risk AI systems, explainability, or suitability of a risk-based approach to protecting rights. However, AI transparency requires a more comprehensive, high-detail approach from the perspective of the limitations of transparency frameworks. The article argues that the role of AI transparency is shadowed and overcomplicated by the tiered risk management framework in the EU AI Act; the scope of AI transparency is unevenly distributed. AI transparency, inter alia, depends on limitations and constraints. By analysing them, the author assesses if artificial transparency in the EU AI Act is sufficient to address the current needs of a digital European future.

2 METHODOLOGY

The research focuses on the provisions for AI transparency in the EU AI Act. The methodology includes a doctrinal research method and comparative analysis of transparency regulation in the EU AI Act.

The first part of the paper provides an overview of AI transparency particularities in the EU AI Act. Two general aspects are considered briefly using doctrinal research and comparative analysis. First, AI transparency's role and true meaning are evaluated in contrast to the already established governmental transparency framework. It became evident that the tailored form of transparency operates within a complex tiered risk management

6 Meeri Haataja and Joanna J Bryson, 'What Costs Should We Expect from the EU's AI Act?' (*Center for Open Science*, 27 August 2021) SocArXiv 8nzb4, doi:10.31235/osf.io/8nzb4.

7 Mario Draghi, *The Future of European Competitiveness: Part A: A Competitiveness Strategy for Europe* (European Commission 2024).

8 Charlotte Siegmann and Markus Anderljung, *The Brussels Effect and Artificial Intelligence: How EU Regulation Will Impact the Global AI Market* (Center for the Governance of AI 2022) 3-4.

9 Ministry of Digital Transformation of Ukraine, *The White Paper on Artificial Intelligence Regulation in Ukraine: Vision of the Ministry of Digital Transformation of Ukraine : Version for Consultation* (Ministry of Digital Transformation of Ukraine 2024) 17.

10 Amnesty International, *"A Digital Prison": Surveillance and the Suppression of Civil Society in Serbia* (Amnesty International Ltd 2024).

framework, where stakeholder roles and responsibilities are blurred. Additionally, the application of transparency rules is not fine-tuned. Following this, the paper reviews the limitations of AI transparency, highlighting numerous constraints that stem from various provisions yet lack consolidation.

The second part of the paper reviews the scope constraints of AI transparency. The author proposes a novel framework of transparency zones, which helps differentiate the AI transparency framework from the risk management framework. This approach allows for an individual and collective assessment of each zone, offering a clearer understanding of how transparency provisions function and interact. Transparency zones are reviewed to cover data, algorithm and output transparency, with substantial elements compared across zones. The paper further evaluates the gradual increase in transparency obligations zone by zone, identifying the target audience and weighing the arguments pro and contra transparency values. The study assesses whether transparency obligations are balanced and whether they impose an excessive burden on one side. Finally, transparency obligations are assessed to check if they are feasible and non-contradictory within a developing AI landscape. The research is concluded with final remarks.

3 OVERVIEW OF AI TRANSPARENCY IN THE EU AI ACT

3.1. Particularities of AI transparency in the EU AI Act11

AI transparency is a broad "umbrella" concept that is contextualised for different audiences and environments.[12] The broad concept of AI transparency, as used in transparency frameworks,[13] overlaps with other AI system properties, like explainability and interpretability, to address ethical and societal concerns.[14] This article uses the broad concept of AI transparency to correspond to different environments where its limitations occur.

11 Artificial Intelligence Act (n 3) preamble, para 64.

12 Anastasiya Kiseleva, Dimitris Kotzinos and Paul De Hert, 'Transparency of AI in healthcare as a multilayered system of accountabilities: between legal requirements and technical limitations' (2022) 30(5) Frontiers in artificial intelligence 7-8, doi:10.3389/frai.2022.879603.

13 Kashyap Haresamudram, Stefan Larsson and Fredrik Heintz, 'Three levels of AI transparency' (2023) 56(2) Computer 93, doi:10.1109/MC.2022.3213181; Md Tanzib Hosain and others, 'Path to Gain Functional Transparency in Artificial Intelligence with Meaningful Explainability ' (2023) 3(2) Journal of Metaverse 166, doi:10.57019/jmv.1306685; Luca Nannini, 'Habemus a Right to an Explanation: so What? – A Framework on Transparency-Explainability Functionality and Tensions in the EU AI Act' (2024) 7(1) Proceedings of the AAAI / ACM conference on AI, Ethics, and Society 1023, doi:10.1609/aies.v7i1.31700.

14 ISO/IEC FDIS 12792 Information Technology - Artificial Intelligence - Transparency Taxonomy of AI Systems (ISO/IEC DIS 12792:2024) (ISO/IEC 2024) 7.

AI transparency generally aims to make regulated AI systems' processes, decisions and processes visible and understandable throughout their lifecycle. Visibility includes both short-term and long-term processes and results. Understandability upgrades AI transparency from mere technical visibility by ensuring a specific level of comprehension for the audience, enabling informed choice, as provided in the OECD Principles on AI.[15]

The EU AI Act establishes a tiered risk management framework on which, based on the reading of Recital 27, the transparency framework largely depends. However, the risk management framework's dominance and shortcomings—criticised for being too arbitrary, not based on objective data,[16] and lacking dynamic risk-benefit analysis—[17] suppresses the transparency framework's visibility. Unsurprisingly, existing classifications, such as technical and protective transparency or rights-enabling, review-enabling, and decision-enabling transparency,[18] show that transparency is sometimes reduced to an operational attribute of the risk management framework.

In the EU AI Act, AI transparency does not benefit from the principle of maximum disclosure or transparency by default, as governmental transparency does. Instead, it is a targeted and tailored form of transparency. Targeted transparency has several implications for AI regulation. First, targeted transparency means limited scope: not all AI systems are subject to obligatory transparency requirements due to the narrow definition of AI, AI system, risk, and other relevant terms. Second, targeted transparency affects the balancing of interests. Third, it also implies the application of the proportionality principle, meaning that the scope of transparency regulation and the subsequent application of transparency requirements is subject to the necessity and proportionality of regulatory intervention.

In addition, AI transparency under the EU AI Act is restrictive, somewhat inadequate, and operates through separate communication "lanes". The Act establishes a risk-based tiered compliance framework involving AI providers, deployers, and public and supervisory institutions. Public transparency is limited, with the public playing a passive role and lacking participatory rights typically granted in other regulatory contexts.[19] Responsibility is concentrated in the hands of supervisory institutions and AI providers (and, in some cases, deployers) via organisational and expert transparency. While AI developers and deployers

15 OECD, *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449 (OECD Legal Instruments 2025).

16 Martin Ebers, 'Truly Risk-Based Regulation of Artificial Intelligence: How to Implement the EU's AI Act' [2024] European Journal of Risk Regulation 7-10, doi:10.1017/err.2024.78.

17 Henry Fraser and José-Miguel Bello y Villarino, 'Acceptable Risks in Europe's Proposed AI Act: Reasonableness and Other Principles for Deciding How Much Risk Management Is Enough' (2024) 15(2) European Journal of Risk Regulation 445, doi:10.1017/err.2023.57.

18 Holst and others (n 5).

19 Kostina Prifti and others, 'From Bilateral to Ecosystemic Transparency: Aligning GDPR's Transparency Obligations with the European Digital Ecosystem of Trust' in Simone Kuhlmann and others (eds), *Transparency or Opacity: A Legal Analysis of the Organization of Information in the Digital World* (Nomos 2023) 135-9, doi:10.5771/9783748936060-115.

have some transparency obligations towards the individuals, most transparency measures—such as documentation and auditing—are directed at supervisory institutions. Furthermore, knowledge sharing between AI providers and downstream deployers is designed with a high degree of discretion for AI providers.

Some framework inconsistency is preprogrammed in the timing when transparency measures are applicable. Unlike others, the EU AI Act concentrates on transparency measures on the launch of the AI system or entrance to the market, with the risk of transparency being assessed *post-factum* and converted into a larger scale risk. Focusing on a specific point may lead to blanket compliance. The ideation, testing, and even post-mortem stages require transparency—especially considering the impact of initial errors or reuse of system components after discontinuation.

EU lawmakers have taken the pragmatic approach to avoid overburdening both themselves and AI market participants. Timing and scope constraints illustrate this point. The application of transparency rules is narrow. The involvement of multiple loosely connected stakeholders further diffuses accountability for AI non-transparency. Meanwhile, the public—arguably the least informed participant in the AI ecosystem—remains passive and lacks participatory rights. These factors, taken together, signal a highly granular approach to AI transparency. Adding to this complexity, the EU AI Act establishes numerous transparency limitations, further shrinking the scope of transparency obligations.

Limitations of AI Transparency

The EU AI Act provides various limitations on transparency: exemptions, exceptions, derogations and restrictions.

First, some *exemptions* in Article 2 of the EU AI Act prevent its application. The logical line between them is not consistent. They include exemptions in *scope*, such as national security, scientific research, and personal use; in *time*, such as pre-market development; and in *type*, like free open-source systems.

Second, some *exceptions* in Article 50 release AI providers and deployers from specific transparency obligations. Exceptions are cumulative (like law enforcement, which releases from several transparency duties, raising questions about why law enforcement is so privileged) and single, like AI assistive role.

Thirdly, some *restrictions* arise from normative competition related to the interaction with other legislation. On one side, the general rule in Article 50 states that transparency duties for certain AI systems are "without prejudice" to other EU or national law transparency obligations; regulatory complementarity and harmonising nature are elaborated in Recital 9. On the other, there are hints of prioritised obligations within the text. They include the confidentiality duty of supervisory institutions set in Article 78 of the EU AI Act, which coincides with typical exceptions to access official information (such as IP rights, trade secrets, audits, national security, etc.). They also include rules for respect of privacy and

personal data protection (Recital 69 of the EU AI Act), the right to clear and meaningful explanations for decisions having legal effects made by high-risk AI systems (Article 86); bias removal vs. sensitive personal data (Article 10); respect for specific substantial public interests in AI regulatory sandboxes (Article 59), as well as the duty to conduct fundamental right impact assessments in high-risk systems. Without the general principle of pro-disclosure, norm competition is too complicated to be free from tensions over what takes priority – public interest in AI transparency or confidentiality.

Fourth, the EU AI Act applies proportionality to AI transparency rules. Proportionality is predetermined, without dynamic balance. The first example is the tiered risk framework, with different transparency obligations corresponding to risk level. Higher-risk AI systems have more extensive transparency obligations than low-risk. AI regulatory sandboxes have lighter transparency obligations compared to standard AI systems. Similarly, in *derogations*, microenterprises and smaller organisations are subject to simplified transparency obligations (Article 17, 63); inconsistently, the risk is not the dominant determinant in this case. In addition, synthetic content generated by AI as part of evidently artistic, creative, satirical, fictional, or analogous work or program is subject to lighter requirements (Article 50), predetermining a balance with freedom of arts.

To sum up, the EU AI Act's approach to AI transparency limitations is complex and fragmented. The transparency framework lacks a systemic pro-disclosure foundation needed for robustness and future-proofing, making it difficult to measure and compare. The limitations are crafted as single or cumulative—sometimes separate, sometimes layered—justified by the strict necessity for regulatory intervention. While the protected values counterbalanced against pro-disclosure are context-specific, there is a lack of a logical explanation for why certain values were selected over others or why not all fundamental rights and freedoms were considered. In this complex labyrinth of limitations, the meaning of transparency risks being lost. However, an extensive scope of transparency obligations, precisely calibrated to specific types or uses of AI systems, could mitigate some of these negative effects to a certain extent. The following section examines transparency zones to assess this possibility.

4 TRANSPARENCY ZONES

Importantly, the transparency framework within the EU AI Act is not limited to the risk management framework. Instead, it acts as a spectrum shaped by the Act's risk-based approach, soft law principles, proportionality considerations, and specific limitations.

For practical purposes—such as assessing transparency obligations and enabling comparability with other frameworks—several transparency zones can be distinguished within the EU AI Act. These zones differ in the scope of transparency obligations, limitations and procedural safeguards. They include zero transparency, basic transparency, moderate transparency, and high-risk zones. The scope of

obligations and derogations reflect the width of transparency, while its depth is determined by exceptions and restrictions.

The participants of the transparency framework include AI providers (platform providers or product or service providers), relevant authorities (policymakers and regulators at the EU and national level), AI partners (AI system integrators, data providers, AI evaluators, and AI auditors), AI subjects (data subjects and other subjects), AI customers (AI users) and AI producers (AI developers).[20] Indirect participants, such as hosting providers, are not included.[21] Sometimes, the stakeholder groups become intertwined due to the role of a stakeholder. For example, a deployer may transition into a provider due to extensive fine-tuning. As a result, transparency mechanisms extend beyond primary stakeholders like AI providers to encompass second-line stakeholders, such as developers of AI integrators.

The target audience is narrower and includes four groups: users, researchers and developers, integrators and providers, and regulators and third-party auditors.[22] Transparency enables them to fulfil their roles. For example, integrators can investigate incidents, regulators can assess performance, researchers can test and validate AI models, and users can make informed decisions.

Transparency measures can be grouped into three main types: data transparency, which involves disclosure of data sources, data processing, data security, etc.; algorithmic transparency, which entails revealing algorithms or model architectures; and outcome transparency, which focuses on disclosing AI system results and decisions.[23] However, the burden on AI stakeholders is uneven. A tiered system of transparency measures is established, with the most important attributes of AI transparency being interpretability, explainability, and traceability.[24]

The EU AI Act defines four transparency zones with varying levels. The first zone, zero transparency, is based on voluntary disclosure. The second zone, basic transparency, centres on AI awareness duty. The third zone, moderate transparency, requires several measures regarding risks, copyright, and data. The fourth and high-risk transparency zone introduces extensive transparency measures for proper accountability, safety, traceability, and control.

20 'ITI Policy Principles for Enabling Transparency of AI Systems' (*Information Technology Industry Council*, September 2022) <https://www.itic.org/policy/artificial-intelligence/iti-policy-principles-for-enabling-transparency-of-ai-systems> accessed 18 June 2024.

21 Thalia Khan and Madhulika Srikumar, 'Developing General Purpose AI Guidelines: What the EU Can Learn from PAI's Model Deployment Guidance' (*Partnership on AI*, 26 November 2024) <https://partnershiponai.org/developing-general-purpose-ai-guidelines-what-the-eu-can-learn-from-pais-model-deployment-guidance/> accessed 18 December 2024.

22 ITI Policy Principles (n 20).

23 Yinuo Geng, 'Transparency for What Purpose?: Designing Outcomes-Focused Transparency Tactics for Digital Platforms' (2024) 16(1) Policy & Internet 83, doi:10.1002/poi3.362.

24 Jessica Kelly and others, 'Navigating the EU AI Act: A Methodological Approach to Compliance for Safety-Critical Products' (*arXivLabs*, 26 March 2024) arXiv:2403.16808 [cs.AI], doi:10.1109/CAI59869.2024.0017

4.1. Zero Transparency Zone

The zero-transparency zone (Articles 2.3, 2.4, 2.6, 2.7, 2.8, 2.9, 2.10, 2.12) includes areas covered by sectoral exemptions and minimal-risk AI systems, allowing major stakeholder groups—individuals, experts, businesses, and governments—to experiment in dedicated fields. Individuals are entitled to a free-hand approach in personal, small-scale projects, experts can conduct research, businesses can innovate until they introduce AI systems to the market or offer open-source systems, and governments can act in national security, military, and defence. In this context, transparency is outweighed by the overriding public interest (exemptions) or private interest (minimal-risk AI systems).

At the same time, zero transparency reflects the EU's policy to promote AI proliferation in areas like national security, military and defence, research, personal or prior market experimentation, free and open-source systems, and minimal risk systems. This zone becomes a playground for innovation and a competitive advantage for the EU market. However, leaving risks in the zero-transparency zone unaddressed—especially in high-risk domains like autonomous weapons—fails to ensure full regulatory comprehensiveness. While some risks could benefit from control or, at least, some visibility, the zero-transparency zone effectively limits the scope of oversight.

The balance test between competing rights and interests depends on the context of the intended use of the AI system. However, it lacks a pro-transparency focus as it does not incorporate harm or public interest override tests. The only safeguard is the sole purpose test, which applies in cases like national security, though not universally.

Zero Transparency Zone	Pro Transparency Values	Contra Transparency Values
National security, personal activities, international cooperation, open-source systems, research, and testing, etc.	-	Protection of personal data Respect for private life Freedom of expression Right to liberty and security Right to a fair trial Freedom to conduct business

Two significant factors shape the scope of the zero-transparency zone: the broad interpretation of exemptions and the sole purpose test.

National security (Article 2.3) is the sole responsibility of individual EU member states and is directly excluded from the EU AI Act's application. This contrasts with the Framework Convention on Artificial Intelligence, which treats national security as an optional exemption while still requiring adherence to human rights standards and encouraging the

voluntary application of high-risk AI system standards.[25] It is the broad discretion of the states to determine national security's conceptual limits flexibly; the normative ambiguity is preprogrammed. Due to the free-hand approach, AI could become the weapon of first resort in future conflicts. [26]

The sole purpose test requires a direct link to national security. Even temporary use of national security AI systems for other purposes—including humanitarian purposes and public security—falls under the scope of the EU AI Act. In cases of dual-use, the AI Act applies to non-national security uses, but the concepts still need to be delineated based on the member states' discretion. Based on the CJEU case law on data retention and national security concerns (examples here[27] and here[28]), proportionality and necessity must be assessed, even though national security remains the sole responsibility of individual states.

These challenges are further compounded by the increasing reliance on private bodies to develop intelligent technologies for national security.[29] Industry trends indicate that initiatives with adaptable solutions often come from the private sector, not the state. Additionally, national security bodies frequently rely on standard third-party AI tools and functionalities,[30] and many non-adversarial AI systems are inherently dual-use by nature due to the universality of the algorithm.[31] This dual-use reality creates a dilemma: applying transparency and compliance requirements to non-military applications while potentially disadvantaging EU actors against adversaries. Consequently, tailored exclusive-use national security systems may proliferate as a result.

Other exemptions in the zero-transparency zone, like scientific research and development (Article 2.8) and minimal-risk AI systems (Articles 2.10, 2.12), also benefit from a broad interpretation of concepts and the sole purpose test. The potential risk of unfair use of the

25 Rosamund Powell, 'The EU AI Act: National Security Implications' (*CETaS Explainers*, 31 July 2024) <https://cetas.turing.ac.uk/publications/eu-ai-act-national-security-implications> accessed 18 December 2024.

26 Emre Kazim and others, 'Proposed EU AI Act–Presidency Compromise Text: Select Overview and Comment on the Changes to the Proposed Regulation' (2023) 3 AI Ethics 382, doi:10.1007/s43681-022-00179-z.

27 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* Joined Cases C 293/12 and C 594/12 (CURIA (Grand Chamber), 8 April 2014) <https://curia.europa.eu/juris/liste.jsf?num=C-293/12> accessed 18 December 2024.

28 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* Joined Cases C-203/15 and C-698/15 (CURIA (Grand Chamber), 21 December 2016) <https://curia.europa.eu/juris/liste.jsf?num=C-203/15> accessed 18 December 2024.

29 Powell (n 25).

30 ibid.

31 Rosanna Fanni, 'Why the EU Must Now Tackle the Risks Posed by Military AI' (*CEPS*, 8 June 2023) <https://www.ceps.eu/why-the-eu-must-now-tackle-the-risks-posed-by-military-ai/> accessed 18 December 2024.

scientific research and development exemption for the end intent of commercialisation is observed, [32] or when publicly funded research ends with no commercialisation but is used. [33]

The personal use exemption is also contested in the context of AI liability. Non-professionals without expertise are subject to a lower standard of conduct than professionals and are not required to abide by the same standard of care as professionals.[34] As the presumption of causation is not applicable for non-professionals in the draft AI Liability Directive,[35] and there is no transparency data to rely on, it is complicated for national judges to solve such cases.

Furthermore, the exemption for minimal-risk AI systems further expands the zero transparency zone, leaving most AI systems (70%)[36] unregulated, with some areas even preempting national national law.[37] Proponents of controllable AI advocate for applying transparency to all AI systems;[38] include XAI[39] and proportional transparency measures.[40]

What does this mean for the enforcement of the EU AI Act? Vague definitions and broad exemptions for national security, minimal risk, and research and development leave large areas either unregulated or governed by different standards. Major stakeholder groups face a dual-standard problem, which may discourage or impede the enforcement of stricter transparency standards unless alternative enforcement mechanisms are introduced.

The public is the least privileged regarding the right to know, facing risks of misuse, such as social engineering. The under-regulation of potential harms requires proactive monitoring and future changes to avoid systemic risks for human rights protection. Given these challenges, the scope of the basic transparency zone—which establishes minimal disclosure requirements—is of critical importance.

32 Kazim and others (n 26) 386.

33 Liane Colonna, 'The AI Act's Research Exemption: A Mechanism for Regulatory Arbitrage?' in Eduardo Gill-Pedro and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2023: Law and the Governance of Artificial Intelligence* (Springer Cham 2023) 59, doi:10.1007/16495_2023_59.

34 Cristina Frattone, 'Reasonable AI and Other Creatures: What Role for AI Standards in Liability Litigation?' (2022) 1(3) Journal of Law, Market & Innovation 38, doi:10.13135/2785-7867/7166.

35 ibid 15-55.

36 Marc P Hauer and others, 'Quantitative Study About the Estimated Impact of the AI Act' (*arXivLabs*, 29 March 2023) arXiv:2304.06503 [cs.CY], doi:10.48550/arXiv.2304.06503.

37 Ida Varošanec, 'On the Path to the Future: Mapping the Notion of Transparency in the EU Regulatory Framework for AI' (2022) 36(2) International Review of Law, Computers & Technology 104, doi:10.1080/13600869.2022.2060471.

38 Peter Kieseberg and others, 'Controllable AI - An Alternative to Trustworthiness in Complex AI Systems?' in Andreas Holzinger and others, (eds), *Machine Learning and Knowledge Extraction: 7th IFIP TC 5, TC 12, WG 8.4, WG 8.9, WG 12.9 International Cross-Domain Conference, CD-MAKE 2023, Benevento, Italy, 29 August – 1 September 2023* (LNCS 14065, Springer Cham 2023) 1, doi:.1007/978-3-031-40837-3_1.

39 Anetta Jedličková, 'Ethical Considerations in Risk Management of Autonomous and Intelligent Systems' (2024) 14(1-2) Ethics & Bioethics 91, doi:10.2478/ebce-2024-0007.

40 Claudio Novelli and others, 'AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act' (2023) 3 Digital Society 13, doi:10.1007/s44206-024-00095-1.

4.2. Basic Transparency Zone

The general obligation of providers and deployers of all AI systems within the scope of the EU AI Act is to ensure AI literacy, as regulated in Article 4. Providers and deployers must ensure that their staff and others involved in operating or using AI systems on their behalf achieve adequate AI literacy. This involves technical knowledge, experience, education, and training, as well as the specific context in which the AI systems will be used and the needs of end-users. The enforcement of this obligation, particularly in terms of transparency, largely depends on regulatory oversight of AI-related documentation, such as training data.

As the primary transparency obligation in a basic transparency zone, AI disclosures draw a line between the human world and the synthetic domain. On one hand, they require disclosure to natural persons when they are exposed to AI or AI output. On the other hand, they require disclosure for machines, indicating that the content is synthetic. However, compliance with transparency obligations does not automatically render an AI system or its output lawful (Recital 137).

Article 50 of the EU AI Act sets out five disclosures, including the disclosure of human interaction with AI, technical watermarking of synthetic content, disclosure of emotion recognition/biometric categorisation systems, disclosure of deepfake content, and disclosure of AI-generated text for the public interest. All these disclosures fall under the scope of AI outcome transparency, not including data or algorithmic transparency layers. The scope of AI disclosures varies. AI HLEG principles suggest it should include "making humans aware that they communicate or interact with an AI system, as well as duly informing deployers of the capabilities and limitations of that AI system and affected persons about their rights" (Recital 27). AI disclosures for low-risk AI systems do not include details about the provider of the AI system, logic beneath the AI algorithms, instructions of use, rights, responsibilities, and remedies, making specific AI documentation available publicly, registering in AI systems registers, etc. The burdensome effect of broader transparency is presumed in that way.

Article 50 further mandates that AI interaction or exposure disclosures to natural persons in specific-risk AI systems. Relevant information must meet the criteria of timeliness, clarity, distinguishability, and accessibility (Article 50.5). Clarity requires that disclosures be high-level and easily understood by the general public, while distinguishability ensures that the public notices. Accessibility is most likely to be interpreted in the narrow sense,[41] but not implying comprehensibility and usability for the intended user. As there are no specific requirements for explanations of system operation, limitations, or user expectations, the discretion to indicate that AI may make mistakes or accuracy metrics rests upon the provider.

41 Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the Accessibility Requirements for Products and Services (Text with EEA Relevance) PE/81/2018/REV/1 [2019] OJ L 151/70.

The values to be weighed in the balance test depend on the context of the AI system's intended use and are not limited to those directly mentioned in the EU AI Act. However, some of them are mentioned in the exceptions to AI disclosure (such as Article 50.3), so they must be considered on both sides of the balance, i.e., pro- and contra-transparency.

Basic Transparency Zone	Pro Transparency Values	Contra Transparency Values
AI interacting with humans or generating synthetic content (e.g., deepfakes, biometric categorisation, public-interest texts).	Respect for private life Protection of personal data Freedom of expression and information Freedom of thought Human dignity Right to property	Protection of personal data Freedom of arts and sciences Right to effective remedy and fair trial Right to property Freedom of expression and information Freedom to conduct business

AI system disclosure regarding interaction or exposure to natural persons covers two cases. First, the providers must disclose AI systems directly interacting with natural persons (Article 50.1); second, the deployers must disclose the exposure to AI systems for biometric categorisation or emotion recognition (Article 50.3). In both cases, the applicability of the exception of law enforcement is subject to appropriate safeguards for the rights and freedoms of third parties. This requirement is specific for AI system disclosure on interaction or exposure for natural persons and is not needed for synthetic content disclosures.

AI systems in direct interaction with natural persons (Article 50.1)

AI disclosure duty is required when an AI system directly interacts with natural persons. Identification of AI may either be implied—when it is "obvious from the point of view of a natural person who is reasonably well-informed, observant and circumspect, taking into account the circumstances and the context of use"—or explicit, through verbal disclaimers, such as warnings, labelling, or other acknowledgements. Signals may also be behavioural (visual clues, such as bot avatar or intentionally synthetic voice).[42]

42 Michael Andrews, 'Emerging Best Practices for Disclosing AI-Generated Content' (*Kontent.ai*, 30 August 2023) <https://kontent.ai/blog/emerging-best-practices-for-disclosing-ai-generated-content/> accessed 18 December 2024.

One challenge is whether the mere awareness of AI is enough for an average person. The first presumption is that an average person, being informed about the use of AI, should be observant enough to see the notification. The second presumption is that the average person is reasonably well-informed. This means that an average person can critically assess AI content with prior and updated knowledge/experience of AI logic, risks, faults, and related issues. The third presumption is that an average person should be circumspect and have realistic expectations for AI content.

These presumptions, however, reflect the high standard of an average person. A simple generative AI chatbot interface with one line for asking questions signals to a user that the AI system is superhuman and knows everything. There is no direct duty to prove AI competence or verify the authority of the output. There is no direct duty to provide an alternative without AI automation, for example, to submit AI-generated content to a human reviewer for verification, evaluate the output's accuracy, or have mechanisms to improve the accuracy. The high standard of an average person may be closer to a "European average person," but it still is hardly compatible with the fact that, in 2024, 44% of EU citizens lack basic digital skills.[43]

The AI system disclosure duty is not applicable in cases of AI systems used for crime detection, investigation, prevention, or prosecution unless the public uses the system for crime reporting (Article 50.1). The law enforcement sector is classified as higher risk because of the power imbalance, the capability to systematically impact human rights and freedoms, and the importance of public trust, remedies, and accountability (Recital 59). However, the public interest in security and public order outweighs the public right to know about the exposure to AI; proportionality is not directly considered (though appropriate safeguards for the rights and freedoms of third parties must be applied, unless AI systems are available for the public to report a criminal offence).

The second case of AI system disclosures applies when AI is legitimately used as an element of emotion recognition or biometric categorisation (Article 50.3). For example, this includes AI-empowered detection of distractions by a driver, emotion detection from the human voice in customer support, etc. Through this, the lawmaker covers a zone beyond the average user's knowledge and recognises an impaired human capability to detect and understand AI. It also indicates a zone of heightened risk of AI misuse, bordering prohibited practices under the EU AI Act, such as real-time remote biometric identification in public places and emotion recognition for law enforcement, workplace monitoring, and education (Article 5). Unlike the first case, the duty falls on the deployer, not the provider, as the deployer has direct control over AI use. Along with personal data protection requirements, AI-powered emotion recognition or biometric categorisation is subject to the AI disclosure duty and informed choice.

43 European Union, 'Digitalisation in Europe – 2024 Edition' (*EuroStat*, 29 April 2024) <https://ec.europa.eu/eurostat/web/interactive-publications/digitalisation-2024> accessed 18 June 2024.

The standard exception of crime detection, investigation, and prevention applies to the AI used in emotion recognition and biometric categorisation; prosecution is not included. These exceptions reflect the objectively widespread practice of using biometric data in individual crime detection and investigation activities (such as forensic analysis) that could and should be more effective with the help of undisclosed AI. Considering that exceptions must be drawn and interpreted narrowly, there is a question of whether the silent imminence factor is essential when weighing values here. It seems that it is not. If it were, predictive crime prevention with undisclosed use of AI would be limited only to crimes with a high degree of objective likelihood of being committed. In this case, preventive minor financial crime screening would be impaired in efficiency due to the disclosure duty. Public order (not an exemption) and public safety (exemption, Article 3(45), 3(46), Recital 33) may overlap in this case. However, it also must be noted that the generic reason for crime prevention, not subject to disclosure duty, is very convenient to justify the excessive intervention and infringement of privacy, which may lead to factual mass surveillance. The other question is whether the duty of disclosure in crime prevention is limited to serious crimes. Real-time remote biometric identification (not categorisation) in public places is tied to limited cases of grave crimes (such as terrorism) and paired with judicial and legal oversight (Recital 35). Again, a systemic reading of the EU AI Act indicates that AI systems used for any crime prevention are exempt from the disclosure duty.

Other transparency challenges in the second case emerge in implementation, monitoring, and communication with exposed users. First, the scope of information to be disclosed and the nature of disclosure are not explicit despite the reality that AI use in borderline practices necessitates more transparency measures than in other cases. Second, it is good that the compliance burden shifts to the side of the deployer, as the user now benefits from the presumption of being a weaker side. However, the deployers are not providers; it is questionable whether they can provide enough algorithmic transparency when they do not have complete control over the knowledge of external datasets their AI systems use. Third, in some cases, transactional transparency might have flaws; for example, users might not be consciously aware that their biometric or emotional data is being collected and analysed, even if informed consent is technically given. For example, they understand the initial purpose of giving consent in a specific context but ignore the secondary uses in other contexts of the provider.

Synthetic Content Disclosures

Synthetic content disclosures cover two cases: providers' disclosure to machines that content is synthetic (technical watermarking, Article 50.3) and deployers' disclosure to persons that content is synthetic (deepfake clause and news clause, Article 50.4).

Technical *watermarking* of AI-generated or manipulated content is important for compliance, liability, risk mitigation and prevention, the quality of future AI, and recognition of digital

"waste" in the digital ecosystem. At the same time, similar to the legal challenges of counterfeit products, mechanisms to ensure authenticity and traceability are necessary.

The technical identification of AI is subject to evolving "state of the art" requirements for labelling and detection. Codes of conduct (Article 95) are expected to bring further clarity. Technical signals—via metadata, watermarking, or cryptographic signatures—must label content as AI-generated and purport information about the source and modification, if any. Technical identification signals applied to synthetic outputs of AI systems must conform to technical standards to be "effective, interoperable, robust, and reliable as far as this is technically feasible" (Article 50).

However, the current state of watermarking AI-generated text is not perfect,[44] as AI can still not recognise AI content in all cases. Additionally, watermarking may occur either during content generation or afterwards. If technical standards evolve, earlier watermarked content may not be updated for the earlier generated content.[45]

Technical watermarking exceptions cover the extent to which AI systems perform an assistive function for standard editing or do not substantially alter the input data or its semantics. A standard law enforcement exception is also applicable.

The deepfake clause (Recital 134, Article 50.4) binds deepfake deployers, explicitly requiring technical disclosure—meaning "the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated." Despite its effect on disinformation and its impact on democratic processes, deepfake is not classified as high risk by default. Deployers of deepfake have a general duty to disclose that the content has been artificially generated or manipulated, but exceptions exist.

The first exception permits the legitimate use of deepfakes for crime detection, investigation, prosecution, and prevention, exempting institutions from the disclosure duty. The second exception, derogation, still requires disclosure of exposure to AI but allows for lighter transparency requirements. If a deepfake is part of an artistic, creative, satirical, fictional, or analogous work or program, and it is evident that this work or program is such, the disclosure must be adapted to avoid hindering its display or enjoyment.

However, the normative ambiguity surrounding what qualifies as "evident" in artistic, creative, satirical, fictional, or analogous content presents implementation challenges. Logically, the concept of evident would be assessed through the prism of the "average user". However, attitudes toward satire and art may differ depending on the context,

44 Meghan Heintz, 'Watermarking for AI Text and Synthetic Proteins' (*Towards Data Science*, 7 November 2024) <https://towardsdatascience.com/watermarking-for-ai-text-and-synthetic-proteins-fighting-misinformation-and-bioterrorism-fd45be625dfe> accessed 17 November 2024.

45 Justyna Lisinska and Daniel Castro, 'The AI Act's AI Watermarking Requirement Is a Misstep in the Quest for Transparency' (*Center for Data Innovation*, 9 July 2024) <https://datainnovation.org/2024/07/the-ai-acts-ai-watermarking-requirement-is-a-misstep-in-the-quest-for-transparency/> accessed 19 July 2024.

culture, upbringing, age, and other essential circumstances. The attitude of the deployer may differ from the attitude of the public, too. As a result, multiple "average user" profiles could emerge, leading to incorrect labelling or the spread of unmarked AI-generated misinformation.

The second challenge lies in striking the balance between freedom of expression and public trust, which remains somewhat flawed. Exceptions to AI labelling or variations in AI disclosure methods may lead to situations where it is unclear what AI content is and what is not, leading to challenges in compliance, enforcement, and transparency. Highly convincing deepfakes may affect public discourse and elections, and trigger quick yet significant or irreversible changes to individual or collective decision-making. Therefore, open labelling and technical watermarking of AI-generated content should be prevalent in all deepfake cases.

Under the *synthetic news clause* (Recital 134, Article 50.4), AI can generate or manipulate text to inform the public on matters of public interest. Still, deployers must disclose that the text has been artificially generated or manipulated. This AI disclosure duty is subject to exceptions.

The first exception covers law enforcement. The second exemption applies when AI functions as an assistant to a human. In cases where AI-generated content has undergone a process of human review or editorial control and where a natural or legal person holds editorial responsibility for its publication, the disclosure requirement does not apply.

Potentially, disclosure that AI—rather than a person—created the content (for example, police briefings) would cast a shadow on the content's credibility, public trust, and acceptance. In other cases, it might compromise investigative techniques and further deepen distrust for law enforcement institutions. However, as AI detection tools improve, it remains unclear how these effects might be mitigated.

In this case, there is also no clarity on the concept of public interest and who is competent to inform the public. Typically, journalistic activities are included, but bloggers, public persons, and influencers are under question in different jurisdictions. The same applies to lawyers who may not benefit from the law enforcement exemption. There is also a slim line between assistance and predominant content creation, and it is up to humans to decide whether the line was overstepped and whether disclosure is necessary. For instance, if subscribers were to discover that up to 49% of the content in daily newspaper articles is AI-generated, they might raise doubts about the truth percentage within the texts and the fairness of pricing. Currently, only fully automated content creation is likely to be subject to labelling requirements.

These doubts also cast a shadow on the next transparency zone. The moderate transparency zone, in which general-purpose AI models are situated, presents and amplifies enforcement challenges at a scale. The next section focuses on this.

4.3. Moderate Transparency Zone

The moderate transparency zone covers free and open-source general-purpose AI (hereinafter GPAI) models, proprietary GPAI models, and GPAI models with systemic risk (Chapter V). The first attempts to translate the EU AI Act into technical requirements show that compliance level varies across large language models, with many popular ones scoring relatively low.[46] Notably, there is no duty of comparability, meaning that the quality of GPAI model as a service for downstream deployers and for business-to-customer users may be different, often favouring the provider's own users.

In the moderate transparency zone, the principle of transparency becomes interlaced with accountability, safety, and other AI principles, making it complicated to define transparency precisely or measure its changes across zones. Compared to the basic transparency zone, the moderate transparency zone adds layers of data and algorithmic transparency. It also targets a multistakeholder audience, including the public, AI provider-integrator, and supervisory authorities.

Transparency obligations include Article 53, which includes two key requirements common to all GPAI models: (1) a copyright and related rights policy and (2) a sufficiently detailed public summary of the content used for training. These requirements impose a significant administrative and technical burden on already existing GPAI models that were created without them, particularly those trained on diverse and large datasets.

For free and open-source GPAI models (Article 53.2), transparency duties are less stringent. Providers must publish key details, including parameters, weights, information on the model architecture, and model usage. In contrast, proprietary GPAIs follow stricter rules. First, GPAI model providers must provide detailed, up-to-date technical documentation on training, testing, evaluation, and capabilities. Second, they must share "acceptable use" documentation to help downstream providers understand model capabilities and limitations while complying with their obligations (Article 53).

More stringent transparency standards apply to GPAI models with systemic risk (Article 55). These models cannot benefit from the privilege of the lighter transparency requirements available to free and open-source GPAI models. Instead, they are subject to additional duties related to risk management, including model evaluation and resistance to risks, assessment and mitigation of possible systemic risks at the EU level, incident tracking, documentation, reporting and correction, and adequate level of security.

Values that participate in the balance test depend on the risk of a GPAI model. For models posing systemic risks, the impact on fundamental rights and freedoms must be assessed. In

46 Pascale Davies, 'Are AI Companies Complying with the EU AI Act? A New 'LLM Checker' Can Find Out' (*EuroNews*, 16 October 2024) <https://www.euronews.com/next/2024/10/16/are-ai-companies-complying-with-the-eu-ai-act-a-new-llm-checker-can-find-out?utm_source=substack&utm_medium=email> accessed 18 December 2024.

contrast, for models without systemic risk, the balance is rather limited, and standard tests for harm or public interest overrides are not required.

Moderate Transparency Zone	Pro Transparency Values	Contra Transparency Values
GPAI models without systemic risk or with systemic risks.	Freedom of expression Freedom of information Right to property Right to liberty and security Protection of personal data Fundamental rights and freedoms in corpore (assessments)	Right to property Freedom to conduct business Protection of personal data

GPAI models without systemic risk

The EU AI Act emphasises *proportional* transparency measures (Recital 101) for all GPAI model providers. It requires "*high* levels of transparency" for open-source GPAI models due to the blurring line of shared responsibility (Recital 102).

Open source and proprietary GPAI model transparency obligations differ in terms of their target audience and level of detail. In both cases, supervisory authorities have access to testing results and evaluation processes, but the public does not. However, the public can access the content summary for training data in both cases (Article 53.1, Recital 107). Proprietary AI systems, in contrast, must provide a more detailed version of this summary to supervisory authorities and integrators (Annex XI - XII).

Parameter disclosure, model architecture, usage instructions, and ongoing documentation are directed to the public/integrators or supervisors/integrators. Open-source AI systems publish technical documentation that is not necessarily detailed enough to disclose substantial information on training data and fine-tuning (Recital 104), and proprietary AI systems provide it confidentially for supervisory institutions and integrators. The overlap of the target audience by the public and integrators or supervisors and integrators may complicate the explainability of AI, as explainability to developers means different things than that of an average individual. Key benchmarks, such as comparison with human performance metrics, may help to understand information.[47]

47 ITI Policy Principles (n 20).

Differences in transparency for proprietary and open-source GPAIs could also lead to inconsistent compliance. Public perception of transparency often depends on publicly available information, meaning proprietary GPAIs risk being less trusted than open-source models.

GPAI providers' transparency duties towards downstream deployers (as specified in Annex XII) require them inter alia to share information with their peers that is (was) part of proprietary know-how. This disclosure often results in partial visibility and limited understandability.

First, acceptable use policies, drafted without standardised requirements, tend to reflect providers' risk aversion priorities rather than societal impact.[48] These policies often shift responsibility to deployers and may be changed unilaterally. Direct use limitations within them are challenging, especially when integrating several models.[49]

Second, indirect limitations—such as inbuilt safeguards—can subtly change model behaviour and amplify limitations to a societal risk, as seen in models like DeepSeek.

Another challenge relates to training data transparency[50]. Major AI providers opt for high-detail descriptions of training data while maintaining intentional opacity,[51] echoing the generality of the obligation to provide a copyright summary under Annex XII but renders the disclosures of little practical use. The major downside of minimal transparency is the default prioritisation of temporary competitiveness over risk management and copyright protection.

GPAI Models with Systemic Risk

The concept of systemic risk is technical. It depends on the number of parameters, users, quality and size of the dataset, amount of computation, input and output modalities, benchmarks and evaluation of capabilities, impact depth, and scope (Annex XIII of the EU AI Act). Determining whether a GPAI model poses systemic risk involves an initial self-assessment by the provider followed by regulatory authorities (Article 55 of the EU AI Act). This two-step process may create ambiguity in determining whether the risk is "systemic".

In addressing systemic risk, the EU AI Act prioritises accountability and risk management over transparency (Recital 104). However, systemic risk still affects transparency. Providers must supply more extensive and detailed documentation with a proactive

48 Kevin Klyman, 'Acceptable Use Policies for Foundation Models' (2024) 7(1) Proceedings of the AAAI / ACM Conference on AI, Ethics and Society 760, doi:10.1609/aies.v7i1.31677.

49 ibid 760.

50 ibid 753.

51 Adam Buick, 'Copyright and AI training data–transparency to the rescue?' [2024] Journal of Intellectual Property Law and Practice 3, doi:10.1093/jiplp/jpae102.

approach to risk assessment and mitigation. Information and documentation on systemic risks are subject to supervisory institutions' confidentiality obligations, meaning it is not publicly available in its entirety.

While the legislator addressed systemic risk through extra accountability, the high transparency zone offers a useful point of comparison, as it establishes transparency duties for AI systems that can also significantly impact individuals.

4.4. High Transparency Zone

High transparency is required for high-risk AI systems (Chapter III), which may account for one-fifth of all AI systems.[52] Unlike prohibited practices, high-risk AI systems are defined by their intended use.[53] In light of Article 6 of the AI Act, these systems pose a significant risk of harm to the health, safety, or fundamental rights of natural persons, including through their influence on decision-making outcomes.

The list of high-risk AI systems means slowing the innovation speed in sensitive areas to prevent quick and dangerous deterioration of Europe's fundamental values. In such domains, human oversight, decision-making, and intolerance for AI-related errors and failures outweigh AI automation's benefits by default. These areas include public security (critical infrastructure), product safety (Annex I), individual safety (emergency), privacy (profiling), law enforcement, and the administration of justice and democratic services. However, limiting access to governmental information in these contexts can lead to reduced public scrutiny.

While public access to governmental information is restricted on these grounds, high-risk AI systems operating in these areas are subject to increased supervision and confidentiality duties. Notably, the list of limitations to access information in freedom of information laws is not identical to the high-risk list in the EU AI Act. Some newly introduced areas in the EU AI Act extend protections to decision-making affecting individuals, covering areas such as education and vocational training, employment, access to services, creditworthiness, and insurance.

52 Initiative for Applied Artificial Intelligence, *AI Act: Risk Classification of AI Systems from a Practical Perspective: A study to identify uncertainties of AI users based on the risk classification of more than 100 AI systems in enterprise functions* (AppliedAI 2023) <https://www.appliedai.de/en/insights/ai-act-risk-classification-of-ai-systems-from-a-practical-perspective> accessed 18 June 2024.

53 Kazim and others (n 26) 383.

High Transparency Zone	Pro Transparency Values	Contra Transparency Values
High-risk AI systems: Biometrics, critical infrastructure, education, employment, law enforcement, asylum and border control, democratic processes, etc.	Personal data protection Respect for private life Right to an effective remedy and a fair trial Right to property Right to liberty and security Right to vote and stand as a candidate Freedom of thought, conscience and religion Right to education Freedom to choose an occupation and engage in work Consumer protection Equality before the law Right to life Environmental protection	Right to property Freedom to conduct business Freedom of the arts and sciences Protection of personal data

Derogations from the high-risk list include four cases where the risk is deemed minor: when AI is intended to perform narrow procedural tasks, improve past human work, identify decision-making patterns or deviations without influencing earlier human decisions, or assist in preparatory assessments. Recital 53 clarifies the derogations with examples for guidance that still leave ambiguity for what a "narrow" procedural task is, how to differentiate it from the preparatory task that is not required to be narrow, or what scope of content enhancement is acceptable. The profiling of natural persons in high-risk sectors is always considered high-risk. The duty of assessment and registering in the high-risk system register (Article 49) remains.

Importantly, the risk level is based on self-assessment, and businesses may be tempted to market their AI systems accordingly, even if the actual intended use falls into the high-risk zone. For example, an AI-powered search for healthcare information, where users input their symptoms, may be marketed as having basic risk. However, if the search result is an AI-generated summary with ranked potential diagnosis results and is used by professionals,

it may mean a high risk for high-stakes decision-making. The question of supervision of similar cases remains open.

Additional transparency requirements for high-risk systems are justified by factors such as the power imbalance (e.g., law enforcement), capability to have a large-scale impact on rights (Recital 66), effect international obligations (e.g., migration, Recital 60), legal decision-making (e.g., administration of justice), or democracy (e.g., elections). These transparency rules concern large-scale or high-impact risks, preventing quick decisions and radical consequences. While systemic risks are addressed by regulating GPAI models, a slow but coordinated impact— arising from multiple low-risk AI systems or targeting specific languages or regions—is not controlled by transparency rules. This regulatory gap leaves the public vulnerable to low-scale or low-impact processes.

The target audience for high-risk AI systems is at its fullest scope and includes all participants in the AI ecosystem. The largest scope of information is visible to providers, deployers and supervisory institutions, not the public. At the same time, tailored and contextual transparency measures, customised individually, may mean a more complicated approach towards removing systemic or societal risks, as they may be hidden beneath the customisation.

Providers of high-risk AI systems have eight primary obligations, set in Article 4 and 16 and Recital 72 of the AI Act. These include AI literacy, data governance, technical documentation and records, transparency, accuracy and cybersecurity, a quality management system, a declaration of conformity, and CE marking. Deployers of high-risk AI systems have four obligations under Articles 4 and 26: AI literacy, monitoring, ensuring the quality of input data, and adherence to acceptable use. Notably, deployers have noticeably more transparency obligations than those in basic and moderate transparency zones.

The provider's duty vis-à-vis downstream deployers in high-risk AI systems covers an internal dimension of transparency, aimed at equipping deployers with to fulfil their transparency obligations. The 'average deployer' concept rests on the AI provider's perception of how the provider reads and foresees deployers' needs and expertise levels.

The provider duty vis-à-vis downstream deployers (Articles 25 and 26) consists of two elements: transparency by design and transparency by instructions. First, the AI system must be designed to allow one to understand and assess how it works, its strengths and limitations, and its intended and prohibited uses—ensuring "acceptable use" by design. Second, the "acceptable use" instructions must address "possible known and foreseeable circumstances related to the use of the high-risk AI system."

To meet essential transparency requirements, three principles: practicality (obligation to provide practical examples in instructions), comprehensibility (meaningful, comprehensive, accessible, and understandable information in all provider

documentation), and language (obligation to give instructions' translations into the languages easily understandable target deployers).

A thin line separates the responsibilities of providers and deployers, with an extra layer of transparency required for public sector deployers (Article 26.8). Providers are primarily responsible for initial transparency duties, such as technical documentation, instructions of use, and registration. However, much of the responsibility is shifted to deployers, who must ensure transparency in actual usage. Deployers are accountable for input data quality, monitoring, human oversight, corrective actions, and fulfilling the right to explanation. In the workplace, they must inform employees before using high-risk AI systems. Public-sector deployers have additional transparency duties, including compliance with registration rules (Article 49), obtaining judicial authorisation, or reporting on biometric data usage (Recital 94).

In addition to the duty to conduct fundamental right impact assessments (Article 27). However, exceptions and derogations include privacy (Article 10), intellectual property rights, confidential business information, and trade secrets (Article 25), public security, a specific, substantial, and imminent threat to the life or physical safety of natural persons, the protection of life and health of persons, environmental protection, or the protection of key industrial and infrastructural assets (Article 46). AI providers and deployers are expected to demonstrate expert knowledge and impartiality when balancing these competing values—though, in practice, it does not always happen.

The hybrid transparency zone, which integrates elements from multiple transparency zones, further adds to the complexity of compliance and oversight.

4.5. Hybrid Transparency Zone

Hybrid transparency, outlined in Recital 137, arises when a particular sector has multiple transparency zones. For example, if a high-risk system is to be used in the context of specific risk under Article 50 of the EU AI Act, the transparency obligations cumulate.

Likewise, some open-source AI systems may be exempt from the EU AI Act or fall into high-risk or low-risk sectors (Article 2). AI use in elections is permitted as high risk (Annex III) and low risk. Likewise, certain law enforcement AI applications are exempt under Article 2, whereas others pose a high risk (Article 6) or prohibited risk (Article 5). Besides, a hybrid transparency zone applies when a product falls into several categories. For example, GPAI models that are customised for high-risk use may be subject to combined transparency obligations. In such cases, transparency requirements accumulate rather than being applied separately (Recital 137).

The existence of multiple transparency zones presents several risks. First, regulatory compliance and transparency measures are complicated in overlapping risk categories and become even more complex when AI systems evolve and blur category borders. For example, in agentic mesh AI, where multiple AI agents, humans and multi-step solutions

interact,[54] issues related to boundaries and ownership are likely to arise in overlapping transparency zones. Transparency is necessary to evaluate how AI agents—being more active than just tools—are using user data, communicating with other agents, and interacting with user tools.[55]

Second, the balance between transparency and secrecy differs across different risk categories, potentially creating a risk of having a "median" level of transparency that is not tailored to specific needs. Third, a loss of public trust in one category can undermine trust across all categories. Fourth, the existence of exemptions or complicated structures—such as "exceptions of exceptions"—may encourage double or varied standards of transparency. Fifth, managing these requirements demands high expertise and additional staff. Sixth, vague exceptions to rules, especially if vague, or different procedural safeguards (e.g., proportionality and harm tests) may create gaps or at least result in uneven application of transparency measures. Finally, the overlap in data sources used across various AI systems could lead to contested data quality, underscoring the need for clear transparency principles and a solid transparency framework.

5 CONCLUSION

The EU AI transparency framework is fragmented and largely dependent on the tiered risk framework. While transparency zones are coherent with predetermined risks, the differences between them are steep. More transparency benefits supervisors but not the public. The framework needs further calibration, as its numerous limitations make it too complicated to define the sensitive line between openness and confidentiality. Larger-scale risks arising from low-risk but very common AI, as well as predetermined value balance, may emerge.

One concern is the overly broad zero-transparency zone (set by Article 2), which allows three major stakeholders in the AI ecosystem—governments, the public, and businesses—to experiment with AI discreetly. AI providers enjoy broad discretion when interpreting concepts and making self-assessments, further extending the scope of zero transparency. In contrast, the basic transparency zone (set by Article 50) is too limited, creating vulnerabilities for IP rights, freedom of thought, and democratic processes. It rests on the average end user, who may not be educated enough to make an informed choice, and it overlooks the dynamic nature of AI technologies and the modest understanding of external risks.

54 Eric Broda, 'Agentic Mesh: The Future of Generative AI-Enabled Autonomous Agent Ecosystems' (*Medium*, 6 November 2024) <https://medium.com/towards-data-science/agentic-mesh-the-future-of-generative-ai-enabled-autonomous-agent-ecosystems-d6a11381c979> accessed 18 June 2024.

55 Paz Perez, 'Treating AI Agents as Personas: Introducing the Agent Computer Interaction era' (*Medium*, 5 November 2024) <https://medium.com/user-experience-design-1/treating-ai-agents-as-personas-6ef0135bdcad> accessed 18 December 2024.

The moderate transparency zone (established by Chapter V) shows other challenges, particularly regarding fluctuating responsibility between providers and downstream deployers. The contrast in rules for open-source and proprietary software demonstrates an overestimation of the ability and willingness to manage the inbuilt risks of open-source software. At the same time, the high transparency zone (established by Chapter III) disproportionately privileges law enforcement. Disclosure obligations are not significantly increased, but the scope of risk management is, shifting the burden onto supervisory authorities.

A critical issue emerges in the hybrid transparency zone, where interactions between different AI systems are not well addressed. With the rise of agentic AI and the further evolution of AI technologies, these interactions may materialise in unpredictable and unforeseen ways.

Despite these flaws, the EU AI Act is a progressive and ambitious attempt to create a human-centered AI environment. Its long-term success, inter alia, depends on solidifying, simplifying and strengthening the AI transparency framework. Systemic improvements include establishing clear disclosure principles and milestones, empowering the public and media with participatory rights, strengthening AI literacy, establishing dogmatic conflict resolution rules, and reframing transparency to have more impact on confidentiality. Without them, AI transparency risks being a multifaceted compromise rather than a guiding principle that helps achieve the balance promised in the EU AI Act.

Future research on transparency in AI-powered digital services, small language models, governmental AI usage, the transparency obligations of providers, or the public role may help identify more underexplored gaps in AI regulation. Addressing these challenges proactively is important for a sustainable AI governance framework and a better future.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРОЗОРІСТЬ У ЛАБІРИНТАХ ЗАКОНУ ЄС ПРО ШІ: РОЗУМНО ЧИ НЕЗБАЛАНСОВАНО?

Гінтаре Макаускайте-Самуоле

АНОТАЦІЯ

Вступ: *Повної прозорості у сфері штучного інтелекту досягти неможливо.*[1] *У взаємозалежному технологічному контексті обсяг прозорості штучного інтелекту та логіка цінностей, які переважають над прозорістю, залишаються незрозумілими. Законодавство про штучний інтелект, наприклад, Закон Європейського Союзу про штучний інтелект (далі - Закон ЄС про ШІ), намагається визначити справжнє значення і роль прозорості ШІ.*

Методи: *Автор застосовує доктринальне дослідження та методи порівняльного аналізу для оцінки прозорості штучного інтелекту в Законі ЄС про ШІ; встановлюються межі щодо чітких зон прозорості. Доктринальне дослідження допомагає визначити обсяг зобов'язань щодо прозорості та вивчити їхні обмеження та взаємодію в Законі ЄС про штучний інтелект, тоді як порівняльний аналіз висвітлює неузгодженості, такі як непояснена різниця між обов'язками щодо прозорості в окремих зонах або різні вимоги до відкритого та пропрієтарного ШІ.*

Результати та висновки: *Результати дослідження розкривають фрагментарну та нерівномірну структуру прозорості штучного інтелекту в Законі ЄС про ШІ, сформовану багатьма винятками, відступами, лімітами та іншими обмеженнями. Зона нульової прозорості (встановлена статтею 2) є надто широкою і надає значну свободу дій зацікавленим сторонам. На противагу цьому, основна зона прозорості (встановлена статтею 50) є надто вузькою, що створює ризики для фундаментальних прав людини. Наступна зона, зона помірної прозорості (Розділ V), має проблеми з розподілом відповідальності між постачальниками штучного інтелекту та тими, хто розгортає технології. Тим часом зона високої прозорості (описана в Розділі III) надає перевагу правоохоронним органам. Нарешті, гібридна зона прозорості підкреслює труднощі в управлінні взаємодією між системами ШІ з різними рівнями ризику.*

Автор робить висновок, що Закон ЄС про штучний інтелект є прогресивним, але потребує доопрацювання, щоб функціонувати як цілісна та надійна система прозорості. Шкала між суспільним інтересом до прозорості штучного інтелекту, індивідуальними та суспільними правами та законними інтересами ризикує бути відкаліброваною постфактум.

Ключові слова: *прозорість ШІ, Закон ЄС про штучний інтелект, зони прозорості, регуляторні обмеження, інновації проти прозорості.*

1 Mona Sloane and others, 'Introducing Contextual Transparency for Automated Decision Systems' (2023) 5 *Nature Machine Intelligence 188*, doi:10.1038/s42256-023-00623-7.

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Research Article

CENTRAL AND EASTERN EUROPE'S CONSTITUTIONAL REVIEW DURING PUBLIC HEALTH EMERGENCIES: ANALYSIS BASED ON THE CONSTCOVID DATABASE

Boldizsár Szentgáli-Tóth

ABSTRACT

Background: *Although significant scholarly assessments have been made regarding the conditions for restricting fundamental rights under extraordinary circumstances and the impact of public health emergencies on the separation of powers, the literature has not yet been able to fully rely on the systematization of the extensive recent constitutional court jurisprudence—particularly in the Central and Eastern European (CEE) region. In recent years, constitutional courts (or supreme courts with constitutional review powers) have addressed many aspects of the COVID-19 pandemic. A thorough examination of this case law can contribute both theoretically and practically to the legal framework governing public health emergencies, the limitations of fundamental rights, the evolution of the separation of powers, and the reinterpretation of the constitutional effects of the global pandemic. Nevertheless, scholars have repeatedly noted the difficulty in accessing relevant materials, which has hindered further research in this field.*

Methods: *The ConstCovid project aims to close this gap by offering systematic access to global constitutional case law related to COVID-19, thereby expanding the potential for comparative research. Several specific examples from the CEE region will be used to demonstrate the regional usefulness of the ConstCovid database. Based on this case law, the regional tendencies and shortcomings of constitutional practice during public health emergencies will be identified. Utilising the ConstCovid database, this study contributes to the broader understanding of the constitutional ramifications of the COVID-19 pandemic and explores its potential implications for managing future public health emergencies in CCE.*

Results and conclusions: *This contribution draws some conclusions from the analysed constitutional case law stemming from ConstCovid, which may be valuable for preparing potential unwanted future public health emergencies. First, it examines strands of case law that applied general constitutional standards to the extraordinary circumstances. Second, it illustrates that these ways of argumentation were combined inconsistently with the elaboration of new frameworks of constitutional interpretation, resulting in meaningful uncertainty across the region. Third, the analysis highlights the absence of constitutional remedies specifically established to address public health challenges.*

1 INTRODUCTION

While working on a research project aimed at systematising constitutional case law related to the COVID-19 pandemic, several decisions by constitutional and supreme courts (hereinafter: CC and SC) from the Central and Eastern European (hereinafter: CEE) region emerged as particularly noteworthy. The project sought to create a global, English-language, publicly accessible database (hereinafter: ConstCovid) to organise and analyse these rulings.

The constitutional questions that emerged from the public health crisis sparked a heated scholarly debate that, among other things, considered the function of constitutional review in numerous ways.[1] Although the extraordinary nature of the pandemic significantly impacted the functioning of this constitutional instrument, regional tendencies of constitutional review remained an understudied field during the period of exceptional legal order. Key areas of inquiry include the assessment of extraordinary restrictions on fundamental rights, weighing conflicting fundamental rights and interests in times of public health emergency, developing proportionality analysis in these situations, and forming the separation of emergency powers within the constitutional framework.[2]

This article examines the principal constitutional disputes adjudicated by CCs and SCs in the CEE region during the COVID-19 pandemic, building upon the methodological framework underpinning the ConstCovid database.[3] In doing so, it seeks to elucidate the specific role of constitutional review in public health emergencies and to identify the unique weight of constitutional review to clarify the applicable constitutional standards in a public health emergency.

1 Monika Florczak-Wator, Boldizsár Szentgáli-Tóth and Iván Halász, 'Popular Sovereignty during the Covid-19 Pandemic: Lessons from the Visegrád Countries. National and Local Elections in the Shadow of the Coronavirus' (2024) 32(5) Studia Iuridica Lublinensia 307-8, doi:10.17951/sil.2023.32.5.305-332.

2 Alessandra Spadaro, 'Covid-19: Testing the Limits of Human Rights' (2020) 11 European Journal of Risk Regulation 317, doi:10.1017/err.2020.27.

3 Institute for Legal Studies, 'Covid and Constitutionalism Project' (*HUN-REN Centre for Social Sciences*, 2023) <https://covid-and-constitutionalism.tk.hun-ren.hu/en> accessed 19 April 2025.

The central hypothesis guiding this inquiry is that most public health emergency-related decisions by CCs in the CEE region were grounded in constitutional standards originally developed for normal periods. However, the unique circumstances of the public health emergency necessitated a number of deviations from these standards, without clearly defined points of reference. This legal uncertainty underscores the need for more robust preparedness. In particular, countries in the CEE region may benefit from adopting tailored constitutional remedies to meet the needs of emergency constitutionalism and ensure timely judicial oversight during future crises.

Although the acute phase of the COVID-19 pandemic has passed, this academic article is part of the ongoing strand of constitutional scholarship dedicated to learning from the pandemic and preparing for potential unwanted future public health emergencies.[4]

2 METHODOLOGY

This study is grounded in the ConstCovid research project, which seeks to establish a global, English-language database focused on constitutional review practices during the COVID-19 pandemic. The database compiles relevant case law, accompanied by keywords and a concise case synopsis. By developing a globally accessible, user-friendly, English-language search tool, ConstCovid facilitates comparative constitutional research.[5]

In contrast to broader projects with more expansive aims, ConstCovid's limited thematic scope enhances its capacity to gather a greater proportion of relevant case law in constitutional review. This narrower scope enables the collection of more directly comparable data within a specific legal field.[6]

Given the inherent similarities between the issues encountered by countries with diverse constitutional cultures[7] during the global health crisis, scholarly and practical interest in such databases increased considerably.[8] In response, several databases were established following the outbreak of COVID-19, aiming to gather decrees and laws, [9] the pertinent

4 Katinka Beretka and Áron Ősze, 'Constitutional Court Attitudes and the Covid-19 Pandemic: Case Studies of Hungary, Serbia, and Croatia' (2025) 7 Frontiers in Political Science doi:10.3389/fpos.2025.1540881.

5 Ginevra Peruginelli, Sara Conti and Chiara Fioravanti, 'Covid-19 and Digital Library Services: An Overview on Legal Information' (2021) 37(1) Digital Library Perspectives 65, doi:10.1108/DLP-07-2020-0064.

6 András Jakab, Arthur Dyevre and Giulio Itzcovich, 'Comparing Constitutional Reasoning with Quantitative and Qualitative Methods' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017) 18-9, doi:10.1017/9781316084281.

7 Ladislav Vyhnánek and others, 'The Dynamics of Proportionality: Constitutional Courts and the Review of Covid-19 Regulations' (2024) 25(3) German Law Journal 389, doi:10.1017/glj.2023.96.

8 Qingyu Chen, Alexis Allot and Zhiyong Lu, 'LitCovid: An Open Database of Covid-19 Literature' (2021) 49(D1) Nucleic Acids Research D1534, doi:10.1093/nar/gkaa952.

9 *COVID-19 Law Lab* <https://covidlawlab.org/> accessed 19 April 2025.

judicial case law,[10] parliamentary responses,[11] effects on access to justice,[12] and restrictions on freedom of expression.[13] Additionally, a number of Covid-19-related legal databases[14] continue to emerge, further contributing to the ongoing effort to organise and analyse the principal dilmemas prompted by the crisis.

Unlike previous collections that broadly catalogued COVID-19-related case law, ConstCovid specifically examines the function of constitutional review by mapping the rulings of CCs and SCs in this area. The project thus contributes to the above-mentioned systematising and stimulating tendency by offering a well-organised research resource that focuses on the function of constitutional review. The systematic assessment of constitutional review as a factor of adaptation to the extraordinary public health challenges remains an underdeveloped area of scholarship. This contribution aims to bridge that gap by analysing relevant case law and outlining fundamental elements for broader topical study, particularly in the CEE area.

In constitutional discourse, various expressions are used to describe the control of constitutional conformity over the legislation and other lower-ranked norms with slightly different meanings,[15] for example, "constitutional adjudication," "judicial review," or "constitutional review."[16]

The idea of constitutional adjudication,[17] typically understood as the assessment by CCs regarding the legality of certain legislation, laws, or norms, was only partially applicable to the methodological approach employed in this study.[18] In contrast to this definition, the research also included decisions establishing constitutional violations by omission, recognising that in many cases, unconstitutional situations stemming from the pandemic resulted from an incomplete or absent legislative environment.

10 'Open-Access Case Law Database' (*Covid-19 Litigation*, 2023) <https://www.covid19litigation.org/> accessed 19 April 2025.

11 'Parliaments in a Time of Pandemic' (*Inter-Parliamentary Union*, 2020) <https://www.ipu.org/parliaments-in-time-pandemic> accessed 19 April 2025.

12 'Impacts of Covid-19 on Justice Systems' (*Global Access to Justice*, 2020) <https://globalaccesstojustice.com/global-access-to-justice/> accessed 19 April 2025.

13 'Covid-19 Triggers Wave of Free Speech Abuse' (*Human Rights Watch*, 11 February 2021) <https://features.hrw.org/features/features/covid/index.html?#censorship> accessed 19 April 2025.

14 'Covid-19 Policy Trackers' (*Lukas Lehner*, 2020) <https://lukaslehner.github.io/covid19policytrackers/#11-civic-freedom-human-rights-media> accessed 19 April 2025.

15 Gerhard Dannemann, 'Constitutional Complaints: The European Perspective' (1994) 43(1) The International and Comparative Law Quarterly 142.

16 Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Bloomsbury Publishing Plc 2015) 78.

17 Arne Marjan Mavčič (ed), *Constitutional Review Systems Around The World* (Vandeplas Publishing 2018) 5-32.

18 Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67(1) American Journal of Comparative Law 109, doi:10.1093/ajcl/avz009.

Beyond constitutional adjudication, the concept of constitutional review itself warranted reconsideration. Constitutional review, as a subset of judicial review, traditionally refers to examining whether an administrative measure complies with the constitution or the laws. Although the two terms are frequently used interchangeably in academic literature, the study adopts a more nuanced understanding.[19]

It draws upon the definition proposed by Versteeg and Ginsburg, who define constitutional review as "the formal authority of a national court or other judicial forum with jurisdiction covering the entire country to annul certain laws due to incompatibility with the national constitution."[20] However, this definition is only partially adopted.[21] For the purposes of this research, constitutional review is defined as the formal competence of the CC or SC of a given country to review the compliance of a law or court decision with the national constitution.

Decisions are eligible for inclusion in the ConstCovid database if rendered after 1 March 2020 and address constitutional dilemmas generated by the global pandemic. Eligible decisions must originate from a country's CC or SC and directly relate to COVID-19 measures. In the CEE region, most rulings are delivered by CCs, with some exceptions. In Greece, constitutional decisions are delivered by the Council of State; in Cyprus, Estonia, and Israel, such decisions fall under the jurisdiction of SCs.[22] Additionally, numerous SC rulings with constitutional significance have been added from Poland, where the CC has had limited operation in recent years.

The analysis of the collected case law reveals two principal directions, each comprising several subcategories. The first concerns the constitutional framework governing public health emergencies. This includes rulings on the operation of constitutional bodies (e.g., online court hearings and parliamentary sessions), the extraordinary distribution of powers among constitutional actors, and the scope of the separation of powers during the special legal order. The second category concerns the constitutionality of certain fundamental law restrictions introduced due to extraordinary circumstances.

Having outlined the methodological foundation of ConstCovid, the main constitutional findings around the CEE region will now be revealed and discussed. This analysis highlights the most paramount controversies before CCs and SCs during the pandemic.

19 Spadaro (n 2) 318.

20 Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30(3) Journal of Law, Economics, and Organization 587, doi:10.1093/jleo/ewt008.

21 *World Justice Project* <https://worldjusticeproject.org/> accessed 19 April 2025.

22 'Venice Commission' (*Council of Europe*, 2025) <https://www.venice.coe.int/webforms/courts/> accessed 19 April 2025.

3 RESEARCH

As mentioned, the case law emerging from the CEE region reveals two primary themes, each comprising several subcategories that further delineate the structure of the ConstCovid database. Many rulings have focused on the constitutional framework of the public health emergency itself, including the boundaries of the separation of powers during the extraordinary period, the influence on the sharing of competences among constitutional actors, and how the various branches of government managed their everyday operations during these difficult times (e.g., online court trials or parliamentary sittings).[23]

The second category of rulings pertains to the legitimacy of some limitations on fundamental rights imposed as a result of the emergency circumstances. The next two subsections outline these categories and offer specific examples, emphasising the concerns most commonly addressed in the CEE region.

3.1. The Constitutional Framework of The Public Health Emergency: The Separation of Powers During the Pandemic

During the public health emergency period, a number of constitutional challenges—previously unknown or unacknowledged in this specific context—surfaced around the CEE region. An indicative list of these controversies can be seen below.

It is always questionable whether a public health emergency may be constitutionally declared. Accordingly, decisions issued by the SC of Israel[24] and the CCs of Bulgaria,[25] the Czech Republic,[26] Moldova,[27] Romania,[28] Serbia,[29] and Slovakia[30] affirmed the validity of the public health emergency.

At one end of the spectrum, the Czech CC ruled that, due to the extraordinary circumstances, constitutional review should not be carried out over the introduction of a special legal order. By contrast, the Romanian CC highlighted that the same principles should govern the public health emergency as ordinary constitutionalism; therefore, the emergency order of the government severely restricting fundamental rights was annulled, and the Parliament was requested to enact a law on the emergency framework of fundamental rights. Similarly, the CC of Moldova declared unconstitutional a

23 Peter Smuk, 'Crisis and Constitutional Politics in Central Europe' (2025) 7 Frontiers in Political Science doi:10.3389/fpos.2025.1545816.
24 Case no HCJ 5314/20 (Supreme Court of the State of Israel, 3 December 2020).
25 Case no 10/2020 (Constitutional Court of Republic of Bulgaria, 23 July 2020).
26 Case no Pl. ÚS 12/21 (Constitutional Court of the Czech Republic, 16 March 2021).
27 Case no 17/2020 (Constitutional Court of the Republic of Moldova, 23 June 2020).
28 Case no 157/2020 (Constitutional Court of Romania, 13 May 2020).
29 Beretka and Ősze (n 4).
30 Case no HCJ 5314/20 (n 24).

statutory provision that excluded judicial review of emergency measures on the grounds of exceptionality.

One of the central questions that arose concerned the extent of extraordinary authorisation required by lawmakers to obtain unassailable legitimacy for restrictions that significantly limited the activities of daily life and resulted in the unprecedented combination of limitations on fundamental rights was one of the main questions that arose.[31] A ministerial decree was deemed an inappropriate legal form in such cases, as demonstrated by the CCs of Romania,[32] Slovakia[33] and Kosovo,[34] which invalidated respective public health ministry decrees on the grounds that the government itself cannot impose severe limitations on fundamental rights even during public health emergencies unless extraordinary parliamentary authorisation was given for this. Additionally, the Romanian CC concluded that the government had overreached its competences by enforcing excessively stringent public health regulations without parliamentary permission.[35]

Upon the initiation of 30 parliamentarians, the CC of Slovakia confirmed the constitutionality of the special authorisations provided by the Public Health Act for enacting emergency regulations with quasi-constitutional force.

Moreover, the Kosovar CC provided the most detailed analysis in this regard. Complaints were heard against four government decisions to classify certain Kosovar towns as quarantine zones. The claims alleged that these decisions violated the constitutional rights to freedom of movement and the separation of powers enshrined by the Constitution of Kosovo, as these measures should have been rendered by the Parliament rather than the Ministry of Health. The CC held that the law duly authorised the governmental authorities to enact special measures to combat the COVID-19 pandemic, and individual decisions on the classification of certain towns as quarantine zones were based on this authorisation. However, it found that the Ministry of Health had overstepped its competence when it used a ministerial decree to regulate minor administrative offences and associated sanctions during the public health emergency. These provisions were thus declared unconstitutional.

Official legislative requirements also created certain legal questions when some procedures were neglected or carried out incorrectly because of the purported need for urgency. A notable example is a ruling by the Slovenian CC invalidating several ministerial decrees on educational matters for failing to publish them in Slovenia's official

31 Gabor Kecso, Boldizsar Szentgali-Toth and Bettina Bor, 'Emergency Regulations Entailing a Special Case of Norm Collision: Revisiting the Constitutional Review of Special Legal Order in the Wake of the COVID-19 Pandemic' (2024) 14(1) Juridical Tribune 23-6, doi:10.62768/TBJ/2024/14/1/01.

32 Case no 458/2020 (Constitutional Court of Romania, 25 June 2020).

33 Case no PL. ÚS 14/2021-107 (Constitutional Court of the Slovak Republic, 7 April 2022).

34 Case no 214/IV/2020 (Constitutional Court of the Republic of Kosovo, 5 May 2020); Case no 01/15 (Constitutional Court of the Republic of Kosovo, 6 April 2020).

35 Case no 672/2021 (Constitutional Court of Romania, 20 October 2021).

gazette, as required by the constitution.[36] The government subsequently reissued and duly published the decrees in the Official Gazette.

The Georgian[37] and Turkish[38] CCs considered the neglect of parliamentary supermajority requirements. The CC of Georgia held that the limitations imposed on labour rights were unconstitutional on formal grounds, as these amendments were made to the Public Health Act—an ordinary law—instead of the Labour Code of Georgia, which constitutes an organic law.

In Turkey, Parliament enacted a law in April 2020 to release several prisoners early to reduce overcrowding during the first wave of the COVID-19 pandemic. However, certain crimes were left out of the scope of this benefit, such as the most serious crimes, as well as terrorism and crimes committed against the constitutional order. Parliamentarians from an opposition parliamentary group challenged the validity of this statute on formal grounds, arguing that it should have been adopted as an amnesty rule rather than as a statute on the execution of penalties. As such, a three-fifths majority would have been necessary for its enactment, meaning the governing coalition could not have passed the bill without opposition support. The Turkish CC held that the impugned law concerned the execution of penalties rather than their scope. Therefore, it amended only the execution policy, which could be amended by a simple parliamentary majority.

To ensure that parliamentary operations could continue, parliamentarians were compelled to halt their operations or adopt digital solutions. However, CCS across the CEE region underlined the paramountcy of normal parliamentary operation, even during a declared public health emergency.[39] A general prohibition on in-person parliamentary sittings was declared an unjustified limitation by the SC of Estonia in December 2021.[40] Furthermore, during the main waves of the global pandemic, the Latvian Parliament adopted a law that explicitly banned non-vaccinated parliamentarians from attending in-person parliamentary meetings. A former deputy attacked this law before the CC, which was struck down. The CC argued that public health restrictions should not interfere with parliamentarians' rights to participate effectively in parliamentary work. It argued that maintaining public trust in Parliament should take precedence over the exceptional solidarity required by public health challenges.[41]

Raising additional arguments against emergency restrictions on parliamentary operations, the Croatian CC reviewed an amendment to the parliamentary Rules of

36 Case no U-I-445/20 (Constitutional Court of the Republic of Slovenia, 3 December 2020).
37 Case no 1/1/1505 (Constitutional Court of Georgia, 1 December 2021).
38 Case no 2020/41 (Constitutional Court of the Republic of Türkiye, 17 July 2020).
39 Boldizsár Szentgáli-Tóth, 'The Role of Constitutional Review to Determine the Emergency Operation of Parliaments' (2024) 4(2) International Journal of Parliamentary Studies 109, doi:10.1163/26668912-bja10090.
40 Case no 5-21-32 (Supreme Court of the Republic of Estonia, 23 December 2021).
41 Case no 2022-20-01 (Constitutional Court of the Republic of Latvia, 7 December 2023).

Procedure in such a way that allowed Parliament to continue its work with a temporarily reduced number of deputies to mitigate infection risks.[42] Only the chairs of parliamentary groups could appear in person at the sittings; in addition, a specific distribution mechanism ensured that no more than a quarter of all representatives could be present in the session hall at any one time. In its reasoning, the Croatian CC stated that less restrictive alternatives, such as remote communication tools, were presumably available to maintain the operation of the legislative body during even the most serious epidemic waves. However, the Parliament failed to identify them.

On the contrary, the resolution of the Romanian Senate regarding the amendment of its standing orders to legalise online parliamentary sittings was also challenged before the CC, but the case was dismissed without examination on the merits.[43]

In several countries, traditional in-person trials were replaced by online hearings, raising constitutional concerns.[44] CCs, like Belgium's, had previously shown reluctance to accept the constitutionality of such measures before the global pandemic.[45] Although significant CC rulings from other regions have addressed these important issues, the subject has not yet been presented before CCs in the CEE region.

In addition, courts must not overlook the safeguards of criminal proceedings during public health emergencies—a principle reinforced by the Serbian CC.[46] Several initiatives challenged the constitutionality of a Serbian ministerial decree establishing a misdemeanour for those violating the quarantine regime during the public health emergency. Claimants argued that the executive may restrict fundamental rights only with explicit constitutional authorisation, which was absent in this case. Moreover, criminal proceedings had already been initiated against those violating the quarantine, and the concurring application of misdemeanours conflicted with the prohibition of double punishment, as enshrined by the Serbian Constitution and the European Convention on Human Rights. Consequently, the CC accepted the arguments of the claimants and abrogated the impugned governmental measure.

The pandemic also impacted municipalities' legal position, and the Constitution may require the central government to ensure that these entities continue to operate effectively during these extraordinary circumstances. For instance, the Hungarian CC heard a dispute regarding the funding given to local councils during the public health emergency.[47] The municipality of Göd, a smaller village close to Budapest, challenged the

42 Case no U-I-4208/2020 (Constitutional Court of the Republic of Croatia, 20 October 2020).

43 Case no 156/2020 (Constitutional Court of Romania, 6 May 2020).

44 Nora Chronowski, Boldizsár Szentgáli-Tóth and Bettina Bor, 'Resilience of the Judicial System in the Post-Covid Period: The Constitutionality of Virtual Court Hearings in the Light of the Covid-19 Pandemic' (2024) 64(3) Hungarian Journal of Legal Studies 429, doi:10.1556/2052.2023.00468.

45 Case no 76/2018 (Constitutional Court of Belgium, 21 June 2018).

46 Case no IUo-45/2020 (Constitutional Court of the Republic of Serbia, 17 September 2020).

47 Case no IV/3261/2021 (Constitutional Court of Hungary, 2 February 2021).

governmental decision issued during the public health emergency and maintained even after the COVID-related measures were lifted. The government established a specific economic zone within the territory of Göd and transferred the right to property of the municipal lands in that particular field to the regional self-government. The municipality argued that this measure infringed its right to property and lacked the right to a sufficient preparatory period. The CC held that the municipality should have been aware of the limits of its right to property over public land, and that the government did not have the authority—during the public health emergency—to transfer the right to property of particular lands to the regional self-governments. Nevertheless, such measures must not undermine the fulfilment of essential local public tasks of the municipality. If such a measure causes significant financial loss that impedes the municipality's capacity to perform its core duties, due compensation should be provided.

Another point of contention involved a series of rulings by the Croatian CC addressing whether planned elections should proceed during a public health emergency or whether postponement would be appropriate.[48] The issue of how to manage such temporary periods was also subject to scrutiny.[49]

3.2. Restrictions on Fundamental Rights Throughout the Pandemic

In addition to the constitutional implications of the measures described, another major category of COVID-19-related constitutional cases concerned the most severe restrictions placed on fundamental rights during the public health emergency. The most vulnerable of these rights—many of which are protected by the Universal Declaration of Human Rights—are outlined below. This list is by no means exhaustive, though, as public health emergencies enabled an infinite number of state interventions around the CEE region.

CCS specifically examined whether vaccination laws—required for the general public or particular professions—were compatible with the right to human dignity during immunisation campaigns.[50] Challenges were raised concerning the forced vaccination of firefighters,[51] teachers, and students in Greece;[52] the operation of catering services in Bosnia-Herzegovina;[53] public personnel in Slovenia;[54] and public health workers in Lithuania.[55]

48 Case no U-VII-3311/2020 (Constitutional Court of the Republic of Croatia, 16 July 2020); Case no U-I-1925/2020 (Constitutional Court of the Republic of Croatia, 14 September 2020).

49 Todd Landman and Luca Di Gennaro Splendore, 'Pandemic Democracy: Elections and Covid-19' (2020) 23(7-8) Journal of Risk Research 1060, doi:10.1080/13669877.2020.1765003.

50 For instance: Case no IV/4110/2021 (Constitutional Court of Hungary, 10 March 2022).

51 Case no 133/2021 (Council of State of Hellenic Republic, 29 June 2021).

52 Case nos 1758-1759/2021 (Council of State of Greece, 26 October 2021).

53 Case no AP-3932-21 (Constitutional Court of Bosnia and Herzegovina, 23 February 2022).

54 Case no U-I-210/21 (Constitutional Court of the Republic Slovenia, 29 November 2021).

55 Case no KT79-N8/2022 (Constitutional Court of the Republic of Lithuania, 21 June 2022).

The Lithuanian CC upheld the impugned mandatory vaccination policy's validity and acknowledged that, due to exceptional circumstances, governmental decrees could impose severe restrictions on individual rights. Besides this, the Greek Council of State confirmed the constitutionality of the vaccination mandate imposed on firefighters, noting that non-compliance merely resulted in reassignment to another department within disaster management, rather than dismissal.

By contrast, the Slovenian CC upheld the rationality of the vaccine requirement but invalidated the challenged provision as it was issued by governmental decree rather than law. Additionally, two cantonal authorities' vaccination requirements for catering services were overruled by the CC of Bosnia and Herzegovina because they exceeded their constitutional authority. Even in cases of public health crisis, such restrictive measures should be based on legislation rather than cantonal orders.

The unequal treatment of vaccinated and non-vaccinated people has sparked concerns about the discriminatory nature of pandemic-related policies.[56][57] A key question was whether the distinction between "protected" and "non-protected" was arbitrary, and whether the limitations placed on the unvaccinated go beyond what is considered an acceptable degree of differential treatment.

In this regard, the CC of North Macedonia heard a case concerning the limitation of freedom of movement for individuals who were neither vaccinated nor had recently recovered from COVID-19. Access to various public spaces was permitted when one could show a vaccination certificate or a recovery certificate from COVID-19 within 45 days. The claimants considered that this amounted to an unnecessary limitation of freedom of movement. The CC said that, in light of the extraordinary public health concerns, the state intervention was reasonable; the law did not impose a direct vaccination duty on the citizens, and the decision was left for individuals to make regarding vaccination. Therefore, the implemented measure was deemed constitutional.

The Hungarian CC affirmed the legitimacy of an amendment to the Criminal Code in a case pertaining to freedom of expression. The amendment penalised individuals who disseminated misleading information that could undermine the effectiveness of collective efforts to combat the pandemic.[58] Parliament had revised the Criminal Code to introduce imprisonment for those who spread knowingly false information during a state of emergency, particularly if such actions could undermine the efficiency of the protective

56 Case no HCJ 5322/21 (Supreme Court of the State of Israel, 14 September 2021); Case no У.бр.101/2021 (Constitutional Court of the Republic of North Macedonia, 16 February 2022); Case no U-I-180/21 (Constitutional Court of the Republic of Slovenia, 14 April 2022); Case no 5-22-4 (Supreme Court of the Republic of Estonia, 31 October 2022).

57 Case no Pl. ÚS 106/20 (Constitutional Court of the Czech Republic, 9 February 2021); Case no IV/03010/2021 (Constitutional Court of Hungary, 22 December 2021); Case no KT83-N9/2023 (Constitutional Court of the Republic of Lithuania, 4 October 2023).

58 Case no IV/00699/2020 (Constitutional Court of Hungary, 8 July 2020).

measures or the credibility of the public authorities. The claimants contested the constitutionality of the amendment, arguing that it lacked foreseeability, granted authorities excessive discretion to prosecute, and created a chilling effect on free speech. The CC found that the amendment employed legal terminology already present in the Hungarian CC, enabling a coherent standard for its application. The court ruled the amendment as constitutional, stating the wording was sufficiently precise and that the level of state intervention was reasonable in an emergency. However, it emphasised that its application in practice should be scrutinised to avoid unnecessary limitations on freedom of expression. Similar concerns have surfaced in other countries regarding pandemic-related limitations to freedom of expression.[59]

During the pandemic, several countries prohibited or severely restricted political assemblies, and many parties challenged the validity of these directives. The Albanian,[60] Slovenian,[61] and Hungarian[62] CCs all examined broad prohibitions on assemblies. The Hungarian and Albanian CCs found that a complete ban on public assemblies was reasonable under the exceptional circumstances. In contrast, the Slovenian CC ruled that a complete ban on public protests or—the limitation of participants to 10 individuals during the first months of 2021 was unconstitutional. The court considered that these measures were unnecessary, as public health could have been protected through less intrusive measures such as the distribution of masks and social distancing.

In the framework of religiously justified exemptions under public health regulations, the Croatian[63] and Czech[64] CCs evaluated restrictions on religious ceremonies. The Czech CC held that limiting participation to 100 persons and prohibiting singing at these ceremonies were constitutional during the public health emergency. The Croatian CC reached similar conclusions.

Individuals who were under quarantine faced difficulties in exercising their right to vote during elections.[65] In addition, foreign-resident citizens may have been partially or entirely disenfranchised due to policies restricting their freedom of movement.[66] The Croatian CC delineated the responsibilities of the State to implement unique voting procedures in light

59 Boldizsár Szentgáli-Tóth and others, 'Freedom of Expression and Misinformation Laws During the Covid-19 Pandemic and the European Court of Human Rights' (2023) 21(1) Lex Localis: Journal of Local Self-Government 215, doi:10.4335/21.1.213-236(2023); Case no 2018/6707 (Constitutional Court of the Republic of Türkiye, 26 May 2022).

60 Case no 11/2021 (Constitutional Court of the Republic of Albania, 9 March 2021).

61 Case no U-I-50/21 (Constitutional Court of the Republic of Slovenia, 17 June 2021).

62 Case no IV/00839/2020 (Constitutional Court of Hungary, 13 July 2021).

63 Case no U-II-5709/2020 (Constitutional Court of the Republic of Croatia, 23 February 2021).

64 Case no Pl. ÚS 102/20 (Constitutional Court of the Czech Republic, 8 December 2020).

65 For more detailed analyses of the relevant issues please see: Richard L Hasen, 'Three Pathologies of American Voting Rights Illuminated by the Covid-19 Pandemic, and How to Treat and Cure Them' (2020) 19(3) Election Law Journal: Rules, Politics, and Policy 288, doi:10.1089/elj.2020.0646; Florczak-Wator, Szentgáli-Tóth and Halász (n 1) 309.

66 Case no AP 542/21 (Constitutional Court of Bosnia and Herzegovina, 7 April 2021).

of the public health emergency for quarantined persons,[67] while the CC of Poland upheld the constitutionality of postal voting as a primary polling method during the same period.[68] This Polish decision was highly criticised, as most constitutional judges involved were former politicians. Previously, a ruling of the Warsaw Provincial Administrative Court held that the extensive use of postal voting for the purpose of the presidential elections was unconstitutional, even if public health concerns justified extraordinary solutions.

The CCs of Croatia,[69] Hungary,[70] Latvia,[71] Lithuania,[72] and Slovenia[73] provided examples of how to balance the legitimate interests of private entrepreneurs against restrictions on economic activity. These courts examined potential infringements of property and business rights brought on by the urgent need for extraordinary measures. The rulings of the Baltic countries, in particular, focused on important legal nuances. The CC of Lithuania held that the prohibition of beauty services and the postponement of all dental treatments—except for very urgent cases —during the public health emergency complied with the Constitution.

By contrast, the CC of Latvia merged three cases involving retail closures in the spring of 2021. With distinct external access for customers, the first applicant operated a business selling domestic items within a large supermarket. The other two candidates leased commercial space and owned big-box stores. Under the contested rule, all supermarkets larger than 7,000 square meters were to close, except those selling essential goods. Both the claimants' rights to equality and property were allegedly violated. The CC held that smaller retailers located inside bigger supermarkets–provided they had isolated exterior access—were in the same predicament as smaller stores outside larger supermarkets. Therefore, the regulation violated the right to equality. However, the prohibition on big-box stores was found to be lawful and reasonable, and thus, it was sustained.

Strict quarantine rules, travel bans, and border closures severely restricted individuals' freedom of movement, leading to flagrant violations of their rights. The CCs of Slovenia,[74] Ukraine,[75] Lithuania,[76] Georgia,[77] and Bosnia-Herzegovina[78] and the SC of Cyprus[79] and

67 Case no I NSW 304/20 (Supreme Court of the Republic of Poland, 24 July 2020).
68 Case no K-27-23 (Constitutional Court of the Republic of Poland, 21 May 2024).
69 Case no 6087/2020 (Constitutional Court of the Republic of Croatia, 23 February 2021).
70 Case no IV/02062/2022 (Constitutional Court of Hungary, 25 October 2023).
71 Case no 2021-37-03 (Constitutional Court of the Republic of Latvia, 10 March 2022).
72 Case no KT8-N1/2023 (Constitutional Court of the Republic of Lithuania, 24 January 2023).
73 Case no U-I-39/23 (Constitutional Court of the Republic of Slovenia, 12 September 2024).
74 Case no U-I-83/20 (Constitutional Court of the Republic of Slovenia, 27 August 2020); Case no U-I-178/22 (Constitutional Court of the Republic of Slovenia, 16 March 2023).
75 Case no 92-u/2020 (Constitutional Court of Ukraine, 10 December 2020); Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 4(2) Access to Justice in Eastern Europe 130-2, doi:10.33327/AJEE-18-4.2-n000064.
76 Case no KT116-A-S108/2020 (Constitutional Court of the Republic of Lithuania, 2 July 2020).
77 Case no N1/5/1499 (Constitutional Court of Georgia, 16 December 2021).
78 Case no 1217/20 (Constitutional Court of Bosnia and Herzegovina, 20 April 2020); Case no 3683/20 (Constitutional Court of Bosnia and Herzegovina, 22 December 2020).
79 Case no CY:AD:2022:D365 (Supreme Court of the Republic of Cyprus, 26 September 2022).

Estonia[80] heard cases involving severe limitations on the right to free movement. The outcomes of these controversies suggest that CCs in the CEE region showed significant deference towards movement restrictions during the public health emergency. The notable exception might be found in Cyprus, where a Greek citizen submitted a successful request for remedy.

The claimant requested a Cypriot district court to revoke a European arrest warrant against him after being accused of several offences by Cypriot police. The Greek national demonstrated his desire to work with the Cypriot authorities by offering to testify virtually, as he was apparently unable to visit Cyprus due to public health constraints. The Nicosia District Court issued the European arrest warrant in spite of this offer. However, the SC recognised the applicant's argument, deemed it plausible, and directed the district court to review the warrant.

In many countries, government regulations tightly controlled the movement of citizens, necessitating the handling and storage of vast amounts of personal data.[81] In Slovakia, parliamentarians filed a petition with the CC of Slovakia, challenging a statute granting the public health authority access to sensitive personal data of customers gathered by telecommunication service providers. This data included both anonymised information for statistical purposes and identifiable data for alerting individuals about required public health actions and safeguarding their health. The CC emphasised the importance of safeguards in protecting personal data, including obligations to delete data after a specific period of time, clear definitions of the data's purpose, supervision by a court or other appropriate body, and notification of the individuals involved. Although the court acknowledged that it was reasonable for authorities to gather data for special public health measures, it ultimately repealed the provision requiring telecommunications service providers to grant such access upon request.[82]

Lastly, the CC of Montenegro developed norms for protecting privacy—a right that faced unprecedented intrusion during the pandemic.[83] One notable case concerned the decision of the Coordinating Body for Contagious Diseases to publish online the names and addresses of people who were ordered to be in self-isolation. This included both foreigners entering Montenegro and Montenegrin nationals targeted by this measure. As medical data falls within the category of personal data requiring heightened protection, the CC contended that this policy did not properly balance the right to privacy with the preservation of public health. The decision was subsequently revoked due to its

80 Case no 5-20-10 (Supreme Court of the Republic of Estonia, 20 May 2021).

81 For further assessment of data protection issues during the pandemic please see: Andrej Zwitter and Oskar Josef Gstrein, 'Big Data, Privacy and Covid-19: Learning from Humanitarian Expertise in Data Protection' (2020) 5(1) Journal of International Humanitarian Action 4, doi:10.1186/s41018-020-00072-6.

82 Case no PL. ÚS 13/2020 (Constitutional Court of the Slovak Republic, 13 May 2020).

83 Case no U-II 22/20 (Constitutional Court of the Republic of Montenegro, 23 July 2020).

unconstitutionality. The government pledged to compensate people whose residences and identities had already been made public.

The author acknowledges that the proposed taxonomy does not encompass all pertinent topics and that certain situations may be more appropriately addressed within additional thematic sections. Nevertheless, this classification may help structure the gathered case law and comprehend the primary paths of constitutional review in times of public health crises in the CEE region.

4 DISCUSSIONS

The cases described under sections 3.1-3.2 underline the special role of constitutional review in the CEE region during public health emergencies. It should be stressed that this case law focuses on public health emergencies rather than the special legal order itself, since several countries in the CEE region ordered far-reaching extraordinary measures without formally declaring a state of emergency.

First, it may be concluded that these cases reaffirm fundamental principles at the core of constitutionalism, the rule of law, and democracy—principles rarely discussed to such an extent, even outside emergencies.[84] CCs in the CEE region have relied on constitutional review as an important constitutional tool for supervising the legality of introducing a special legal order and formulating the separation of powers among the constitutional actors during public health emergencies. Apart from this, the investigated case law also underlines the special importance of constitutional review in determining the standards applicable for exceptional fundamental rights restrictions.[85]

The jurisprudence examined demonstrates a clear distinction between the two main alternatives adopted by CCs in response to the unprecedented constitutional implications. Some rulings applied general constitutional standards to the exceptional circumstances, while others advocated for the elaboration of special constitutional requirements tailored to the review of emergency measures.

This ambiguity has shaped constitutional practice in the CEE region during the recent public health emergency and highlighted the need for further noteworthy clarifications. Questions remained for further constitutional analysis regarding the essential components of the rule of law, separation of powers, constitutional democracy, and

84 Ittai Bar-Siman-Tov, 'Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8(1-2) The Theory and Practice of Legislation 11-3, doi:10.1080/20508840.2020.1800250.

85 Jessika Eichler and Sumit Sonkar, 'Challenging Absolute Executive Powers in Times of Corona: Re-Examining Constitutional Courts and the Collective Right to Public Contestation as Instruments of Institutional Control' (2021) 6(1) Review of Economics and Political Science 4, doi:10.1108/REPS-08-2020-0132.

fundamental rights protection, including how necessity and proportionality assessments and balancing mechanisms should function under extraordinary measures. On the contrary, where derogations from ordinary constitutional norms are considered, CCs in the CEE region have failed to establish exact tools of interpretation outlining the acceptable level of this derogation.

While general constitutional tests such as necessity and proportionality may serve as initial reference points for evaluating constitutional disputes arising during public health emergencies, this does not provide a reasonable ground for differentiation. The extensive public health impact on constitutional actors' daily operations, the complex involvement, and the far-reaching, systemic restrictions on paramount fundamental rights require the clarification and development of public health emergency standards.

Despite certain attempts in the CEE region, no Constitutional Court succeeded in developing an alternative interpretation of key constitutional principles—such as the separation of powers, legal security, or the tests of necessity and proportionality—applicable during public health emergencies. This absence of predictability regarding the constitutional reflections around the CEE region led to controversial outcomes of constitutional analyses, such as the Slovenian CC enforcing the same formal demands on emergency regulations as on ordinary ones. While the Lithuanian CC acknowledged the need for urgency as a reasonable argument when an emergency governmental decree imposed severe restrictions on fundamental rights.

Turning to the main conclusions, the emergency application of general constitutional standards highlights an urgent need for clarification. CCs in the CEE region should clearly identify the principles and tests that remain non-derogable, even if declared during a public health emergency.[86] Similar to other constitutional controversies linked to exceptional legal orders, CCs should consider necessity and proportionality during public health emergencies; however, with different highlights than during other forms of emergencies.[87]

On the one hand, additional justification may be necessary due to extraordinary interference with the operation of constitutional actors. On the other hand, the intimate connection between emergency measures and the severe restrictions on the fundamental rights of individuals should be duly considered.[88] Therefore, constitutional review should

86 Monika Florczak-Wątor and others, 'States of Emergency and Fundamental Rights in Books and in Action: The Visegrad Countries and the Covid-19 Pandemic' in Monika Florczak-Wątor and others (eds), *States of Emergency and Human Rights Protection: The Theory and Practice of the Visegrad Countries* (Routledge 2024) 14, doi:10.4324/9781032637815-1.

87 Pavel Ondřejek and Filip Horák, 'Proportionality During Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20(1) European Constitutional Law Review 7-12, doi:10.1017/S1574019624000051.

88 Joelle Grogan, 'Covid-19, The Rule of Law and Democracy: Analysis of Legal Responses to a Global Health Crisis' (2022) 14(2-3) Hague Journal of Rule of Law 359, doi:10.1007/s40803-022-00168-8.

aim to delineate the scope of discretion available to constitutional actors in implementing public health restrictions imposed on individuals with constitutional means.

Many of the most pertinent constitutional rulings resonate with the scholarship of Hans Kelsen,[89] Hermann Heller,[90] and Giorgio Agamben,[91] emphasising that the essential components of democracy and the rule of law must not be overruled—even in the face of public health concerns. This position implies that any adaptations to parliamentary operation should be limited by constitutional standards. However, as the controversial constitutional practice in the CEE region experienced during the global pandemic demonstrates, a clear consensus on these standards has yet to emerge.

Regarding the second point, this contribution proposes some points of reference that might orient CCs to assess the constitutionality of emergency operations. Three aspects of balancing should be crystallised for the sake of constructing a well-founded review mechanism tailored to emergencies: first, which constitutional actor has the competence to order far-reaching emergency measures; second, how far such state interventions could go; and third, how competing rights and interests of concerned stakeholders should be compensated for the legitimate harm caused by the exceptional state interference. While the CCs in the CEE region have made undeniable steps toward articulating such a system of criteria for public health measures, more questions have been left open than closed by these attempts.

A third main conclusion highlights the importance of timeliness in constitutional adjudication. Given the scale and urgency of the constitutional challenges posed by public health emergencies, CCs—as primary guardians of constitutional review—must deliver promptly. This requirement is grounded in two considerations. First, the frequent introduction of virulent measures with very short notice cannot be reviewed effectively unless CCs deliver their rulings within a short deadline. Second, ConstCovid shows that despite the low success rate of emergency-related constitutional submissions around the CEE region, several of these countries are among those on a global scale that produced the most relevant rulings focusing on the implications of the public health emergency.[92] Specifically, out of approximately 1,000 constitutional rulings from more than a hundred countries included in the ConstCovid database, the CEE region accounts for 173 decisions, of which only 41 claims were clearly upheld. Based on this, one can argue that although the CEE region has a relatively strong record of emergency constitutional review from a comparative perspective, the substantial analysis of the judgments shows the limited efficiency of this constitutional review. In light of these findings, CEE countries might consider implementing a special constitutional remedy that allows for the expedited review of emergency measures.

89 Hans Kelsen, *Reine Rechtslehre* (Mohr Siebeck, Verlag Österreich 2017) 38-9.

90 Hermann Heller, *Gesammelte Schriften*, vol 2 (Sijthoff 1971) 249-78.

91 Giorgio Agamben, *State of Exception* (University of Chicago Press 2005) 36.

92 Arianna Vedaschi and Chiara Graziani, 'New Dynamics of the "Post-Covid-19 Era": A Legal Conundrum' (2023) 24(9) German Law Journal 1632-7, doi:10.1017/glj.2023.116.

These orientations might be worthy of consideration not only in light of the recent public health emergencies but also regarding the cumulative contemporary crises, including the climate, economic, demographic, and military conflicts, assuming the growing importance of emergency solutions[93] that should affect constitutionalism around the CEE region as well. The global pandemic brought to the forefront emergency solutions that had not been previously known to the public, such as virtual parliamentary sittings, remote court hearings, heightened data protection and privacy concerns, and the spread of disinformation caused by the increased online presence during the public health emergency. Due to technological development and social changes, such tendencies are likely to persist beyond the pandemic regardless of the public health circumstances.[94]

Such examples illustrate that the constitutional implications of public health emergency issues will endure, even as the acute phase of the pandemic has passed. Although most of the relevant case law emerged during or shortly after the pandemic, the constitutionality of some public health emergency measures is likely to be further assessed in the forthcoming years. The present contribution seeks to serve as a starting point for further scientific discussion on these pressing constitutional issues in the CEE region.

5 CONCLUSIONS

This research shows that, despite a number of meaningful, relevant decisions—as well as a strong comparative record on a global scale—constitutional remedies rarely provided effective redress for claimants in the CEE region. Many cases addressed either the constitutionality of certain limitations on fundamental rights or organisational issues and aspects of the separation of powers. Even so, the CCs/SCs in the CEE region played an important role during the period of public health emergency. Nevertheless, the substantial uncertainty and lack of predictability relativised the efficiency of this constitutional review.

This was mainly due to the inconsistent manner in which CCs attempted to reconcile existing constitutional standards with the specific challenges posed by the public health crisis, as well as the uneven development of new frameworks of interpretation tailored to the exceptional situation. Moreover, the lack of a special constitutional remedy to be submitted against emergency measures with very short notice further weakened the efficacy of constitutional oversight. With the help of the ConstCovid database, this article aims to highlight these systemic inconsistencies and formulate some policy recommendations for CCS/SCS in the CEE region to tackle these constitutional challenges.

93 Yuriy Prytyka and others, 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' (2022) 5(3) Access to Justice in Eastern Europe 219-20, doi:10.33327/AJEE-18-5.2-n000329.

94 Caryn Devins and others, 'The Law and Big Data' (2017) 27(2) Cornell Journal of Law and Public Policy 357.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНСТИТУЦІЙНИЙ КОНТРОЛЬ У КРАЇНАХ ЦЕНТРАЛЬНОЇ ТА СХІДНОЇ ЄВРОПИ ПІД ЧАС НАДЗВИЧАЙНИХ СИТУАЦІЙ У СФЕРІ ГРОМАДСЬКОГО ЗДОРОВ'Я: АНАЛІЗ НА ОСНОВІ БАЗИ ДАНИХ «CONSTCOVID»

Болдіжар Сентґалі-Тот

АНОТАЦІЯ

Вступ. *Незважаючи на значні наукові дослідження щодо умов обмеження основних прав та впливу на поділ влади у сфері охорони здоров'я за надзвичайних ситуацій, у літературі ще не можна повною мірою покладатися на систематизацію нещодавно поширеної практики конституційних судів, особливо в регіоні Центральної та Східної Європи (ЦСЄ). Протягом останніх років конституційні суди (або верховні суди з повноваженнями конституційного контролю) розглядали багато аспектів пандемії COVID-19. Ретельне вивчення цього прецедентного права допоможе зробити теоретичний і практичний внесок у правову базу, що регулює надзвичайні ситуації у сфері охорони здоров'я, обмеження основних прав, еволюцію поділу влади та переосмислення конституційних наслідків глобальної пандемії. Проте науковці неодноразово відзначали труднощі у доступі до відповідних матеріалів, що перешкоджає подальшим дослідженням у цій сфері.*

Методи. *Проєкт «ConstCovid» має на меті усунути цю прогалину, пропонуючи систематичний доступ до глобальної конституційної судової практики, пов'язаної з COVID-19, у такий спосіб розширюючи потенціал для порівняльних досліджень. Кілька конкретних прикладів із регіону Центральної та Східної Європи будуть використані для демонстрації регіональної корисності бази даних «ConstCovid». На основі цієї судової практики будуть визначені регіональні тенденції та недоліки конституційної практики під час надзвичайних ситуацій у сфері громадського здоров'я. Використання бази даних «ConstCovid» у дослідженні сприяє ширшому розумінню конституційних наслідків пандемії COVID-19 та допомагає з'ясувати її потенційні наслідки для управління майбутніми надзвичайними ситуаціями у сфері громадського здоров'я в Центральній та Східній Європі.*

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Результати та висновки. *У цьому матеріалі зроблено деякі висновки з проаналізованого конституційного прецедентного права, що випливає з «ConstCovid», які можуть бути корисними для підготовки до потенційних небажаних майбутніх надзвичайних ситуацій у сфері громадського здоров'я. По-перше, тут було розглянуто напрямки судової практики, які застосовували у загальних конституційних стандартах щодо надзвичайних ситуацій. По-друге, дослідження ілюструє, що ці способи аргументації поєднувалися непослідовно з розробкою нових меж конституційного тлумачення, що призвело до значної невизначеності в усьому регіоні. По-третє, аналіз підкреслює відсутність конституційних засобів правового захисту, спеціально створених для вирішення проблем громадського здоров'я.*

Ключові слова: *конституційний контроль, надзвичайна ситуація, Центральна та Східна Європа, правова база даних, доступ до конституційних судів, «ConstCovid».*

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Research Article

THE ROLE OF CRIMINAL RECONCILIATION IN ACTIVATING RESTORATIVE JUSTICE IN JORDANIAN, EMIRATI, AND FRENCH LEGISLATION (AN ANALYTICAL LEGAL STUDY)

Raed S. A. Faqir, Alaeldin Mansour Maghaireh*, Tarek Abdel Salam, Ehab Alrousan, Mohammed Nour Eldeen Sayed and Luma Ali Faraj Al Dhaheri

ABSTRACT

Background: *The study investigates how restorative justice in France, the United Arab Emirates, and Jordan is triggered by reconciliation. With an emphasis on social cohesion and justice, criminal reconciliation aims to address crime through alternative means. To address the shortcomings of conventional criminal justice, this study looks at negotiated justice in these nations. It places a strong emphasis on defending people's rights and mending the victim-offender bond. Punitive measures are subordinated to compensatory justice.*

Conciliatory justice has replaced traditional punitive measures in the criminal justice systems of the United Arab Emirates, Jordan, and France. Due to the ineffectiveness of traditional punitive measures for minor offences, parties are now able to settle their differences outside of the legal system. An alternative to reconciliatory justice, criminal reconciliation attempts to settle disputes amicably by addressing the repercussions of the crime, making amends, reintegrating offenders, and fostering social harmony.

Methods*: The study utilised descriptive, analytical-inductive, and comparative methods to analyse legal aspects of criminal reconciliation in three countries. The analytical-inductive method collected and examined data, the comparative method contrasted legal texts, and the descriptive method described the phenomenon.*

Results and conclusions: *Jordanian, Emirati, and French legislations should establish an arbitral system for criminal reconciliation, allowing accused individuals to plead for specific crimes. Repeat offences should be addressed with legal action, and criminal reconciliation should lead to the expiration of criminal claims, including social services and therapy.*

1 INTRODUCTION

In the 1990s, the French judiciary implemented a system of criminal reconciliation, allowing the public prosecutor to end criminal proceedings by reaching a settlement between the accused and the victim.[1] This system, rooted in French legislative systems, is deeply rooted in Arab culture and history, dating back to the early Islamic ages.

This topic is important for preventing crime and addressing the needs of both the perpetrator and the victim. Restorative justice offers an alternative to criminal litigation, saving time and resources. It also reduces the burden on the judicial system, which is overwhelmed by increased criminal cases.

Restorative justice promotes reconciliatory justice by avoiding punishment for the accused and involving the victim in determining the resolution of the criminal claim. This approach reduces prison overcrowding, allows for rehabilitation efforts, and strengthens social relationships within the community.

Traditional criminal policy is mainly focused on the concepts of crime and punishment, relying essentially on identifying crime and imposing suitable punishment. However, as a product of the modern era, this policy has failed to address the criminal phenomenon. The increase in criminal activity, slow criminal justice proceedings, and prison overcrowding have all contributed to the necessity of transitioning to restorative or reparative justice in resolving the crisis of traditional criminal justice.

Penal reconciliation plays a crucial role in restorative justice by addressing the challenges within the criminal justice system and offering benefits to all parties involved. Its importance is evident in the promotion of restorative justice and reconciliatory punishment in Jordanian, Emirati, and French legislation.

This study explores criminal reconciliation as an alternative to litigation in Jordan, the UAE, and France, highlighting its importance in crime prevention, defendant-victim plea bargaining, and its impact on criminal procedures. Accordingly, the study seeks to address the following questions:

What is the relationship between the system of restorative justice and criminal reconciliation, and their legal nature? How has the system of criminal reconciliation evolved in the context of negotiated restorative justice? What is the scope of criminal reconciliation, its parties, and conditions in the Jordanian, Emirati, and French legislation? What is the role of criminal reconciliation during various stages of criminal proceedings in the settlement of criminal litigation?

1 Lazhar Khechana and Karima Berni, 'Penal Conciliation as an Alternative to Recovery of Smuggled Proceeds of Crime' (2023) 34(3) *Journal of Human* Sciences 437.

2 METHODOLOGY

The study examines criminal reconciliation in France, the United Arab Emirates, and Jordan using an analytical and comparative methodology. It explores these laws' rules, definitions, applications, and legislative frameworks. In addition to reviewing important legal terminology and court rulings, the analysis looks at how criminal reconciliation contributes to implementing restorative justice in these nations.

The vertical comparative approach highlights disparities and potential areas for development by comparing the criminal reconciliation laws of France, the United Arab Emirates, and Jordan. Legal definitions, scope, jurisprudential opinions, roles, courts, and reconciliation effects are all included. Legislative and data analysis are combined with both strategies to determine how well each system handles restorative justice and criminal reconciliation.

This study explores the legal nature of the restorative justice system and criminal reconciliation, focusing on its historical development, scope, parties, and conditions in Jordanian, UAE, and French legislation. It also examines the effects of criminal reconciliation on criminal litigation, drawing conclusions and recommendations.

3 RESTORATIVE JUSTICE AND CRIMINAL RECONCILIATION: NATURE AND LEGAL CHARACTERISTICS

Criminal reconciliation within restorative justice is characterised by its voluntary nature, where both the offender and the victim engage in the process willingly.[2] It typically involves a neutral facilitator or mediator who helps both parties communicate and reach an agreement. The process focuses on repairing harm and restoring relationships rather than punishing the offender. It is designed to be an alternative to traditional criminal trials, with the aim of achieving a resolution that addresses the needs of the victim, holds the offender accountable, and fosters reconciliation. This system strongly emphasises healing, dialogue, and understanding between the parties, promoting a more restorative approach to justice.[3]

2 Maryam Sami, 'Restorative Justice in Financial and Business Crimes: Criminal Conciliation and Mediation as a Model' (master's thesis, Faculty of Law and Political Science, Ibn Khaldoun University 2021) 24.

3 Daniel W Van Ness and others, *Restoring Justice: An Introduction to Restorative Justice* (Routledge 2022) doi:10.4324/9781003159773.

3.1. Historical Development of Restorative Justice and Criminal Reconciliation

Restorative justice is an age-old concept practised across diverse cultures, including Aboriginal peoples, Native American tribes, and communities in the Middle East, Europe, and Asia. Traditions of Arabs, Romans, Greeks, Hindus, and Buddhists all embraced restorative principles, making it a fundamental aspect of societal customs in ancient civilisations.[4]

Ancient communities resolved disputes through reconciliation and mediation, focusing on restoring rights to their original state. These methods were widely practised throughout history and persisted in various forms until the twentieth century.[5]

The historical roots of the criminal reconciliation system date back to the accusatory system, which dealt with criminal disputes as ordinary disputes, consisting of two parties: the complainant (the victim) who suffered from the crime and the defendant (the accused) who committed the crime. According to the accusatory system, filing a criminal lawsuit or waiving it was at the victim's discretion.[6]

Ancient Greek and Roman legal systems influenced the development of individual justice systems that combined criminal and civil procedures to ensure justice and fair compensation for victims. In these systems, both the plaintiff and defendant present their evidence and arguments to the judge, who evaluates the case and issues a ruling based on the presented information.[7]

Anglo-Saxon legal systems permit victims to file criminal lawsuits directly with the judiciary, allowing them to determine the outcome by accepting or rejecting a settlement, a right not available to a judge without the authority to offer a settlement. [8]

In the adversarial system, criminal disputes occur between the accused and the public prosecutor, who represents the interests of the public. The public prosecutor initiates the lawsuit, presents evidence, and conducts proceedings confidentially. In contrast,

4 Muhammad Asadullah, 'Decolonization and Restorative Justice: A Proposed Theoretical Framework' (2021) 3(1) Decolonization of Criminology and Justice 27, doi:10.24135/dcj.v3i1.25.

5 Douglas Hurt Yarn, 'Evolution and Dueling Dispute Processing' (2023) 44(3) Evolution and Human Behavior 272, doi:10.1016/j.evolhumbehav.2023.02.007.

6 George Pavlich, 'Rethinking Accusation: Comparing Two Formative Restorative Justice Promises' in Theo Gavrielides (ed), *Comparative Restorative Justice* (Springer Cham 2021) 26-7, doi:10.1007/978-3-030-74874-6_2.

7 Rita Kohli, Elizabeth Montaño and Damany Fisher, 'History Matters: Challenging an A-Historical Approach to Restorative Justice in Teacher Education' (2019) 58(4) Theory into Practice 379, doi:10.1080/00405841.2019.1626613.

8 Jawaher HS Al Jubour and Ahmed MM Hayajneh, 'Judicial Reconciliation as a Cause for the Expiration of Public Prosecution: Comparative Study' (doctoral thesis, University of Jordan 2017) 15.

modern legal systems widely incorporate restorative justice as a comprehensive alternative for resolving criminal disputes. This approach emphasises justice by involving victims, offenders, and their families in voluntary solutions to repair harm and promote societal well-being.[9]

Since 1791, the French legal system has accepted criminal settlements in customs cases, although at first, they only applied to offences. The basis for criminal settlements in Latin legal systems was laid by the French Customs Law of 1971. The nature of these settlements is up for debate among academics; some see them as administrative penalties, while others see them as civil contracts. Settlements prioritise voluntary consent and judicial supervision, and victims play an active role.[10]

The Jordanian and Emirati legislations adopt a system of penal reconciliation influenced by Arab Islamic cultural traditions. This promotes social peace and harmony, combining legal and social considerations to resolve conflicts arising from crime.[11] Modern legislation in Jordan and the UAE adopts penal reconciliation to maintain social harmony and justice while preserving victim interests and reducing the burden on the judiciary, allowing them to focus on serious crimes.[12]

3.2. Conceptual Convergence of Restorative Justice and Criminal Reconciliation

Restorative justice engages the community and victims in resolving disputes outside courts, allowing parties to reach a compromise at any stage—during investigation, trial, or even after judgment.

French law is a model for Latin legislation that applies criminal reconciliation, which is the basis for most Arab legislation. Reconciliation leads to the dismissal of criminal cases in the initial and final stages, and after a final judgment, punishment for legally permissible crimes is suspended. This philosophy encourages informal dispute resolution and dismissal.[13]

Reconciliation is an agreement between conflicting parties based on positivity and acceptance, leading to the termination of criminal litigation or suspension of the penalty.

9 Belqasem Souieqat, 'Reconciliatory Justice Between Opposition and Support' (2018) 10(19) Journal of Politics and Law Notebooks 184.

10 Robert Cario, 'The Impact of Victimological Theories on the Rights of Crime Victims in France' (2014) 2(1) International Journal on Criminology 46, doi:10.18278/ijc.1.2.5.

11 Abdullah Aqtaish, 'Criminal Reconciliation Theory in Islam: A Comparative Jurisprudential Study' (master's thesis, Graduate Studies College, An-Najah National University 2022) 26.

12 Ahmad Alhajri and Abdulellah Al Nawayseh, 'The Impact of Criminal Reconciliation on the Conduct of Criminal Proceedings in the UAE Legislation: A Comparative Study' (2024) 21(2) University of Sharjah Journal of Legal Sciences 35, doi:10.36394/jls.v21.i2.2.

13 Maryam Ahmed Saleh Al Saadi, 'Criminal Reconciliation and Its Impact on Public Prosecutions' (master's thesis, Sultan Qaboos University 2017) 8.

Notably, the criminal procedural laws in the UAE, Jordan, and France do not define this term but outline its provisions and applications.[14]

However, civil law in both Jordan and the United Arab Emirates, as well as French civil law, provides a definition of civil reconciliation. In French civil law, reconciliation is defined as "a contract by which two parties end a dispute or prevent a dispute from arising by each party relinquishing part of their demand, reaching a compromise and concluding an agreement."[15] However, the legislative absence of the term criminal reconciliation has led some jurists to define it as "the meeting of the wills of the accused and the victim to end the criminal litigation in an amicable manner." Others define it as "an exceptional consensual procedure reached through an agreement between the victim and the perpetrator of the crime aimed at withdrawing the accusation in the crime."[16]

Criminal reconciliation is a legal mechanism that aims to settle criminal disputes peacefully between victims and perpetrators, involving negotiation and a written agreement compensating the victim for the harm caused by the crime.[17]

3.3. Legal Nature of Restorative Justice and Criminal Reconciliation

The criminal reconciliation system, an exceptional procedural system in Jordan, the UAE, and France, dismisses criminal complaints, assuming public prosecution is the custodian and cannot obstruct its course.[18]

Some legal scholars view reconciliation between the administration and the accused as a legal act that reflects the will of the party acting towards legal facts and their consequences rather than focusing solely on the incident itself. Unlike narrow legal actions, it focuses on intent rather than outcomes. According to this perspective, criminal reconciliation is a

14 Jordanian Civil Law no (43) 1976, art 647 <https://www.wipo.int/wipolex/en/legislation/details/2612> Accessed 5 February 2025; Federal Law of UAE no (5) of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates', art 722 <https://uaelegislation.gov.ae/en/legislations/1025> Accessed 5 February 2025.

15 French Civil Code 1984 (Amended 14 September 2024) art 2044 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/1804-03-25 > Accessed 5 February 2025.

16 Sami (n 2) 24-5.

17 Comparative legislation uses different synonyms for the term "reconciliation," such as "conciliation" and "forgiveness." In France, the legislator also uses it in several meanings such as: reconciliation, concordat, transaction, and compromise.

18 Jordanian Criminal Procedure Law no (9) 1961, art 2 <https://www.iclc-law.com/ar> Accessed 5 February 2025; Federal Decree-Law of UAE no (38) 2022 'Promulgating the Criminal Procedures Law', art 10 <https://uaelegislation.gov.ae/en/legislations/1609> Accessed 5 February 2025; Loi (France) n 2004-204 du 9 mars 2004 'Portant adaptation de la justice aux évolutions de la criminalité' (Amended 1 January 2025) art 6 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000249995> Accessed 5 February 2025.

unilateral legal act by the accused, who has the right to accept or reject it—ultimately leading to the dismissal of the criminal case.[19]

Some proponents of French jurisprudence classify criminal reconciliation as a civil contract based on Article 2044 of the French Civil Code. They regard reconciliation as a voluntary procedural act that can only be concluded with the consent of both parties.[20] From this perspective, criminal reconciliation is akin to civil reconciliation, serving as a mutual agreement to resolve disputes. However, others consider it a contract of submission, particularly in the context of economic crimes. French jurist Sallier argues that such contracts reflect one party's unilateral dominance, imposing its will not on an individual but on an indefinite group.[21]

Criminal jurisprudence views criminal reconciliation in economic crimes as an administrative penalty[22] aimed at reducing punishment and avoiding judicial procedures, while its supporters argue it constitutes a form of legislative license. [23]

4 SCOPE, PARTIES, AND CONDITIONS OF CRIMINAL RECONCILIATION IN JORDANIAN, EMIRATI, AND FRENCH LEGISLATION

4.1. Scope of Criminal Reconciliation

Jordanian law permits penal reconciliation for a range of crimes, including assault, defamation, property damage, and minor economic crimes. This allows issues to be resolved without resorting to full judicial procedures, offering an alternative means for dispute resolution and justice outside formal court processes.[24]

UAE legislation permits reconciliation for various misdemeanours and violations, including refusal to pay alimony, bodily harm, abortion, secret disclosure, trust breach, property misappropriation, embezzlement, and property rights violations.[25] It also permits

19 Al Saadi (n 13) 27.

20 Ali Abdul-Jabbar Rahim Al-Mashhadi, 'Civil Liability for the Damage of the Corona Vaccine According to the Decisions of the French Court of Cassation' (2022) 2(2) Akkad Journal of Law and Public Policy 24, doi:10.55202/ajlpp.v2i2.131.

21 Yamina Bellman, 'Contracts of Adhesion and Consumer Protection' (2019) 30(2) Journal of Human Sciences 103.

22 Abdul Samee Ahmed Al-Tair, 'Reconciliation as an Alternative to Criminal Prosecution under the System of Restorative Justice (A Comparative Study)' (2024) 1(24) Al-Qurtas Journal for Human and Applied Sciences 247.

23 ibid.

24 Jordanian Penal Code no (16) 1960, art 52 <https://www.wipo.int/wipolex/en/legislation/details/15077> Accessed 5 February 2025.

25 Federal Decree-Law of UAE no (31) 2021 'Promulgating the Crimes and Penalties Law', arts 382(1), 390, 394, 403, 432(1), 433, 453, 454, 464, 465, 468, 473 <https://uaelegislation.gov.ae/en/legislations/1529> Accessed 5 February 2025.

reconciliation for certain more serious offences, such as child abduction and kidnapping occurring within the family, concealment of stolen items, and crimes where the public prosecutor can reconcile.[26]

Furthermore, the Emirati Anti-Rumour and Cyber Crimes Law permits reconciliation for various offences, including electronic breaches,[27] assault on personal data,[28] unauthorised access, fake email fabrication, slander, defamation, and confidential information disclosure, with first-time offenders facing up to one year imprisonment. [29]

The French legislature has established criteria for the application of penal conciliation, including the need for an official report and minimal damage.[30] The public prosecutor has the authority to propose specific measures for those admitting to misdemeanours or violations.[31] Originally limited to misdemeanours, the scope expanded to include all offences and crimes punishable by imprisonment or fines.[32] The scope was further expanded to include crimes punishable by up to three years in prison,[33] excluding press crimes, involuntary manslaughter, political crimes, and offences committed under the influence of alcohol.[34]

4.2. Parties of Criminal Settlement

The reconciliation agreement involves two parties: the victim (or their heirs or representatives acting on behalf of the victim) and the accused—whether during the pre-trial and trial stages or after the final judgment, which may be suspended by the reconciliation.

26 ibid, arts 379, 380, 456, 236.

27 Federal Decree-Law of UAE no (34) 2021 'On Countering Rumors and Cybercrimes' art 2(1) <https://uaelegislation.gov.ae/en/legislations/1526> Accessed 5 February 2025

28 ibid, art 6 (1).

29 Federal Law of UAE no (6) 2022 'Concerning Juvenile Delinquent and Juvenile at Risk of Delinquency' art 20 <https://uaelegislation.gov.ae/en/legislations/1618> Accessed 5 February 2025.

30 Adnan Al-Sabai, 'Criminal Reconciliation Mechanism in Moroccan Legislation and Comparative' (2021) 32 Journal of Law and International Business 17.

31 Kareema Mohammed Al-Zaitouni, 'The Reconciliation of the Offender and the Victim as a Model of Restorative Justice' (2019) 17(1) Al-Ostath 231.

32 It can be said that the criminal settlement in the French legislation extends to include the offenses stipulated in arts 222-11, 222-13 (1 to 11), 222-16, 222-17, 222-18, (1) 227-3 to 227-7, and from 227-9 to 227-11, 311-3, 313-5, 314-5, 314-6, 322-1, 322-12 to 322-14, 433-5 to 433-7 and 521-1 of the Criminal Law. See: Code Penal (France) 22 July 1992 (Amended 1 January 2025) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/> Accessed 5 February 2025.

33 See: French Code of Criminal Procedure of 31 December 1957 (Amended 1 February 2025) art 41 (1) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154> Accessed 5 February 2025.

34 Feirouz El Maouhab, 'The Role of Penal Mediation in Achieving Restorative Justice' (2024) 13(2) Alijtihed Journal on Legal and Economic Studies 396, doi:10.36540/nvxbs614.

- **The Victim:**

Criminal jurisprudence differs in its definition of "victim". Some scholars define a victim as anyone who suffers an attack on their protected interest or is harmed by the crime, while others consider indirect victims as well.[35] For example, in a case of fraud, the victim is the owner of the misappropriated money, but the indirect victim is the spouse and children.

In French criminal law, a victim is defined as "any person who has suffered harm resulting from the crime, including physical, emotional, or economic losses."[36] This designation is granted only after proving "that their suffering from the harm resulting from the crime committed against them was personal, real, and recognised as socially unacceptable."[37] The victim may be a person who has been harmed or damaged as a result of the crime, whether that harm or damage is physical, emotional, or material.[38]

French legislation aligns with Jordan and UAE laws, allowing victims to be natural or legal persons, as affirmed by the Egyptian Court of Cassation.[39]

Jordanian and Emirati legislations permit only unauthorised assault victims to submit reconciliation requests, either personally or through a legal representative, regardless of specific damage or risk. Reconciliation requests from others, such as children or a spouse, are not accepted without a specific power of attorney. An exception exists when the request—either from them or their representative—is accepted as evidence of reconciliation in court or by the public prosecutor, especially when they are heirs of a deceased victim.[40]

In the UAE, Article 350 (1) of the Criminal Procedure Law states that only the victim or their legal representative has the right to request reconciliation with the accused, except in cases where the victim is legally incompetent, insane, or a minor.[41] The French legislature

35 Sabine Mandl and Julia Planitzer, 'Who is a Victim? The Concept of Victim in the Victims' Rights Directive: A human rights analysis of the concept of victim from a gender-specific perspective' (2022) 12 SIAK-Journal 49-50, doi:10.7396/IE_2022_E.

36 Saful Khafidz Susilo, Sanusi and Fajar Ari Sudewo, 'Comparison of Protection for Victims of Crime Between Indonesia and France' (Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education, MALAPY 2022, 28 May 2022, Tegal, Indonesia) 5, doi:10.4108/eai.28-5-2022.2320493.

37 ibid.

38 Mohamed Abdelmohsen Mohamed Ben Tarif, Mohammed Mansour Al-Akour and Mo'men Nayef Al-Saaydeh, 'Criminal Protection of Victims of Justice in Jordanian Legislation' (2019) 22(1) British Journal of Humanities and Social Sciences 108.

39 Raed SA Faqir, 'The Criminal Liability of Parent Corporations for Acts of Its Subsidiaries under Criminal Law in Jordan: A Comparative Study' (2016) 7(3) Beijing Law Review 2019, doi:10.4236/blr.2016.73022.

40 The Jordanian Criminal Procedure Law no (9) 1961 did not address this issue, unlike the Emirati legislation, which clearly addressed it in art 350 (1) of the Emirati Criminal Procedure Law no (38) of 2022. See: Decision no 492/2006 (Jordanian Court of Cassation, Quintet Panel, 6 August 2006).

41 Federal Decree-Law of UAE no (38) 2022 (n 18) art 350(1).

also emphasises the role of the victim in criminal reconciliation, as stated in Articles 41 (1) (2) and 495 (7) of the French Criminal Procedure Law.[42]

Jordanian law, similar to Emirati and French law, allows victims or their representatives to initiate reconciliation requests with the accused. However, unlike Emirati law, Jordanian law does not explicitly address heirs' right to initiate a reconciliation request, as stated in Article 3(1) of the Criminal Procedure Law No. 9 of 1961.

The legislative bodies of Jordan and the UAE have resolved the issue of criminal reconciliation involving underage victims. Complaints from victims under the age of fifteen are not considered[43] unless approved by their legal representative.[44] In France, the minimum age for criminal reconciliation is 18 years old, with parents or legal guardians participating on behalf of younger victims.[45]

Whether criminal reconciliation can be used in cases of multiple victims is not addressed in Jordanian, Emirati, and French legislation.[46] However, complaint provisions stipulate that waivers must be collective, and a reconciliation agreement between one victim and the accused is invalid. This is because criminal reconciliation is a meeting of interests.[47]

- **The Legal Representative of the Victim:**

Jordanian law does not explicitly address submitting a reconciliation request through a legal representative. However, complaints for offences listed in Articles 415, 416, 419, 420(1), 422, 423(1), 424, and 425 of the Penal Code require a complaint to be filed by the victim. The Code of Criminal Procedure permits the informer or their agent to file a complaint. By analogy, it can be inferred that a reconciliation request may also be submitted through a legal representative. [48]

Nonetheless, the Jordanian Code of Criminal Procedure and Penal Code should be amended to allow reconciliation between victims and the accused based on an agreement between the victim, their legal representative, heirs, and the accused.[49]

42 See: Loi (France) n 2004-204 (n 18), known as the "Berban" law, which introduced amendments to the mechanisms of conciliation and expanded its scope of application; as well as Law: Loi (France) n 2016-1547, 18 November 2016 'De modernisation de la justice du XXIe siècle' (Amended 1 January 2023) <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805> Accessed 5 February 2025.

43 Federal Decree-Law of UAE no (38) 2022 (n 18) art 14(1).

44 Jordanian Criminal Procedure Law no (9) 1961 (n 18) art 3(b).

45 Code civil des Français (n 15) art 388.

46 Jordanian Penal Code no (16) of 1960 (n 24) art 53.

47 Al Saadi (n 13) 128.

48 Jordanian Criminal Procedure Law no (9) of 1961 (n 18) art 27(1).

49 Case no 120/2003 *Quintet Panel* (Jordanian Court of Cassation, Criminal Chamber, 30 March 2003).

Jordanian law currently stipulates that the victim or their legal representative must personally submit a request for reconciliation. This limits these two categories from acting without others.[50] If the victim dies, the right to reconciliation may not be transferred to the heirs, mirroring the non-transferability of the right to withdraw a complaint. However, the legal representative of the heirs may submit a reconciliation request to the public prosecutor or the court.[51]

By contrast, the Emirati legal framework provides more explicit provisions for reconciliation through a legal representative. Articles 348 and 350 of the Criminal Procedure Law clearly allow reconciliation procedures to be initiated based on an agreement between the victim or their legal representative and the accused. [52] Unlike the Jordanian approach, the Emirati system does not require the victim to personally submit the request, thus granting greater flexibility in the reconciliation process and ensuring that procedural barriers do not hinder justice.

Jordanian, Emirati and French legislation allow reconciliation between victims and accused in criminal cases without financial compensation. This enables public prosecution or court to accept it regardless of material or moral compensation.[53] French legislation, however, states that reconciliation is a reason for the expiration of criminal lawsuits only in specific categories of cases—namely petty crimes, customs crimes, cash dealings, and indirect tax system offences—and only in the context of economic and financial crimes.[54]

- **The Accused:**

The UAE and Jordan's criminal legislation does not define the term "accused," but the Criminal Procedure Law states that the plaintiff in a public rights claim is the one against whom the claim is brought.[55] In the UAE, the accused applies to anyone initiated in criminal proceedings,[56] regardless of whether they are charged with a crime or a misdemeanour.[57]

50 Al Jubour and Hayajneh (n 8) 69.

51 Mouaid Al-Qudah and Mamoun Abu-Zeitoun, 'The Rights of the Victim in the Face of the Public Prosecution's Exclusive Authority to Initiate Criminal Proceedings: A Comparative Study' (2017) 18(1) International Review of Law 13, doi:10.5339/irl.2017.4.

52 Federal Decree-Law of UAE no (38) 2022 (n 18) arts 348, 350(1).

53 Fakhrah Saif Salem Al-Mansouri, 'The Judicial Reconciliation as an Alternative to Criminal Lawsuit: A Comparative Study to the Emirati Law and Egyptian Laws' (2023) 14(25) Judicial Studies Journal 109.

54 Sarah-Marie Cabon, 'Negotiation in Criminal Matters' (Doctoral Thesis, University of Bordeaux, 2014) 61.

55 Jordanian Criminal Procedure Law no (9) 1961 (n 18) art 2.

56 Khalid M Al Hammadi, 'Criminal Settlement in the UAE Criminal Procedure Law: A Comparative Study' (2024) 19(5) Legal Journal 2991.

57 Mohammed Abouelwafa, 'The Legal Development of the Federal Criminal Procedures Law of the United Arab Emirates and the Possibility of Terminating the Criminal Prosecution with Criminal Reconciliation' (2022) 30 (2) Security and Law Journal 76.

French criminal legislation, by contrast, differentiates between suspects and accused individuals. During investigation, suspects are referred to as innocent until charges are made. Once a crime is attributed to the suspect, they are considered the accused and may become potentially involved in the criminal settlement process.[58]

In legal jurisprudence, the accused is defined as anyone suspected of committing a criminal act, obligated to face responsibility and undergo legal procedures.[59] They are also the adversary in a criminal lawsuit, with strong evidence directing the accusation. The accused can be anyone suspected of involvement in a crime or those who have been taken into criminal custody or arrested by authorities.[60]

In Jordanian law, the term "accused" refers to a party involved in a criminal dispute, often referred to as "suspect" during the initial investigation stage.[61] Under UAE legislation, the same term is used during the evidence-gathering stage. A person is then considered "convicted" in cases of first-instance or final judgment and as a "convict" upon final judgment.[62]

The accused is defined as a person who has been charged, filed a criminal suit, arrested, or issued an arrest warrant by judicial authorities. They are entitled to the presumption of innocence until a final and binding judgment of guilt is issued in the suit against them.[63]

In Jordan, the UAE, and France, legal insanity exempts the accused from prosecution, while foreign diplomats are granted legal immunity, protecting them from trial before the national courts. Instead, such diplomats are subject to prosecution under the penal laws of their own countries.[64]

58 Yevhenii Tyrlych, 'Obtaining Samples for Examination in Criminal Proceedings: A Comparative Analysis' (2024) 4 Visegrad Journal on Human Rights 122, doi:10.61345/1339-7915.2024.4.17.

59 Fawaz Jabir Fatahan and Yousef Zakaria Arbab Issa, 'The Right of the Accused to Remain Silent' (2022) 10 Al-Qulzum Journal of Political and Legal Studies 23.

60 Khechana and Berni (n 1) 438.

61 Abdullah M Ehjelah, 'The Power of Judicial Control in the Final Verdict Issued in a Case before its Initiation by the Criminal Judiciary: A Comparative Study of the Jordanian and Emirati legislations' (2016) 13(2) University of Sharjah Journal of Sharia and Law Sciences 401.

62 Tareq Al-Billeh and others, 'Guarantees for Questioning the Accused in the Jordanian Criminal Procedures' (2023) 34 Journal of Namibian Studies: History Politics Culture 2214, doi:10.59670/jns.v34i.1497.

63 Khaled M Al Hammadi and Zubeida JM Al Mazmi, 'Personal Freedom Guarantees in the Face of Arrest in Emirati Legislation: A Comparative Study' (2023) 18(1) Legal Journal 127.

64 Munaaba John Apuuli, 'Analysis of Diplomatic Immunity and Crimes Committed by Diplomats: A Research Report' (School of Law, Kampala International University 2019) 16.

4.3. Terms of the Criminal Reconciliation Agreement

There is consensus between criminal legislations in Jordan, the United Arab Emirates, and France on the necessity of meeting a set of conditions for the defendant to be eligible to participate in the criminal reconciliation agreement. The most important of these conditions include:

A. Jordanian, Emirati, and French laws recognise both natural persons and legal entities as subjects of criminal law. Legal entities are responsible for crimes their representatives or agents commit, subject to fines and confiscation. However, personal punishment is not prohibited. Reconciliation can occur directly between the victim and the accused or with the legal representative of the accused.[65]

B. The accused must be alive and able to express their will during criminal proceedings. According to the Jordanian Penal Code and the French Code of Criminal Procedure, no party can be deceased.[66] The death of the accused grounds the termination of the criminal action[67] and the dropping of penalties.[68] In the UAE, the criminal action expires, and penalties are dropped upon the accused's death, rendering reconciliation agreements unenforceable.[69]

Article 350 (2) of the UAE Penal Code permits reconciliation between the heirs of the accused and the victim. However, upon the accused's death, reconciliation is not possible, raising questions about reconciliation's purpose.[70]

C. Legal action against an unknown person is impossible, as it requires identification and reconciliation. A criminal lawsuit cannot be filed against an unknown person, as it requires identification and judgment of guilt. Agreements between known and unknown parties are impossible, as they require free will and acknowledgement of guilt, which cannot be achieved with an unknown accused.[71]

65 See: Jordanian Penal Code no (16) of 1960 (n 24) art 74(3). Federal Decree-Law of UAE no (31) 2021 (n 25) art 65. The French legislator addressed the criminal responsibility of moral persons, and the penalties imposed on them in arts 121 (2), 131 (38), and (39) of the French Penal Code, see: Code Penal (France) (n 32). See art 65 of the UAE Penal Code no (31) of 2021, which limits the penalty for a legal entity to a fine not exceeding five million dirhams (5,000,000).

66 Fahad MH Hadi, 'The Public Prosecution in Jordanian and Kuwaiti Law' (Master's thesis, Faculty of Law, Middle East University 2014) 70.

67 Hamzeh M Abu Issa and Abdallah Al-Khseilat, 'The Impact of Death of the Accused on the Criminal Action in the Jordanian Law, International' (2019) 9(5) Journal of Humanities and Social Science 134, doi:10.30845/ijhss.v9n5p17.

68 Federal Decree-Law of UAE no (38) 2022 (n 18) art 268.

69 ibid, art 324.

70 Abdulaziz Al-Hassan and Amin Dahmash, *Explanation of the Federal Penal Code of the United Arab Emirates issued by Federal Decree-Law no 31 2021 (General Theory of Crime, General Theory of Penalty)* (Scientific Renaissance for Publishing and Distribution 2024) 377.

71 Alhajri and Al Nawayseh (n 12) 35.

D. The procedural capacity of the accused is addressed in Jordanian legislation, specifically in Articles 88-94 of the Penal Code. Article 88 states that the accused is not responsible if coerced to commit the crime. Article 92 states that the accused is not accountable if suffering from insanity or mental disorder.[72] Article 93 states that the accused is not accountable if in a coma due to forced alcohol or drug consumption. Article 94 deals with the lack of criminal responsibility for young offenders under twelve years old. The accused must possess mental maturity, understanding, freedom of choice, and mental capacities at the time of the crime. Accountability requires willingness and consciousness, as stated in Article 74 of the Penal Code.[73]

Similarly, Emirati legislation emphasises the requirement for the defendant's legal capacity in criminal proceedings.[74] Legal capacity is lost in cases of insanity, minority (under the age of twelve), or when the defendant completely lacks perception, will, or freedom of choice at the time of committing the crime.[75] French and Emirati legislation both address defendants losing legal capacity due to insanity, coercion, mistake, or irresistible force.[76]

5 IMPACTS OF CRIMINAL RECONCILIATION ON CRIMINAL LITIGATION

Criminal reconciliation fosters dialogue, understanding, and empathy in criminal litigation, promoting healing and rehabilitation. It requires reevaluating legal frameworks, balancing accountability and reform, and reverberating throughout the criminal justice system.

5.1. Impact of Criminal Reconciliation During the Evidence-Gathering Stage

Reconciliation between the perpetrator and victim is a procedural agreement that may occur at any stage of the criminal proceedings, including the initial investigation.[77] While it does not fall under the category of a criminal complaint, it restricts the judicial control authority.[78] After verifying the agreement's validity and the perpetrator's commitment, the case is referred to the public prosecution, which may shelve the case if no complaint has been filed.[79]

72 Waddah Saud Al-Adwan, 'Contraindications Criminal Liability in Jordanian Law: A Descriptive and Analytical Study' (2019) 34(4) Tanta Faculty of Sharia and Law Journal 677.

73 This is confirmed by art 4 (b) of Jordanian Law no. (24) 2014 in cases of criminal liability of minors.

74 Federal Decree-Law of UAE no (38) 2022 (n 18) arts 29, 186(1), 188, 261(2), 299. Also see, Federal Decree-Law of UAE no (31) of 2021 (n 25) art 63.

75 Al-Hassan and Dahmash (n 70) 377.

76 See: Code penal (France) (n 32) arts 122 (1), (2), (3) and 122 (2).

77 See the Decision of the UAE Minister of Justice no. (409) 2017, issued on 4 May 2017 (Official Gazette 31/5/2017) regarding the establishment of federal prosecutors for criminal reconciliation, official crime no. 615 of the forty-seventh year.

78 Alhajri and Al Nawayseh (n 12) 42.

79 Al Saadi (n 13) 53.

French and Jordanian legislations permit criminal reconciliation during evidence collection, preventing prosecution pursuit and lawsuit closure. [80] Public prosecutions must refrain from filing criminal lawsuits if a reconciliation agreement is proven. [81] Articles 6, 7, and 8 of the French Penal Code and Articles 347 and 349 of the UAE Criminal Procedure Law No. (38) and 41 (1), (2), (3) of the French Criminal Procedure Code seek to strike efficiency with justice. Examining these clauses reveals a legal system that supports alternative dispute resolution, providing flexibility while safeguarding victim rights and maintaining public order by means of flexibility.

UAE legislation prohibits the continuation of criminal prosecutions if the perpetrator resorts to reconciliation, settles with the victim, and commits to compensation. If referred to the court, the court must issue a non-acceptance decision.[82] If reconciliation is reached between the parties during the evidence stage before the judicial police, the police must cease further action and refer the matter to the public prosecution, which in turn issues a decision to close the case.[83]

In Jordanian, Emirati, and French legislation, the public prosecution does not drop charges without proof of reconciliation between the accused and the victim. This proof can be through admission, legal representation, or certified documents indicating reconciliation.[84] Perpetrator or victim statements and uncertified documents are not accepted. In French legislation, the public prosecution ensures the accused's compliance with reconciliation terms and can reconsider dropping charges if terms are not met.[85]

As demonstrated by UAE, French, and Jordanian law, reconciliation between the offender and victim is a fundamental procedural tool to halt criminal prosecution at several phases, including during evidence collection. This procedure typically calls for formal verification—that is, legal counsel or certified documentation—to guarantee it is not predicated on hearsay or unreliable claims. These legal systems stress the need for real and enforceable reconciliation by demanding solid proof, even while they seek to offer flexible solutions and reduce court loads. The public prosecution plays a crucial role in balancing restorative justice and legal accountability because it validates the reconciliation and maintains the power to reconsider dropping charges if the terms are not upheld, particularly under French law.

80 See: Code penal (France) (n 32) arts 6, 7, 8; Code de procédure pénale (France) (n 33) arts 41 (1), (2), (3).

81 Federal Decree-Law of UAE no (38) of 2022 (n 18) arts 347, 349.

82 Musab Al-Husseini and Mohammad Al-Aani, 'Judicial Reconciliation in Border Crimes and Retribution and Blood Money in UAE Legislation' (2022) 19(3) University of Sharjah Journal of Legal Sciences 154, doi:10.36394/jls.v19.i3.6.

83 Alhajri and Al Nawayseh (n 12) 42.

84 Federal Decree-Law of UAE no (38) 2022 (n 18) art 351 (1) and (2).

85 Mohamed Fathi Al-Jallawi, 'Organized Criminal Settlement in French law' (2020) 52(2) Legal and Economic Research Journal 9.

5.2. The Impact of Reconciliation During the Criminal Investigation Stage

The system of criminal reconciliation is an alternative to litigation.[86] It is characterised by friendliness, satisfaction, recognition, and apology from the perpetrator, with the victim accepting compensation. Either party can initiate reconciliation without third-party intervention. Reconciliation is crucial in ending criminal prosecution and reducing penalties, depending on the stage of the agreement.

In Jordanian legislation, reconciliation allows the parties to agree on financial compensation during the preliminary investigation stage.[87] Pre-trial reconciliation between the perpetrator and the victim prevents the state from pursuing and punishing the crime. This results in public prosecution members refraining from filing a lawsuit or taking further action. Once reconciliation is finalised, the investigation cannot be reopened—even if reconsidered by the victim. The reconciliation order holds special validity, preventing reconsideration or any new actions. [88]

Under Emirati legislation, reconciliation may occur during the preliminary investigation stage or after a final judgment has been issued. [89] If an agreement is reached during the criminal investigation stage, the public prosecutor will refrain from initiating prosecution.[90] The law permits reconciliation between the accused and victim—or their representatives—prior to court proceedings. [91] The Court of Cassation of Abu Dhabi further provides that victims, agents, heirs, or representatives may seek reconciliation with the accused before public prosecution or court, depending on the circumstances of the misdemeanours and offences. [92] Like Jordanian legislation, Emirati law does not allow the investigation to be reopened once reconciliation has been finalised, ensuring the process's finality and validity.[93]

In French legislation, reconciliation plays a significant role in halting criminal proceedings. A reconciliation agreement must be reached for the prosecution to cease pursuing the accused, ensuring the agreement's validity and satisfaction.[94] Compensation is a condition

86 Al Saadi (n 13) 48.
87 ibid 51.
88 Al-Jallawi (n 85) 68.
89 Federal Decree-Law of UAE no (38) 2022 (n 18) art 350 (5). Article expressly states that settlement is permissible in any case, even after the issuance of a final judgment or criminal order.
90 ibid, art 118.
91 ibid, art 350(3).
92 Appeal no 1056 [2018] Court of Cassation of Abu Dhabi,Criminal Judgments.
93 Al Jubour and Hayajneh (n 8) 15; Alhajri and Al Nawayseh (n 12) 42.
94 See also, Code de procédure pénale (France) (n 33) art 41(1), which states that the public prosecutor can cease criminal proceedings if reconciliation is reached, ensuring the agreement's validity, party satisfaction, and lack of the previous precedents against the accused.

for reconciliation's validity,[95] requiring the prosecution to stop all investigation proceedings once the agreement is reached.[96] Public prosecution suspends judicial pursuit after a criminal reconciliation is achieved. However, the French legal system also provides that the public prosecution supervises the implementation of reconciliation terms. If the terms are not met, the prosecution can reopen cases and resume proceedings against the accused, but this cannot occur during the preliminary investigation stage.

Reconciliation in Jordanian and Emirati legislation prevents the state from pursuing and punishing the crime, while in French legislation, it suspends judicial pursuit after reconciliation, with safeguards to ensure compliance. The shared emphasis across all three jurisdictions on the finality of reconciliation agreements highlights its importance as an alternative to litigation, fostering resolution and justice without prolonged court proceedings.

An analysis of the criminal reconciliation frameworks found in French, Emirati, and Jordanian law suggests that these systems are a good substitute for conventional litigation. This strategy strongly emphasises the development of reciprocal agreements between victims and offenders, often including aspects of compensation as a crucial step in the resolution process. In all three jurisdictions, the achievement of reconciliation results in the suspension or termination of criminal prosecution. The procedural approach, however, is where the main distinction is found in Jordan and the UAE; once reconciliation is completed, the case cannot be reopened, guaranteeing finality. On the other hand, French law permits the public prosecution to monitor adherence to the terms of reconciliation and reopen the case if required. Although all three systems aim to lessen the workload for courts, French law offers extra protections to guarantee that the terms of reconciliation are fulfilled.

5.3. Impact of Criminal Reconciliation During the Trial

Reconciliation between the perpetrator and victim during the trial stages and final judgment leads to the dismissal of the criminal lawsuit.[97] In many cases, the accused resorts to reconciliation to avoid penalties. Courts can accept or reject reconciliation requests, confirming the agreement's validity and specific crimes for which reconciliation is allowed.[98]

95 Emmanuel Arianto Waluyo Adi, 'Penal Mediation as the Concept of Restorative Justice in the Draft Criminal Procedure Code' (2021) 5(1) Lex Scientia Law Review 153, doi:10.15294/lesrev.v5i1.46704.

96 Matthew Marcellinno Gunawan, Pujiyono Suwadi and Muhammad Rustamaji, 'Comparison of Restorative Justice Implementation in Indonesia, Usa, Germany, Poland and Switzerland' (2024) 18(1) Revista de Gestão Social e Ambiental 3, doi:10.24857/rgsa.v18n1-055.

97 Al Saadi (n 13) 119.

98 Bahaa Jihad Mohammed Al-Madhoun, 'The Criminal Reconciliation in Criminal Offenses According to the Palestinian Criminal Reconciliation Law Compared to Islamic Sharia: A Comparative Analytical Study' (master's thesis, Islamic University 2018) 92.

Jordanian and Emirati legislations allow reconciliation during the trial stage to prevent convictions and imprisonment.[99] If a court settles a criminal case through reconciliation, the dispute is terminated, requiring immediate release, removal of the incident as a criminal record, non-consideration of the offence as a repeated offence, and the return of settlement items.[100]

Under Jordanian law, reconciliation between the perpetrator and victim is allowed during trial for crimes that require a personal complaint or civil rights claims.[101] This applies to First, Second, or Cassation courts. Reconciliation may mitigate punishment but does not result in the dismissal of the lawsuit.[102] Article 52 (A) of the Jordanian Penal Code No. 16 of 1961 allows for reconciliation during the trial stage and prior to the issuance of a final judgment.[103]

In comparison, the situation does not differ in UAE law, which allows reconciliation between the offender and the victim during the stages of trial in the Courts of First and Second Instance and even before the Court of Cassation. If the court verifies the validity of the reconciliation conditions and the victim's interest is achieved, a decision to dismiss the criminal lawsuit is issued. It is also acceptable for the reconciliation to occur before or after the issuance of the criminal judgments.[104] The Federal Court ruled that proving reconciliation with the accused in court must be done by the victim, their legal representative, their heirs, or their legal representative in misdemeanours and violations outlined in Articles 339 of the Penal Code.[105] As confirmed by the Abu Dhabi Court of Cassation: "The court must issue a decision to dismiss the criminal lawsuit in case of proving the reconciliation agreement between the offender and the victim in crimes where reconciliation is allowed by law."[106]

In French legislation, once the parties to a dispute reach a settlement agreement and the public prosecutor approves it, the court's role is to authenticate it after ensuring it complies with the provisions of the law. If verified, the court issues a ruling to terminate the criminal case without a conviction. However, the court also has discretionary authority to reject a settlement agreement if it deems the terms unfair or inconsistent with justice. In such cases, the court will proceed with the criminal proceedings. Once the

99 The Jordanian Court of Cassation ruled that the approval of the Customs Department to settle the dispute on smuggled goods at the request of the defendant, pursuant to arts (241-243) of the Customs Law, terminates the dispute from both criminal and civil aspects, preventing the issue from being raised again. See: Case no 1227/1993 Jordanian Court of Cassation [1994] Bar Association Journal 2209.

100 Khuloud Birkat Alian Al-Khataleen, 'The Role of Reconciliation in Terminating Criminal Lawsuits: A Comparative Study' (master's thesis, Al-Ahliyya University 2021) 54.

101 Alhajri and Al Nawayseh (n 12) 45.

102 Appeal no 595/2000 (Jordanian Court of Cassation, 24 July 2000).

103 Jordanian Penal Code no (16) 1960 (n 24) art 52(a).

104 Appeal no 898 [2020] Supreme Federal Court of UAE, Criminal Judgments.

105 ibid.

106 Appeal no 165 [2019] Court of Cassation of UAE, Criminal Judgments.

court has approved a reconciliation agreement and ruled to terminate the case, this decision is final and cannot be reversed.

It is evident that the primary goal of criminal reconciliation in the legal systems of Jordan, the UAE, and France is to resolve disputes amicably and avoid formal prosecution. However, comparative research reveals significant procedural differences across these jurisdictions.

In both Jordan and the UAE, reconciliation is permitted during the trial phase, and if the agreement is legitimate, it generally results in case dismissal—especially in the UAE. In Jordan, reconciliation lessens punishment but does not necessarily result in dismissal. However, under French law, a court must verify an agreement and have the authority to reject it if it is considered unfair. While reconciliation is a top priority in all three systems, French law provides a higher degree of judicial oversight.

5.4. Impact of Criminal Reconciliation After Sentencing

In both Jordanian and French law, criminal reconciliation is allowed at different stages of criminal proceedings, such as during investigations and trials, but always before the final judgment. While reconciliation after the final judgment is not recognised, parties may still engage in it; however, it does not impact the concluded criminal action and only affects the specified penalty.

Therefore, the preference for a reconciliatory settlement after a final judgment is limited to implementing the penalty, while the final judgment itself remains in place in both Jordanian and French legislation. In comparison, in Jordanian law, reconciliation between the parties following a final judgment can lead to the suspension or reduction of the penalty.[107] In French law, its impact is also limited, as it may lead to the termination or reduction of the penalty.

Emirati legislation differs from Jordanian and French legislation by explicitly allowing for reconciliation after the issuance of a final judgment. This is expressed in Article 354 of the Criminal Procedures Law, which states that: "If reconciliation with the accused occurs after the issuance of a final criminal judgment, the public prosecution shall order the suspension of its implementation." Thus, Emirati legislation permits criminal reconciliation after a judgment becomes final, granting the public prosecution the authority to order the suspension of the judgment's implementation, resulting in the suspension of the punishment under the force of law. Criminal reconciliation is considered a matter of public order, and the court has no discretion in this matter, regardless of the duration or type of sentence—whether custodial or financial. Reconciliation, whether before or after judgment, results in the expiration of the state's right to enforce the original, complementary, and financial penalties.

107 The Jordanian legislature, in art. 421(3) of Penal Code, took the mitigating effect of reconciliation for punishment in cases of post-judgment checks. See: Jordanian Penal Code no (16) 1960 (n 24).

An analysis of criminal reconciliation in the legal systems of France, the UAE, and Jordan reveals that it promotes resolution at several stages of criminal cases. However, there are notable differences in how it affects things after issuing a final judgment. In both French and Jordanian law, reconciliation is permitted before the final judgment and may lead to the reduction or suspension of the penalty, but it has no bearing on the final judgment itself. In contrast, Emirati law permits reconciliation even after a final ruling, allowing the public prosecution to halt the imposition of the penalty. This illustrates a more comprehensive approach, where reconciliation can impact both the penalty and its enforcement, regardless of the type of sentence.

6 CONCLUSIONS

The criminal reconciliation system, rooted in both Arab and Western civilisations, has been adopted in Jordan, the UAE, and France in response to social, cultural, and economic changes, as well as calls for democracy and capitalist system openness. These factors have resulted in the development of new criminal laws.

This study has achieved several important results, as follows:

1. A criminal settlement is a written agreement between the victim, their representative, heirs, or a mediator to resolve disputes in criminal matters that can be resolved amicably.
2. Jordan, the UAE, and France have adopted prosecutorial reconciliation mechanisms, focusing on parties' roles. However, procedural texts limit the state's right to impose punishment.
3. In all three countries, criminal reconciliation terminates criminal disputes and prevents judgments. However, it does not guarantee acquittal or the preservation of a final judgment if the legal consequences of a case worsen or the incident's description changes from misdemeanour to felony.
4. The legislation differences between the UAE, Jordan, and France significantly influence how criminal reconciliation is applied in the post-trial phase and during the enforcement of punitive judgments.
5. The legal systems of Jordan, the UAE, and France agree that criminal reconciliation does not impact any civil claims arising from the reconciled crime, regardless of whether those claims are filed in criminal or civil courts.

Based on its findings and in-depth analysis, the study presents crucial recommendations for the legal environments of Jordan, the UAE, and France:

1. A supervisory system for criminal reconciliation should be established in Jordanian, Emirati, and French legislation. This system should allow the accused to reconcile for specified crimes and act against repeating offences to prevent waiver of prescribed punishments.

2. Jordan and UAE legislative systems should broaden the scope of special criminal legislation, like French practices, emphasising criminal reconciliation as a reason for the expiration of criminal lawsuits.
3. The principle of criminal reconciliation should not limit compensation to just financial but should include other forms of restitution. The goal is to create a deterrent punishment, preventing crime recurrence through social services, educational courses, or therapy sessions rather than concealing the results.
4. French legislators must establish clear guidelines for criminal settlements to ensure and protect victims' rights. The judiciary must also be provided with defined criteria for approving or revoking settlements, thereby maintaining an appropriate balance between administrative discretion and judicial oversight.
5. Jordanian and Emirati legislators must clearly define criminal reconciliation provisions, including their implications for multiple victims and the impact on the complaint-waiving system.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ ПРИМИРЕННЯ В АКТИВІЗАЦІЇ ВІДНОВНОГО ПРАВОСУДНЯ В КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ ЙОРДАНІЇ, ЕМІРАТІВ ТА ФРАНЦІЇ (АНАЛІТИЧНО-ПРАВОВЕ ДОСЛІДЖЕННЯ)

Раед С. А. Факір, Алаелдин Магхайре*, Тарек Абдель Салам, Ехаб Алрусан, Могаммед Нур Елдін Сайєд та Лума Алі Фарадж Аль Дагері

АНОТАЦІЯ

Вступ. *У дослідженні вивчається, як відновне правосуддя у Франції, Об'єднаних Арабських Еміратах та Йорданії здійснюється за допомогою примирення. Із наголосом на соціальній згуртованості та справедливості примирення у кримінальному провадженні має на меті боротися зі злочинністю альтернативними засобами. Щоб усунути недоліки традиційного кримінального правосуддя, у цій статті розглядається договірне правосуддя в зазначених країнах. Звернено увагу на захист прав людини і налагодження зв'язку між жертвою та правопорушником. Каральні заходи підпорядковуються компенсаційному правосуддю.*

Примирне правосуддя замінило традиційні каральні заходи в системах кримінального правосуддя Об'єднаних Арабських Еміратів, Йорданії та Франції. Через неефективність традиційних заходів покарання за дрібні правопорушення сторони тепер можуть вирішувати свої розбіжності поза правовою системою. Примирення, альтернатива відновному правосуддю, намагається вирішити суперечки мирним шляхом за допомогою усунення наслідків злочину, відшкодування шкоди, реінтеграції правопорушників і сприяння соціальній злагоді.

Методи. *У статті використовувалися описовий, аналітико-індуктивний та порівняльний методи для аналізу правових аспектів примирення в трьох країнах. За допомогою аналітико-індуктивного методу було зібрано і проаналізовано дані.*

Порівняльний метод застосовували для зіставлення юридичних текстів, а описовий — для опису досліджуваного явища.

Результати та висновки. *Кримінальне законодавство Йорданії, ОАЕ та Франції має запровадити арбітражну систему примирення, дозволяючи обвинуваченим особам заявляти про конкретні злочини. Повторні правопорушення повинні вирішуватися в судовому порядку, а примирення має призвести до закриття провадження за кримінальними позовами, включно з наданням відповідних соціальних послуг та терапією.*

Ключові слова: *відновне правосуддя, примирення у кримінальному законодавстві, компенсаційна угода, зміст примирення та його сторони, правові наслідки, закриття провадження за кримінальним позовом, Йорданія, Об'єднані Арабські Емірати, Франція.*

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Research Article

ENSURING EFFECTIVE JUDICIAL PROTECTION IN ADMINISTRATIVE DISPUTES THROUGH THE ANNULMENT POWER OF THE ADMINISTRATIVE JUDICIARY

Bruna Žuber* and Tilen Majnik

ABSTRACT

Background: *Judicial control of administrative action has traditionally focused on the legality of administrative acts with little regard for the consequences of the administrative dispute. This was changed by the European Court of Human Rights (ECtHR) through its interpretation of the right of access to court under Article 6 of the European Convention on Human Rights. The ECtHR expanded this right to include the enforceability of administrative court judgments, prompting a shift in the role of the administrative judiciary toward ensuring the effective resolution of disputes. This has influenced reforms across European countries, many of which have introduced mechanisms to support administrative courts in delivering more effective judicial protection.*

This article has two main objectives: first, to examine how administrative disputes have evolved from merely assessing the legality of administrative acts to ensuring effective judicial protection of individuals by expanding the right to a fair trial, and second, to analyse how this shift has influenced national legal frameworks, with a focus on mechanisms that empower courts to enforce their decisions and conclusively resolve disputes.

Methods: *The historical method is employed to trace the development of judicial control in administrative disputes and the influence of ECtHR case law. The logical method supports the analysis of key judgments, demonstrating the evolving interpretation of the right to a fair trial. The comparative method assesses how different European legal systems have adapted their frameworks to strengthen the enforceability of administrative court decisions. The systemic method ensures the internal coherence of findings, while the dogmatic method interprets relevant legal norms. Finally, the axiological method is employed to critically evaluate reforms and their alignment with core legal values.*

Results and Conclusions: *The enforceability of administrative court judgments gained prominence with the ECtHR's Hornsby case, which recognised that the right to a fair trial includes the execution of judgments. This understanding has led to substantial reforms across Europe to increase the effectiveness of administrative justice. While these reforms have improved individual rights protection and dispute resolution, they must respect constitutional principles, particularly the separation of powers and judicial impartiality.*

1 INTRODUCTION

Administrative dispute is one of the fundamental mechanisms for protecting individual rights and legal interests in the field of administrative law. However, its effectiveness depends on the legal system's ability to ensure that judgments of administrative courts are implemented promptly and comprehensively. This article examines this dimension of administrative judicial decision-making by analysing the mechanisms available to administrative courts to ensure the effective implementation of their judgments, particularly in cases where they annul contested administrative acts and refer the matter back to the administrative authority for reconsideration.

In this context, it is crucial that the administrative court's judgment is correctly and promptly implemented, allowing for the definitive resolution of the conflict between the public authority and the individual. Only such judicial decision-making that aims to comprehensively resolve the administrative dispute can ensure that the party effectively protects its legal position.

In the past, little attention was paid to effectively protecting parties' interests. Instead, the primary focus was on ensuring the objective legality of administrative acts, often resulting in removing an unlawful administrative act without considering whether this alone sufficiently safeguarded the party's rights. However, gradual developments in this field have led to a paradigm shift in administrative dispute resolution. This shift, mainly influenced by the European Court of Human Rights (hereafter ECtHR), emphasised the administrative dispute as a mechanism for comprehensive judicial protection of individuals. Under this new approach, administrative courts aim to fully protect parties' legal positions and ensure that administrative authorities comply with court judgments.

The first part of the article delves into the developments in the ECHR practice that led to the current understanding of the administrative dispute in Europe as a means for effective judicial protection of parties. This approach addresses all dimensions of a dispute and allows for its comprehensive resolution. The second part of the article presents a comparative legal analysis of the mechanisms that empower European administrative courts to achieve this new understanding of administrative disputes. One such mechanism is the full jurisdiction procedure, whereby the court replaces an unlawful administrative act with its own ruling. However, due to its constitutional and procedural complexity, a more

detailed analysis of this mechanism exceeds the scope of this article, which is focused on the problems of the enforcement of annulling judgments. These mechanisms also ensure that administrative authorities consistently comply with the judgments of the administrative court during repeated proceedings. While most of the development in this field has been carried out by Western European countries, recent reforms in Central and Eastern European jurisdictions—such as Slovenia, Poland, and Hungary—have led to the incorporation of at least some such mechanisms in their respective legal orders. The article concludes by presenting the main findings of this research.

2 RESEARCH METHODOLOGY

This article employs a multifaceted research methodology to achieve its dual objectives.

In the first part, the historical method is predominantly utilised to trace the evolution of administrative disputes—from mechanisms ensuring the legality of administrative acts to instruments providing effective judicial protection of individual rights. This involves a chronological analysis of the European Court of Human Rights case law, highlighting the significance of the *Hornsby* case, which significantly shaped the current understanding of administrative disputes.

The second part combines several methodologies to analyse the impact of this evolution on national legal frameworks across Europe. The comparative method serves as the principal tool for evaluating different approaches adopted by various legal systems to enhance the effectiveness of administrative court judgments, facilitating cross-jurisdictional insights. The systemic method ensures the legitimacy of findings by considering the interconnectedness of legal norms and institutions within different legal systems, acknowledging that changes in one area may impact others.

This section also applies the historical method to contextualise the development of specific legal frameworks governing administrative disputes. The logical method is employed to dissect relevant case law through analysis and to identify patterns indicating the growing importance of the right of access to court in the jurisprudence of various European administrative courts through induction. The dogmatic method is applied in interpreting legal norms analysed in this section, providing a doctrinal perspective on statutory provisions and judicial decisions.

Finally, the axiological method underpins the critical assessment of the evolution of administrative judicial review, focusing on the values and principles that have driven and shaped this transformation.

3 THE DEVELOPMENT OF THE NATURE OF THE ADMINISTRATIVE DISPUTE FROM PROTECTING (OBJECTIVE) LEGALITY TO EFFECTIVE PROTECTION OF HUMAN RIGHTS

Throughout most of the twentieth century, limited attention was given to the mechanisms available to administrative courts for resolving issues arising from unlawful administrative acts.[1] As part of the judicial branch, it was accepted that courts could annul unlawful administrative acts and refer the matter back to the administration, with minimal concern for the effects and proper implementation of their judgments.[2] Only in rare cases and within a few jurisdictions, were courts able to go further by deciding the case themselves through full jurisdiction proceedings.[3]

However, this lack of attention to the practical consequences of administrative courts' judgments was reversed at the end of the twentieth century, largely due to the efforts of the ECtHR.[4] In the landmark *Hornsby* case,[5] in which Greek administrative authorities failed to implement an administrative court judgment, the ECtHR held that Article 6 of the European Convention on Human Rights[6] (hereafter ECHR) guarantees everyone the right to have a case tried by a court. However, this right would be illusory if a state's domestic legal system allowed a final, binding judicial decision to remain ineffective to the party's detriment. Thus, the execution of a judgment must be regarded as an integral part of the trial within the meaning of Article 6 ECHR.[7]

This is of particular importance in the context of administrative proceedings concerning the civil rights of litigants[8] since by bringing an application for judicial review, they seek not only the annulment of the contested administrative act but, above all, the removal of its effects. For this reason, the effective protection of the party presupposes an obligation on the part of the administrative authorities to comply with

1 Françoise Sichler-Ghestin, 'L'exécution des Décisions du Juge Administrative' (2017) 39(2) Civitas Europa 7.

2 Marc Gjidara, 'Les causes d' inexécution des décisions du juge administratif et leurs remèdes' (2015) 52(1) Zbornik Radova Pravnog Fakulteta u Splitu 71.

3 Robert Siuciński, 'Between Judicial Review and the Executive: The Problem of the Separation of Powers in Comparative Perspective' (2020) 9(2) Perspectives of Law and Public Administration 138.

4 Gjidara (n 2) 71.

5 *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997) para 38 et seq <https://hudoc.echr.coe.int/eng?i=001-58020> accessed 16 January 2025.

6 European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5.

7 ibid, para 40.

8 Art. 6 of ECHR applies only to judicial proceedings regarding civil rights and obligations and criminal charges, however the concept of 'civil rights and obligations' has its own meaning under ECHR, subject to the interpretation by ECtHR, regardless of how the term may be understood in domestic legislation. William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 273 et seq.

the court's judgment.[9] As the ECtHR has pointed out in several subsequent cases, a failure by the authorities to comply with the judgments of the administrative courts constitutes a violation of Article 6(1) ECHR.[10]

This principle has gained further traction through the work of the Council of Europe, whose Committee of Ministers has adopted Recommendation Rec(2004)20,[11] which seeks to ensure effective judicial review of administrative acts as a means of protecting the rights and interests of individuals—an essential element of the human rights protection system. The Recommendation states that judicial review of administrative acts must be effective to ensure the effective protection of citizens' rights and interests while guaranteeing the administration's credibility in the eyes of society and the efficiency of the administration itself.[12] It also seeks to ensure that a court has at its disposal all the measures necessary to restore the lawful situation, which covers, among other things, the power to order the adoption of a new administrative act and the possibility of preventing the adoption of such acts.[13]

Although the case law of the ECtHR doesn't require administrative courts to replace unlawful administrative acts with their own judgments, it does require them to possess the necessary tools to ensure that administrative authorities comply with judicial rulings when issuing a new administrative act following the annulment of the original.[14]

The Council of Europe made similar recommendations in Recommendation Rec(2003)16,[15] which obliges Member States to ensure that administrative authorities implement judgments within a reasonable time and take all necessary measures under national law to give them full effect. In cases of non-compliance by a public authority, an appropriate procedure should be provided, for example, through the use of injunctions or coercive fines. The Recommendation also states that public authorities and individual officials should be held liable for refusing to implement court judgments.[16]

9 *Hornsby v Greece* (n 5) para 41.

10 *Sharxhi and Others v Albania* App no 10613/16 (ECtHR, 11 January 2018) para 92 et seq <https://hudoc.echr.coe.int/eng?i=001-179867> accessed 16 January 2025; *Okyay and Others v Turkey* App no 36220/97 (ECtHR, 12 July 2005) para 72 et seq <https://hudoc.echr.coe.int/?i=001-69672> accessed 16 January 2025.

11 Recommendation Rec(2004)20 of the Committee of Ministers to Member States 'On Judicial Review of Administrative Acts' (adopted 15 December 2004) <https://rm.coe.int/cmrec-2004-20-on-judicial-review-of-administrative-acts/1680a43b5b> accessed 16 January 2025.

12 ibid, para 86.

13 ibid, para 87.

14 ibid, para 88.

15 Recommendation Rec(2003)16 of the Committee of Ministers to Member States 'On the Execution of Administrative and Judicial Decisions in the Field of Administrative Law' (adopted 9 September 2003) <https://search.coe.int/cm?i=09000016805df14f> accessed 16 January 2025.

16 ibid, para II/1.

These developments at the European level have significantly impacted the administrative justice systems within states, which have, in turn, begun to place greater emphasis on the question of effective legal protection in administrative disputes.[17] The power to annul an unlawful administrative act without ensuring a definitive end to the dispute between the private person and the state was no longer deemed adequate. Therefore, the administrative courts were increasingly seen as the final phase of the administrative decision-making process, where the dispute between the private person and the state would be settled finally and concretely.[18]

Driven by the case law of the ECtHR, these developments have not only extended the powers of administrative courts by allowing them to exercise full jurisdiction in an increasing number of cases,[19] but have also encouraged the introduction of new mechanisms. These mechanisms aim to ensure that judgments which annul unlawful administrative acts and remit the matter back to the administration also bring about a definitive resolution of the dispute, thereby providing effective protection of private persons' interests. These mechanisms are presented and analysed below.

4 JUDICIAL POWERS AND MECHANISMS FOR EFFECTIVE JUDGMENT IMPLEMENTATION

Respect for the rule of law requires that public and private persons comply with court judgments. The judge must settle the dispute completely and definitively, as the plaintiff who brings a case before them does not expect only a theoretical satisfaction by annulment of an unlawful administrative act, but also the correct application of the law in their case. This must be manifested in the concrete effects of the judgment.[20] To achieve this, the administration must implement the judgments of administrative courts correctly, thus ensuring the effectiveness of administrative disputes.

17 Konrad Lachmayer, 'The Principle of Effective Legal Protection in International and European Law: Comparative Report' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 339.

18 See eg: Karianne Albers, Lise Kjellevold and Raymond Schlössels, 'The principle of effective legal protection in administrative law in The Netherlands' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 241; Sylvia Calmes-Brunet, 'The Principle of Effective Legal Protection in French Administrative Law' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 159; Stefano Vaccari, 'The Problems of Res Judicata in the Italian Administrative Justice System' (2019) 11(1) Italian Journal of Public Law 244.

19 Perhaps the clearest example of this is Austria, where the 2014 reform gave administrative courts the power to decide on the substance of administrative cases as a rule. See: Martin Köhler, 'The Reform of the Administrative Jurisdiction in Austria: Theoretical Background and Main Features of the System' (2015) 14 Public Security and Public Order 49.

20 Gjidara (n 2) 70.

Although, at least in Western European countries, the administration generally ensures the correct implementation of administrative court judgments,[21] poor executions or even non-executions can occur for various reasons, such as negligence, institutional rigidity, or the complexity of enforcement.[22]

Administrative judges in European countries are equipped with more and more mechanisms to ensure the correct and speedy implementation of their judgments. In line with the growing importance of administrative dispute as the final and definitive phase of dispute resolution, these mechanisms are being established at any of the three phases of an administrative dispute—the trial, the judgment, or the post-judgment phase. The nature and functioning of such mechanisms depend mainly on the type of alleged irregularities and their potential effect on the legality of the disputed administrative act and each country's specific culture and legal traditions. These mechanisms will be presented and analysed in depth below.

It is worth pointing out that not all administrative court judgments suffer from the risk of incorrect or delayed implementation. Judgments where the lawsuit is dismissed and the contested administrative act is confirmed, or judgments where the contested administrative act is annulled with no further proceedings allowed, are clear examples of situations where no further action from the administration is necessary. The same applies to reformatory or full jurisdiction judgments, whereby the administrative act is annulled and replaced by the judgment itself. Such judgments require no further action from the administration.

A. Trial Phase

Some legal systems have introduced mechanisms for remedying potential defects in administrative acts to conclude administrative disputes without the need for court intervention in the form of a judgment. Such measures can reduce the workload of administrative courts and enable them to work on cases where a judgment is necessary to resolve disputes between the parties. They can also allow both parties to continue attempting to resolve the dispute even after it has been brought before the administrative court, thereby achieving similar results to those of alternative dispute resolution.

The scope of the mechanisms available for dispute resolution during the trial phase can vary from country to country. In some cases, their use may be limited to resolving procedural irregularities in the administrative procedure. These mechanisms can, however, also be used to change the substance of the administrative act. Since using such mechanisms means that the trial does not end with a judgment, they must be implemented carefully so as not to violate any fundamental rights and principles, such as the impartiality and neutrality of the judge or the right of access to the court.

21 Eg in France the rate of decisions, which present difficulties of execution, is generally low, at around 1%. See: Sichler-Ghestin (n 1) para 19.

22 Gjidara (n 2) 71.

Another important factor in implementing such mechanisms is determining who has the power to use them—either the administrative court itself or the authority that issued the administrative act. This consideration is important in determining the scope of such mechanisms, as placing the power solely in the hands of the authority may severely limit the plaintiff's access to the court. Therefore, adequate checks and balances must be in place to prevent potential abuse.

1. Mechanisms at the Disposal of the Administrative Authority

During an administrative dispute, the authority may remedy violations in the substance of the administrative act or the procedure of its adoption. In Germany, for example, the administrative authority can remedy some procedural irregularities during the administrative dispute proceedings until the end of the phase of consideration of facts.[23] Following the German example, some other countries have established similar institutes.[24]

The legal consequence of such a correction is the dismissal of the lawsuit for annulment by the court, provided it finds that the administrative act has been duly corrected and that no substantive irregularity remains.[25] Despite the dismissal of the lawsuit, the judge can consider the correction of the procedural irregularities when deciding on the amount of costs.[26]

The administrative authority's ability is limited to correcting procedural irregularities; only the court may correct substantial irregularities. It is, in principle, also not possible to correct a procedural violation that could influence the weighing of interests when the authority adopts an administrative act—such as a missing hearing of the party in the administrative procedure.[27] Furthermore, procedural irregularities, which also violate fundamental procedural human rights—such as the right to a fair procedure or the right to effective judicial protection—cannot be remedied in this way.[28]

23 For example the procedure was conducted without a party's application; the administrative decision is lacking required justification; the decision was taken without the opinion or consent of the authority which should have been involved in the decision. See: German Administrative Procedure Act of 25 May 1976 'Verwaltungsverfahrensgesetz (VwVfG)' (amended 15 July 2024) s 2, § 45 <https://www.gesetze-im-internet.de/vwvfg/BJNR012530976.html> accessed 16 January 2025.

24 See for instance instance Art. 273 (Modification or annulment of decisions concerning administrative disputes) in: Slovenian General Administrative Procedure Act of 16 September 1999 'Zakon o splošnem upravnem postopku (ZUP)' (amended 7 January 2022) <https://pisrs.si/pregledPredpisa?id=ZAKO1603> accessed 16 January 2025.

25 Franziska Grashof, *Neighbours "Reinventing the Wheel" or Learning From Each Other? The Belgian Administrative Loop and its Constitutionality: A Comparison to the German Debate* (Maastricht Faculty of Law Working Paper series 2017-4, Maastricht University 2017) 9, doi:10.2139/ssrn.2943939.

26 ibid.

27 ibid 13.

28 ibid 15.

In our opinion, such a mechanism can speed up proceedings and ensure a swift resolution of administrative disputes, especially when the administrative act is contested purely on alleged procedural irregularities. Since this mechanism is at the disposal of the administrative authority, it raises no doubts regarding its constitutionality from the point of view of the principle of separation of powers or impartiality of the judge. However, whenever such a mechanism is used—and it only allows for the correction of procedural, not substantive, irregularities—there must be no doubt that procedural irregularity did not lead to a substantially different decision. If such doubt exists, the mechanism should not be used, and the administrative court must be given the chance to rule on the legality of the substance of the administrative act.

2. Mechanisms at the disposal of the court

One common mechanism is the court's ability to supplement the grounds of an administrative act during court proceedings, even in discretionary decisions. For example, in Germany, this applies to a formal lack of reasoning or a deficiency in the substantive content of the reasoning.[29]

The 1996 reforms introduced additional solutions for remedying procedural irregularities without the need to annul the administrative act. Firstly, under Article 87 (1) (2) Nr. 7 of the German Code of Administrative Court Procedure (hereinafter VwGO),[30] the judge could allow the administrative authority to remedy procedural irregularities within a certain period if it considered that this would not delay the resolution of the dispute.[31] Similarly, under Article 94 (2) VwGO, the judge could suspend court proceedings upon application by the administrative authority to enable it to correct procedural irregularities.[32] Both provisions were removed in the 2002 reform. The official reason for their removal was that they did not work in practice.[33]

Similar mechanisms can be observed in the Netherlands, which recently adopted several reforms to its General Administrative Law Act (hereinafter Awb)[34] to enforce administrative court judgments effectively. This reflects the increasing importance of administrative courts as a conflict resolution mechanism. For this reason, Article 8:41a Awb stipulates that administrative courts shall, if possible, settle the dispute between the parties. Although

29 ibid 6.

30 German Code of Administrative Court Procedure of 21 January 1960 'Verwaltungsgerichtsordnung (VwGO)' (amended 15 July 2024) <https://www.gesetze-im-internet.de/englisch_vwgo/index.html> accessed 16 January 2025.

31 Grashof (n 25) 6.

32 ibid.

33 ibid 7.

34 Netherlands General Administrative Procedure Act of 4 June 1992 'Algemene wet bestuursrecht (Awb)' (amended 1 January 2025) <https://wetten.overheid.nl/BWBR0005537/2025-01-01> accessed 16 January 2025.

symbolic, the provision encourages the administrative courts to focus on effective and final dispute resolution to serve society.[35]

Since 2010, Dutch courts have been able to use a new instrument called *bestuurlijke lus* (the administrative loop). Its purpose is to allow the authority to remedy all the defects and unlawful elements in its administrative act identified by the court.[36] This is done by an interim judgment, in which the court states that it has found unlawful elements in the contested administrative act and will annul it in its final judgment unless the irregularities have been duly remedied. The judge may also provide the authority with guidelines or concrete instructions for remedying the administrative act.[37] In this way, the court allows the public authority to remedy the unlawfulness of the contested act while ensuring that a final judgment is issued to end the dispute.[38] The mechanism was introduced to avoid further rounds of administrative litigation after repeated administrative procedures, which had been widely criticised as too lengthy and ineffective.[39]

The administrative loop appears to be a reasonably effective method for achieving definitive dispute resolution. The Dutch Council of State has used it in about 10-15 per cent of cases yearly since 2012,[40] and the dispute was resolved definitively in approximately 90 per cent of cases.[41]

A similar (though narrower in scope) mechanism was adopted by the Flanders region of Belgium in 2012.[42] The Flemish version of the administrative loop only allowed the authority to remedy irregularities in its decision without changing its substance. Still, if a substantially different decision were required, the court would annul the contested administrative act and refer the matter back to the authority. Additionally, the Flemish administrative loop did not permit appeals against an administrative act that had been remedied through the

35 Kars J de Graaf and Albert T Marseille, 'On Administrative Adjudication, Administrative Justice and Public Trust' in Suzanne Comtois and Kars de Graaf (eds), *On Lawmaking and Public Trust* (Eleven 2016) 117.

36 ibid.

37 Sander Jansen, *The Dutch Administrative Loop under Scrutiny: How the Dutch (Do Not) Deal With Fundamental Procedural Rights* (Maastricht Faculty of Law Working Paper series 2017-3, Maastricht University 2017) 3, doi:10.2139/ssrn.2943938.

38 Graaf and Marseille (n 35) 117.

39 Jansen (n 37) 4.

40 In the cases where an appeal is well-founded, the Dutch Council of state uses one of the mechanisms for definitive dispute resolution in about 50 % of cases. See: Jurgen CA de Poorter, 'Increasing the Efficiency of the Administrative Courts' Powers: A Dutch Success Story?' (Scientific Cooperations Workshops on Social Sciences: Proceedings booklet: Branches Titanic Business Hotel, Istanbul, Turkey, 8-9 May 2015) 370.

41 ibid.

42 Heidi Bortels, *The Belgian Constitutional Court and the Administrative Loop: a Difficult Understanding* (Maastricht Faculty of Law Working Paper series 2017-2, Maastricht University 2017) 6, doi:10.2139/ssrn.2943929.

administrative loop. Due to its peculiarities, this version of an administrative loop had a limited scope and was rarely used.[43]

However, several applicants brought a complaint regarding the administrative loop to the Belgian Constitutional Court, claiming that it violated the principle of the rule of law and fundamental procedural rights.[44] The Constitutional Court found that the contested provisions violated, *inter alia*, the principles of judicial independence and impartiality. Specifically, by suggesting the use of the administrative loop, the court revealed its position on the outcome of the case—particularly since a substantially different decision could not be issued within the administrative loop.

Furthermore, the Constitutional Court found a violation of the principle of separation of powers, as the provisions did not leave the administrative authority any discretion in how to remedy the irregularities in its administrative act. Since the decision could not be substantially changed within the administrative loop, the administrative authority could not determine whether the irregularities required a substantially different outcome.[45]

The Constitutional Court also found it unconstitutional that a party cannot initiate an administrative dispute against an administrative act that has been remedied through the administrative loop, as this violates the right of access to the court. Although the Constitutional Court declared this version of the administrative loop unconstitutional, it emphasised that the legislator's efforts to achieve an effective and definitive dispute settlement should be welcomed.[46]

Following the Constitutional Court's decision, the Flemish legislator adopted a new version of the administrative loop that resolved all objections to unconstitutionality. Still, there is much less academic and political support for its use than in the Netherlands, primarily because it requires a more active administrative court—one that can now impose an obligation on the administrative authority to issue a substantially different administrative act.[47]

Implementing the mechanisms listed in this section demonstrates the efforts of several countries to improve the effectiveness of administrative disputes already in the trial phase of the proceedings. However, it also highlights that such efforts can conflict with fundamental procedural rights and constitutional principles.[48] Therefore, any reform towards more efficient administrative dispute resolution must consider protecting fundamental procedural rights.

43 ibid.

44 ibid 8.

45 ibid 9.

46 Case no 74/2014, B.14 [2014] Belgian Constitutional Court.

47 Bortels (n 42) 18.

48 Sander Jansen and Mariolina Eliantonio, *The Modernisation of the Rules of Administrative Judicial Procedure under Scrutiny: the Rulings of the Belgian Constitutional Court on the "Administrative Loop" in a Comparative Perspective, Concluding Remarks* (Maastricht Faculty of Law Working Paper series 2017-7, Maastricht University 2017) 9, doi:10.2139/ssrn.2943945.

While these mechanisms are effective for achieving definitive dispute resolution, their implementation must not violate the principle of separation of powers. This risk arises especially in the assessment of administrative action where the administration has discretion. In such cases, judicial review is typically limited to assessing whether the limits of discretion have been breached. Such mechanisms might be challenging even when administrative courts exercise deference to the authority during review.[49]

B. Judgment Issuance Phase

The judgment is the most important tool of the administrative court for dispute resolution between the administrative authority and the individual. It enables the court to decide on the legality of the disputed administrative act and the consequences if it is found to be unlawful. The growing importance of the principle of effective legal protection in administrative disputes has greatly expanded the scope and effects of administrative court judgments. This includes not only the expansion of powers to decide on the matter in the full jurisdiction proceeding but also, even in annulment judgments, an increase in the judge's powers to ensure the judgment's speedy and accurate implementation for full dispute resolution. This section analyses those newly gained powers.

1. *Instructions to the Administrative Authority on How to Proceed After Annulment—The 'Didactic' Function of the Judgment*

The most widespread mechanism for ensuring the effectiveness of a judgment that annuls an administrative act is to include in it the instructions to the administration on how to proceed in the matter, whether from the procedural point of view or the point of application of substantive law. In Austria, for example, from 1875 until the reforms of 2012 (which established reformatory judgments as the core remedy for unlawful administrative acts), the administrative court had the option to include binding instructions to the administration in its judgment.[50] Kelsen recognised an indirect

49 The administrative courts may practice deference in their review when reviewing actions of a specific public person (ratione personae) or when they review an issue with specific legal nature (ratione materiae). See: Guobin Zhu (ed), *Deference to the Administration in Judicial Review: Comparative Perspectives* (Ius Comparatum – Global Studies in Comparative Law 39, Springer 2019) 8.
Most notable example of limited scope of review due to deference is known from the Chevron case in the USA, where the Supreme court granted deference to the agency's interpretation of a statue that it administers, as long as such interpretation is based on a permissible and reasonable construction. See: *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 [1984] US Supreme Court <https://supreme.justia.com/cases/federal/us/467/837> accessed 16 January 2025.

50 Marco Mazzamuto, 'The Formation of the Italian Administrative Justice System, European Common Principles of Administrative Law, and "Jurisdictionalization" of Administrative Justice in the Nineteenth Century' in Giacinto della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de siècle: Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (The Common Core of European Administrative Law, OUP 2021) 300, doi:10.1093/oso/9780198867562.003.0011.

reformatory effect of the court's findings, with the only exception being that the Austrian administrative court could not decide directly on the matter.[51]

Such instructions can exist in many forms and have various levels of binding effect, depending on the procedural rules of a country. They most commonly appear in the reasoning section of a judgment, usually in the form of a paragraph instructing the administrative authority on how to carry on the proceedings following the annulment. However, they may also be included in the judgment tenor.[52] Differences may also arise in the source of their binding power—whether through an explicit provision of the law or a (broader) definition of the concept of *res iudicata*, encompassing not only the (often generic) tenor of the judgment but also its key grounds.[53]

In some cases, difficulties in implementing the administrative court's judgment do not stem from the unwillingness of the administration to comply but rather from the complexity of the matter itself. In such cases, the judge can anticipate future developments and, using a didactic drafting of their judgment, precisely indicate the measures necessary for its correct implementation.[54] The desire to improve the clarity and comprehensibility of judgments has led to changes in practice in some legal systems, such as in France. French judges were once known for their very distinct laconic style—writing judgments in a single sentence beginning with "Considering that …", followed by a syllogistic organisation of the argument[55] However, recent trends have moved towards more didactic judgments, which provide in-depth reasoning and comprehensive guidance to the administration comprehensively, thus abandoning the tradition of *imperatoria brevitas*.[56] In 2019, the style was formally changed to align with that of the ECtHR and the Court of Justice of the European Union (hereinafter CJEU).[57]

In Slovenia, the binding nature of administrative court judgments has seen significant development in recent years. Prior to the 2023 amendment of the Slovenian Administrative Dispute Act (hereinafter ADA),[58] the law already stipulated that, when repeating the proceedings following the annulment of a contested administrative act in an administrative

51 Thomas Olechowski, 'Zwischen Kassation und Reformation: Zur Geschichte der Verwaltungsgerichtlichen Entscheidungsbefugnis' (1999) 16 Österreichische Juristen-Zeitung 581.

52 In such a case, the instructions are similar to an injunction, which is further analyzed below.

53 Slovenian administrative dispute act has been recently amended so that it contains both such options. More on that below.

54 Gjidara (n 2) 79.

55 John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) 56, doi:10.1017/9781009057127.

56 Jean Massot, 'The Powers and Duties of the French Administrative Judge' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Research Handbooks in Comparative Law series, Edward Elgar 2010) 422, doi:10.4337/9781849808101.00035.

57 Bell and Lichère (n 55) 56.

58 Slovenian Administrative Dispute Act of 28 September 2006 'Zakon o upravnem sporu (ZUS)' (amendment 26 April 2023) <https://pisrs.si/pregledPredpisa?id=ZAKO4732> accessed 16 January 2025.

dispute, the administrative authority must adhere to the legal opinion of the administrative court regarding both substantive law and procedural matters. It was also provided that any other administrative authority deciding on ordinary or extraordinary legal remedies against a newly issued administrative act, following a court judgment, was similarly bound by the court's legal opinion and views.[59]

Under older case law, administrative authorities could reconsider decisions and choose an alternative course, even if it contradicted the legal opinions and views of the court. However, they had to provide specific reasons for doing so.[60] Interestingly, the older case law did not indicate, even by example, which grounds could justify such a derogation from the legal view of the administrative court.

Recent case law has clarified that a derogation from the obligation to be bound by the judgment of the administrative court is possible only in exceptional circumstances—specifically, where compelling legal circumstances have occurred. These include, for instance, the enactment of a new law applicable at the time of reconsideration by the administrative authority, the annulment of the governing law by the Constitutional Court, or if the position of the court of first instance is contrary to the position taken by the Court of Justice of the European Union in the preliminary ruling procedure on the interpretation of a rule of European Union law. Likewise, a subsequent divergent ruling by the Supreme Court of the Republic of Slovenia in a substantially identical case also constitutes valid grounds.[61]

What these cases share is a fundamental change in the legal or factual circumstances of the case. Since the administrative authority is only bound by the judgment of the administrative court insofar as the legal and factual basis for the decision remains unchanged, recent case law affirms that the authority must comply with the views expressed in the administrative court's judgment in all other circumstances.

The concept of the binding nature of the administrative court's judgment has also been significantly influenced by a notable procedural shift in the adjudication of administrative disputes: courts now more frequently issue final decisions after oral hearings rather than in sessions without them.[62] Critics have argued that oral hearings do not contribute to the

59 ibid, arts 64/4, 64/5.

60 Case X Ips 519/2007 [2007] Slovenian Supreme Court; Case X Ips 706/2008 [2008] Slovenian Supreme Court ; Case X Ips 169/2010 [2011] Slovenian Supreme Court.

61 Case I Up 183/2016 [2016] Slovenian Supreme Court.

62 In recent years, the oral hearing in administrative dispute has become increasingly important in Slovenia. Today, the oral hearing in administrative dispute is considered an independent human right. Its nature and purpose are the same as the oral hearing in other court proceedings. More on this see: Bruna Žuber, 'Oral Hearing in the Procedure of Judicial Control of Administrative Acts: A Tool for Empowering the Principle of Effective Judicial Protection?' (2020) 61 Jahrbuch für Ostrecht 305; Bruna Žuber e Giacomo Biasutti, 'L'udienza di discussione nel contenzioso amministrativo come diritto umano: un confronto tra il sistema sloveno e quello italiano' (2023) 2 Ceridap 85, doi:10.13130/2723-9195/2023-2-26.

effectiveness of administrative disputes when the court conducts a fact-finding procedure during the hearing but ultimately refrains from ruling on the merits. Instead, it merely annuls the contested administrative act and remands the case to the administrative authority for reconsideration.

The Supreme Court responded to these criticisms in its decision No. X Ips 220/2016 of 17 May 2017.[63] It stated that, in cases where a court in an administrative dispute establishes facts of the case at an oral hearing and subsequently annuls the contested administrative act, the administrative authority is also bound by those established facts. This obligation is inextricably linked to the court's legal positions on evidentiary matters and to the operative part of the judgment. Thus, according to the view of the Supreme Court, the administrative authority is bound not only by the substantive final judgment, but also by the operative part of the judgment and the underlying reasons that justify it.

Moreover, in a recent case, the Supreme Court also explicitly addressed the binding effect of a final judgment on future decisions in the same matter, including those made by the administrative court itself. The Court took the view that the binding effect of a final judgment rendered in the same case also applies to the administrative court when it would rule in an administrative dispute against a new administrative act in the same matter.[64] Neither the administrative authority nor the administrative court may depart from the positions previously established by the final judgment.

Recognising these developments, the legislature codified this evolving jurisprudence through amendments to the ADA. Under Article 64(5), when a contested administrative act is annulled and remanded for reconsideration, the public authority is required to adhere to the operative part of the judgment, as well as to the facts established by the court at the oral hearing in which it upheld the lawsuit and annulled the act. In addition, the authority must follow the court's legal opinion on the application of the substantive law and its views relating to the procedure. It should be borne in mind that the court in an administrative dispute can also determine the method in which its decision is to be implemented in the operative part of the judgment, and that the binding effect also applies in that respect (64(5) of ADA).

2. Administrative Court Injunction Requiring the Administration to Act in a Particular Way to Implement an Administrative Court Decision

An injunction can be the next step in ensuring the effectiveness of judicial instructions to the authority on how to proceed following the annulment of an unlawful administrative act. Such a mechanism is available to the courts in many European countries. Italy, for example, provides a special procedure in Articles 112 to 115 of its code of administrative trial[65] for

63 Case X Ips 220/2026 [2017] Slovenian Supreme Court.

64 Case X Ips 12/2023 [2023] Slovenian Supreme Court.

65 Italian Code of Administrative Procedure of 2 July 2010 no 104 'Codice del processo amministrativo approvato' (amended 31 December 2024) <https://www.altalex.com/documents/codici-altalex/2014/09/10/codice-del-processo-amministrativo> accessed 16 January 2025.

the cases of non-execution of an administrative court decision.[66] By its legal nature, this procedure allows the administrative judge to establish all appropriate measures to ensure the execution of the judgment if the public administration fails to comply with it.[67] In principle, the judge who issued the judgment in an administrative dispute is also competent to decide on the execution of the judgment.[68] In principle, the judge may order compliance by prescribing the means of execution, including determining the content of the new administrative act or by adopting a new administrative act *in lieu* of the public administration.[69] In such cases, the administrative judge effectively replaces the public administration in exercising its powers. This is often done by appointing an *ad acta* commissioner—an official appointed by the court to act on behalf of the non-compliant public administration.[70] This mechanism is a crucial instrument for ensuring the effectiveness of the administrative dispute in Italy.[71]

In the Netherlands[72] and Belgium,[73] the court may order in its judgment that a new administrative act be adopted within a specified period and may also impose a penalty in the event of non-compliance. Similarly, in France, if the court requires the administrative authority to decide on specific content within a certain period, it can issue an injunction to that effect. Traditionally, French administrative courts did not specify in the text of the judgment what steps the administrative authority had to take to implement the judgment correctly, as it was considered that giving instructions to the authority on how to implement a judgment would violate the principle of separation of powers.[74] This practice

66 ACA-Europe, *Administrative justice in Europe: Report for Italy* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2018) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025.

67 Ivone Cacciavillani, *Il Giudizio di Ottemperanza: Il Processo Esecutivo Amministrativo* (Istituto Editoriale Regioni Italiane 1998); Giuseppina Mari, 'Il giudizio di ottemperanza' in Maria Alessandra Sandulli (ed), *Il Nuovo Processo Amministrativo: Studi e Contributi*, vol 2 (Giuffrè Editore 2013) 457; Mario Sanino, *Il Giudizio di Ottemperanza* (Giappichelli 2014).

68 See: Italian Code of Administrative Procedure (n 65) art 113/1.

69 ibid, art 114/4.

70 Simona D'Antonio, Il Commissario ad Acta Nel Processo Amministrativo: Qualificazione Dell'organo e Regime Processuale Degli Atti (Editoriale Scientifica 2022).

71 Giuseppina Mari, *Giudice Amministrativo ed Effettività Della Tutela: L'evoluzione del rapporto tra cognizione e ottemperanza* (Editoriale Scientifica 2013).

72 ACA-Europe, *Administrative justice in Europe: Report of Netherlands* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2017) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025. See also: Netherlands General Administrative Procedure Act (n 34) art 8:72, subs 4-6.

73 ACA-Europe, *Administrative justice in Europe: Report of Belgium* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2018) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025. See also: Consolidated Acts on the Council of State *of Belgium* 'Lois sur le conseil d'état', art 36, § 3–5 (amended 1 January 2025) <http://www.raadvst-consetat.be/?page=proc_consult_law&lang=fr> accessed 20 February 2025.

74 Jean Waline, *Droit Administrative* (26th edn, Dalloz 2016) 708.

changed with the enactment of the law of 8 February 1995—now Articles L911-1 and L911-2 of the French Code of Administrative Justice (hereinafter CJA)[75]—which introduced the power of the administrative courts, in their final judgment on the matter, to issue injunctions requiring administrative authorities to adopt a particular act or measure with particular content within a specified time (Article L 911-1), or to review the facts and adopt a new administrative act based on the outcome of factual review in specified amount of time (Article L 911-2).[76] Injunctions may be used to prevent an authority from acting in the matter or oblige it to act in a particular way.[77] However, if the authority has several options for implementing the administrative court's judgment, issuing an injunction is not possible.[78]

The Conseil d'Etat has gone even further with regard to the implementation of its own judgments by adopting what it calls '*véritable guide de l'exécution de la chose jugée*' (a true guide to the execution of the *res iudicata*). Through this approach, the court outlines, as clearly as possible in the grounds of the judgment, the precise measures required for execution and includes in the operative part of the judgment the formula: "This annulment entails for the State the obligations set out in the grounds of the present decision, which constitute the necessary support for it."[79]

It is generally accepted in France that the power of injunction has played an important role in the evolution of the French administrative judge—from a mere guardian of legality, whose role was primarily to assess the lawfulness of contested administrative acts, to an actor seeking to ensure the resolution of the conflict between the litigants. Although an injunction can only be issued if a litigant requests it, this power has extended the judge's horizon to the post-judgment period, whether this request has been made or not.[80]

3. *Res Iudicata as a Mechanism for Ensuring Compliance with an Administrative Court Decision*

The concept of *res iudicata,* or the finality of the administrative court's judgment, is crucial in establishing a legally binding judgment and ensuring the long-term resolution of a dispute between the parties. Many states that know this concept separate its effects into two spheres: formal/procedural *res iudicata* and substantive/material *res iudicata*.[81] In general, if a judgment becomes a formal *res iudicata*, it can no longer be subject to an appeal or other

75 French Code of Administrative Justice 'Code de justice administrative (CJA)' (amended 1 January 2025) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933> accessed 16 January 2025.

76 Bell and Lichère (n 55) 172.

77 ibid 173.

78 Waline (n 74) 708.

79 ibid.

80 Jean-François Lafaix, 'L'injonction au Principal: Une Simplification de L'exécution ?' (2017) 39(2) Civitas Europa 109.

81 International Association of Supreme Administrative Jurisdictions, *The Execution of Decisions of the Administrative Court: General Reports of 8th Congresses* (Madrid 2004) 14.

regular legal remedy. Substantive *res iudicata*, on the other hand, means that the judgment has definitively resolved the dispute between the parties, which is why new disputes concerning the same legal and factual situation are not allowed. This dimension of *res iudicata* is manifested in the principle of *ne bis in idem*. Such a definition is used, for example, in Germany[82] and Italy.[83] In France, the judgment obtains *autorité de chose jugée* (which can be equated with the substantive *res iudicata* effect mentioned above) when it is rendered, whether or not an appeal is lodged against the judgment. However, this judgment obtains *force de chose jugée* (which can be equated to formal *res iudicata*) only once no ordinary legal remedy with suspensive effect can be brought against it.[84]

The substantive dimension of *res iudicata* can have important effects on the duty of the administration to respect and properly implement the judgment of an administrative court. Whenever the court decides on the matter itself in a full jurisdiction proceeding or whenever it annuls the administrative act but does not refer the matter back to the administrative authority—because no new administrative act on the matter is necessary—the effects of substantive *res iudicata* are easy to understand: the particular legal and factual situation between the parties has been resolved, and no new administrative or judicial procedure is allowed concerning it. However, when the court annuls the administrative act and refers the matter back to the administrative authority, the concept of *res iudicata* can be important in determining what kind of decisions the latter can take regarding the case.

In Germany, for example, one of the effects of substantive *res iudicata* is called *Präjudizialität* (prejudiciality), which means that the judgment of an administrative court acts as a binding precedent in any further proceedings between the parties.[85] This is particularly important in cases where the administration is obliged to issue a new administrative act. In such cases, the court's decision in the initial proceedings creates a binding relationship between the parties so that the administrative act with the same content, which has already been declared unlawful, cannot be issued.[86] This limitation also cannot be bypassed by issuing an administrative act that is only marginally different in content[87] because the effect of *res iudicata* from previous administrative disputes applies to the disputed administrative act and the regulation of a singular situation established by this act.[88] By issuing a slightly

82 Yuval Sinai, 'Reconsidering Res Judicata: A Comparative Perspective' (2011) 21(2) Duke Journal of Comparative & International Law 353.

83 Vaccari (n 18) 226.

84 Silja Schaffstein, *The Doctrine of Res Judicata before International Commercial Arbitral Tribunals* (Oxford International Arbitration Series, OUP 2016) 40.

85 Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsrecht VwGO: Kommentar* (CH Beck 2021) 24.

86 ibid 26.

87 Steffen Detterbeck, 'Das Verwaltungsakt-Wiederholungsverbot' (1994) Neue Zeitschrift für Verwaltungsrecht 37.

88 ibid.

different administrative act in a repeated procedure, the authority restores the previous regulation of a singular case, which the court has already annulled. Thus, if the administrative authority issues an administrative act similar to the annulled one, and there has been no change in the factual or legal situation in the matter, this administrative act may be annulled by the administrative court in a new administrative dispute without examining the merits because of the prejudicial effect of the decision from the first proceeding.[89]

It should be noted that, due to a generic wording of the tenor of a judgment annulling an unlawful administrative act and referring the matter back to the authority, the tenor of the judgment alone does not reveal the content of the judicial regulation of the relationship.[90] It is, therefore, widely recognised in German theory that the grounds of a judgment are a part of its *res iudicata*, meaning that their use in a specific case may be indispensable for determining the content of the operative part of the judgment.[91] In such cases, the judgment's grounds concerning the irregularity in the annulled administrative act also determine the possible courses of action for the administrative authority. For example, suppose the court has annulled an administrative act solely because of procedural irregularities. In that case, the authority may issue a new administrative act identical to the old one while avoiding said irregularities.[92] However, if the annulment of the administrative act is based on a violation of substantive law, the authority may not, in principle, issue a substantially identical act without any change in the factual or legal situation.[93]

The development of the concept of *res iudicata* has also had a major impact on the effectiveness of administrative disputes in Italy. There, great emphasis has been placed on the objective limits of *res iudicata*, which determine the extent to which the judgment in a repeated proceeding binds the administration. Suppose the objective limits of *res iudicata* are set as broadly as possible and cover the dispute's entire legal and factual dimension. In that case, the public administration has less or possibly no freedom to adopt substantially the same administrative act as the last time. On the other hand, if the objective limits are as narrow as possible, the administration may even be able to adopt the same administrative act on the same legal grounds as in the annulled one.[94] Both legal theory and practice have gradually moved toward widening the objective limits of *res iudic*ata, thus establishing it as an important element in ensuring the stability of the outcome of administrative disputes at the cost of the "inexhaustibility of administrative power".[95] Thus, by the beginning of the second half of the twentieth century, the objective

89 Schoch and Schneider (n 85) 81.
90 ibid 52.
91 ibid 50.
92 ibid 81.
93 ibid.
94 Vaccari (n 18) 233.
95 ibid 265.

limits of *res iudicata* were set at the simple "loss of effect" of the contested measure, meaning that with the annulment of the administrative act—as defined in the tenor of the judgment—the effects of substantive *res iudicata* were exhausted.[96]

Ever since the 1980s, however, the objective limits of *res iudicata* have been understood in a much broader way, based on the idea that by contesting an administrative act, the plaintiff not only pursues the immediate objective of annulling the administrative act but also the objective of satisfying a certain substantive claim.[97] Since such a substantive claim is the object of an administrative dispute, the objective limits of *res iudicata* must be sufficiently broad to cover it. Therefore, they must not be exhausted with the annulment of the administrative act but should regulate the actions of the administration in repeated proceedings to achieve the substantive claim.[98] Since it is only from the reasons of the judgment that the administration can determine the correct way of exercising its power in a repeated proceeding, those reasons must also be covered by the effects of substantive *res iudicata.*[99]

Further space for development is seen in using the objective limits of *res iudicata* to ensure a definitive resolution of the administrative dispute. This could be achieved by establishing procedural preclusion, so the administrative authority would be required to plead all possible facts and grounds in defence of its administrative act during the administrative dispute, as it would be precluded from using them in repeated proceedings. The objective limits of *res iudicata* would thus extend from "what has been pleaded' to 'what could be pleaded."[100]

As shown, understanding the concept of (substantial) *res iudicata* can greatly impact the effectiveness of administrative dispute procedures in protecting fundamental rights and definitively resolving disputes. However, the broader the understanding of this concept, the more tools and skills are needed on the part of the administrative court to effectively adjudicate each (factual as well as legal) dimension of the dispute before referring the matter back to the administration. A broader understanding of *res iudicata* needs to consider possible discretionary powers on the part of the administration and other limitations in the procedural rules governing administrative disputes.[101]

96 ibid 235.
97 ibid 237.
98 ibid 238.
99 ibid.
100 ibid 254.
101 For example, prohibition to supplement justification for the administrative act with a new one, which is present in some legal systems.

4. *Power to Set the Temporal and Other Effects of the Judgment Annulling the Administrative Act*

Normally, the annulment of an administrative act restores the legal situation before the decision was taken. However, returning things to how they were may not always be easy or desirable, especially if it violates the principle of legal certainty. That is why legal systems have established several mechanisms to ensure that the annulment of unlawful administrative acts does not create further problems for the parties or the public interest.

In France, for example, the court may issue a more detailed ruling or limit the effects of its judgment to an annulment with only prospective effect. This is particularly necessary when the retroactive effect of the annulment would have manifestly excessive consequences for either private or public interests.[102] This option is most often used in cases of irregularities in appointments and promotions in the civil service. In such cases, the annulment of the administrative act does not automatically mean that the civil servant loses their job or promotion.[103]

When deciding on the modulation of the annulment's effects, the judge must balance the principle of legality with the principle of legal certainty.[104] The judge may also decide that the annulment will take effect later, giving the administration sufficient time to issue a new administrative act.[105]

Similarly, in both the Netherlands[106] and Belgium,[107] the court has the power to order that the legal effects of the annulled administrative act be maintained, even if the decision is annulled. This instrument can be used when a new administrative act is unlikely to help an interested party because the first one was annulled due to procedural irregularities.[108] Another reason for maintaining the effects of an annulled administrative act may be that it has created factual consequences that cannot be undone, such as permitting the construction of a building that has already been built. In such cases, awarding damages may be a more appropriate solution to the unlawful situation, especially if the unlawfulness is of minor importance.[109]

A final reason for maintaining the effects of an annulled decision may be to avoid *reformatio in peius*. This may be the case, for example, if the administrative authority grants too much aid due to an incorrect interpretation of the law, which is in no way the fault of the aid recipient.[110]

102 Vaccari (n 18) 126.
103 ibid. See for example: CE 12 déc 2007, Sire, no 296072 [2008] French Council of State.
104 Gjidara (n 2) 81.
105 ibid.
106 Jansen (n 37) 5.
107 Bortels (n 42) 3.
108 Albers, Kjellevold and Schlössels (n 18) 242.
109 ibid.
110 ibid.

In Slovenia, according to Article 64(3) of the ADA, as amended in 2023, if the administrative court annuls the contested administrative act, it may determine how its decision will be implemented. On the normative level, this provision is new and inspired by a similar power of the Slovenian Constitutional Court, which may specify in its decisions which authority must implement the decision and in what manner. In practice, the Constitutional Court uses this power to ensure the proper implementation of legislation or the effective enforcement of a human right or fundamental freedom during the period in which the legislator must remedy the unconstitutionality established by the Constitutional Court.[111]

The administrative court shall determine the manner of implementation in the operative part of the judgment *ex officio*. However, the plaintiff may nevertheless propose in the lawsuit how the implementation should be formulated if this would assist the court.[112] The law does not specify the measures that the administrative court may use to ensure the implementation of its judgment. Given the characteristics of this institution, it is expected that there will be many similarities with how the decision of the Constitutional Court is to be implemented, bearing in mind that the substantive scope will be tailored to the nature and importance of the administrative dispute. There is no doubt that, in substance, the determination of the manner of implementation of a court`s judgment may be an instruction to the administrative authority as to what act it should issue, how it should conduct the procedure, what substantive law it should apply, and how it should establish the facts. In this sense, determining the manner of implementation of a judgment may be regarded as an alternative to a dispute of full jurisdiction, which makes an important contribution to ensuring effective judicial protection.

It is also clear that the administrative court will not be able to exercise a legislative function in the institution's context of determining the manner of implementation. Still, it is possible that it could temporarily exercise a normative administrative function in individual justified cases. It is clear from the above that the administrative court will have a wide range of options in this institution's application, which means that the scope of its application will be determined by case law.

Finally, it should be noted that this may also be enforceable in case of non-compliance with the determined manner of implementing a court decision. Article 102(3) of the ADA provides that court judgments imposing an obligation on the State, a local authority, or their bodies or organisations shall be enforced under the rules of enforcement of civil claims. In this respect, case law also remains to be developed.

111 Case U-I-198/03 [2003] Slovenian Constitutional Court; Case U-I-7/07 [2007] Slovenian Constitutional Court; Case Up-1054/07 [2007] Slovenian Constitutional Court.

112 Erik Kerševan, *Zakon o Upravnem Sporu z Novelo ZUS-1C* (GV Založba 2023) 111.

C. Post-Judgment Phase

Historically, the phase after an administrative dispute ended received little attention. It was considered that the work of the administrative court was completed with the issuance of a judgment, regardless of how effectively the judgment resolved the dispute. However, this phase of an administrative dispute is now receiving increasing attention due to the development of the ECtHR's case law on the right to effective judicial protection.

In most cases, an administrative dispute will be successfully concluded with the issuance of a judgment. The administrative body will appropriately consider the positions expressed in the judgment when issuing a new administrative act, ensuring the realisation of the party's interests. However, if, for any reason, the administrative body cannot or does not adequately fulfil its obligations under the administrative court's judgment, mechanisms must be available to compel the administrative body to act and achieve a definitive resolution of the matter.

1. *Communication Between the Administrative Authority and the Administrative Courts after Annulment to Ensure the Correct Implementation of the Administrative Court Decision*

Quite often, the implementation of administrative court decisions is hampered not by a lack of will on the part of the administrative authorities but by their genuine inability to comply or by their lack of understanding of how to proceed with implementation. In such situations, it may be helpful for administrative authorities to have an advisory body available to advise them on how to properly implement decisions of the administrative courts.

In France, this type of body was established by a decree of 30 July 1963, which created the *Commission du Rapport* (the report commission). Its purpose was to assist in the enforcement of the judgments of the Conseil d'Etat.[113] Over time, however, it developed into the *Section du Rapport et des Etudes* (Reports and Studies Section) of the Conseil d'Etat, which has a wide range of tasks, including conducting studies on current issues in administrative law that often have a significant impact on legislation.[114] Over the years, the system of assistance in implementing judgments of the administrative courts has also been expanded and now covers all administrative courts, not just the Conseil d'Etat.

Thus, the administrative body can request clarification from any administrative court regarding the meaning of its judgment, both in terms of its scope and the practical details of its execution. Responses are handled by the Reports and Studies Section for judgments of Conseil d'Etat and, in the case of administrative courts, by the president of said court, who may also appoint a rapporteur or, if necessary, refer the matter to the Reports and Studies Section of the Conseil d'Etat.[115]

113 Gjidara (n 2) 83.
114 ibid.
115 ibid 84.

In practice, however, most questions concerning the execution of administrative court decisions are resolved informally; for example, only 14 such decisions were issued in 2018.[116]

Since this mechanism is consultative in nature, it is most appropriate for jurisdictions where the highest administrative court functions not only as a judicial body but also as an advisory body to the executive branch of government, as seen in the example of France above. Wherever such a mechanism exists, it is typically found within the advisory competence of these courts—particularly when their mandate includes not only drafting normative acts but also providing opinions on any matter concerning the administration.[117]

Italy also has a special procedure for requesting information from the administrative judge on executing a judgment. The Code of Administrative Trial has introduced the possibility of requesting the judge to clarify the execution of a judgment.[118] This may be the case for judgments that are not fully comprehensible or for changes in the factual situation that make the concrete execution of the judgment uncertain.[119] The public administration, the private party, or the *ad acta* commissioner may initiate this procedure. At the end of this procedure, the judge may define, clarify, or specify how the parties should execute the judgment.[120]

2. *Escalation of Sanctions in the Case of Non-execution of Administrative Court Decisions*

The binding nature of administrative court decisions ensures compliance and underscores the constitutional role of the administrative judiciary. However, this concept would lack practical impact without legal sanctions for non-compliance. To ensure effective legal protection, the court must have the authority to impose sanctions on an administrative body that, in repeated proceedings, refuses to comply with an administrative court judgment. One of the more coercive measures to ensure compliance with the administrative court decisions is the power, available in some countries, for courts to impose a penalty on administrative bodies for failure to comply with, or incorrect implementation of, their judgments.

116 Bell and Lichère (n 55) 127.

117 Another example of this is Spanish Council of State, which may submit formal motions/proposals to the government on any matter that the practice and experience of its functions suggest. See: Alicia Cebada Romero, 'A Challenged Council: The Spanish State Council between a Decentralized Advisory Function and the Publicity of Opinions' (2023) 43(1) Parliaments, Estates & Representation 53, doi:10.1080/02606755.2023.2169409.

118 See: Italian Code of Administrative Procedure (n 65) arts 115/5, 114/7. See also: Davide Palazzo, 'La c.d. ottemperanza di chiarimenti nel processo amministrativo' in Flaminia Aperio Bella, Andrea Carbone e Enrico Zampetti (eds), *Dialoghi di Diritto Amministrativo: Lavori del Laboratorio di Diritto Amministrativo 2019* (L'Unità del Diritto, Roma TrE-Press 2020) 189.

119 On this see: Case no 3569, s VI [2012] Italian Council of State.

120 See: Italian Code of Administrative Procedure (n 65) art 112/2. See also: Case no 1988, s V [2024] Italian Council of State.

In Hungary, for example, as of 2018, the courts have had several options to ensure their judgments are enforced. After requesting clarification from the administrative body regarding non-compliance, if the clarification is unsatisfactory or not provided, the court can impose a fine on the administration of up to HUF 10 million (approx. EUR 30,000). This fine is not the only means of enforcing compliance with the judgment: the court may also order another administrative body or, depending on the nature of the failure, the supervisory authority to carry out the obligation instead.[121] If these means are ineffective, the court can order provisional measures until the administrative body has fulfilled its obligations under the judgment.[122]

France is another country with a longstanding legal tradition of allowing courts to impose penalties on public authorities for failure to (properly) execute judgments of administrative courts. Since 1980, the Conseil d'Etat—and, since 1995, all administrative courts—have been authorised to attach a procedural fine (*astreinte*) to any enforcement order.[123] This penalty typically consists of a sum of money for each day the judgment remains unenforced. At the end of the process, the court determines a final sum of money due, allocating how much money is to be paid to the parties and how much to the state.[124] Penalties for non-compliance can be substantial, up to EUR 1 million per day.[125]

In practice, the use of *astreintes* is rare, as injunctions—often issued alongside judgment and serving to inform parties of the consequences of the decision—are generally respected by the authorities.[126] In 2018, all administrative courts in France ordered the enforcement of 100 *astreintes* out of 3,555 complaints of non-enforcement (about half of which involved appeals by the administration and therefore, did not constitute true cases of non-enforcement. Ultimately, only 15 *astreintes* were liquidated.[127]

Administrative courts in some countries employ different coercive measures that do not rely on financial penalties but involve a greater degree of interference with the administrative authority's functions, raising issues related to the principle of separation of powers.

In Slovenia, Article 65(1) of the ADA provides that the administrative court may rule on a party's right, obligation, or legal interest in a full jurisdiction dispute if, after the annulment of an administrative act, the administrative authority issues a new act that contradicts the legal opinion of the administrative court or its views regarding the procedure.

121 Krisztina F Rozsnyai, 'Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure' (2018) 17(1) Central European Public Administration Review 16.

122 ibid.

123 Bell and Lichère (n 55) 125.

124 ibid.

125 Conseil d'État, 'Rapport public 2019: activité juridictionnelle et consultative des juridictions administratives en 2018' (*Le Conseil d'État*, 5 juillet 2019) 141 <https://www.conseil-etat.fr/publications-colloques/rapports-d-activite/rapport-public-2018> accéder 16 janvier 2025.

126 Bell and Lichère (n 55) 125.

127 ibid.

To rule in a full jurisdiction dispute, certain conditions must be met. First, the plaintiff must expressly request it in the lawsuit. Second, the court must find that either the nature of the right or the protection of a constitutional right requires such a ruling.[128] Furthermore, the facts of the case must provide a reliable basis for the decision, or the court must conduct a fact-finding procedure at the oral hearing.[129]

However, if the legal nature of the matter prevents a decision in full jurisdiction dispute, the court can "only" annul the unlawful act (or declare it unlawful) and refer the case back to the administrative authority for reconsideration, even in cases where the legally decisive facts will be established at the oral hearing.[130] Two categories of cases are excluded from full jurisdiction decisions: (1) those in which the nature of the matter inherently does not allow the court to decide in a full jurisdiction dispute, and (2) those involving discretionary administrative powers. In such cases, the contested administrative act can only be annulled. Still, it is also reasonable to apply the statutory power, which allows the court to determine how its decision will be implemented. The statutory power of the administrative court to decide a case on its own in a full jurisdiction dispute for non-compliance with its views is, therefore, in some cases, a toothless tiger.

Allowing the administrative court to sanction non-compliance through full jurisdiction proceedings is arguably more effective than imposing fines, as it produces a conclusive resolution and avoids unnecessary delays. In case of imposition of a fine, the administrative authority might still resist implementing the judgment. However, in some situations, deciding in full jurisdiction proceedings is impossible due to the nature of the case. For this reason, a system that allows the court to decide on the type of sanction to use depending on the nature of the case might be the most optimal solution.

Such an option is available to the administrative courts in Poland. If an administrative authority fails to comply with a court judgment, the affected party may file a complaint, requesting that a decision be rendered in full jurisdiction proceedings. The court is then obliged to decide on this matter if the circumstances permit it.[131] If this is not possible, the court may state whether the failure to act constitutes a flagrant violation of the law. Moreover, the court may, either on its own authority or at the request of the party, impose a fine on the authority or order the authority to compensate the complainant with a sum of up to half the amount of the fine. In the latter case, the decision is taken at the complainant's or ex officio's request.[132]

128 Slovenian Administrative Dispute Act (n 58) art 7/1.

129 ibid, art 65/1.

130 Tatjana Steinman, 'Komentar k 65. členu ZUS-1' in Erik Kerševan (ur), *Zakon o Upravnem Sporu (ZUS-1) s Komentarjem* (Lexpera 2019) 371.

131 Siuciński (n 3) 145.

132 ibid.

5 CONCLUSIONS

Administrative dispute is today a key mechanism for ensuring judicial protection against administrative acts. Recent developments in this field have shifted the scope of administrative judicial decision-making from merely removing unlawful administrative acts from the legal order—which suffices from the perspective of protecting objective legality—towards actively contributing to the correct and comprehensive resolution of administrative disputes, thereby ensuring effective protection of human rights.

This shift in understanding has been driven primarily by the efforts of the European Court of Human Rights, as demonstrated by this research. The landmark *Hornsby* case broadened the understanding of the right to a fair trial to include the execution phase of administrative court judgments. This study also analysed different mechanisms for achieving speedy and correct resolution of administrative disputes. In some cases, such resolution can be achieved through full jurisdiction proceedings. However, even when annulment of the contested administrative act and referral of the matter back to the authority is the only possibility, courts can still prompt the quickest possible resolution through various mechanisms established for this purpose.

The primary focus of this study was a comparative legal analysis of such mechanisms. Findings show that, in Europe, due to the importance placed by the ECtHR and domestic legal orders on ensuring effective legal protection in administrative disputes, many countries are seeking innovative ways to equip administrative courts with the appropriate tools to achieve this objective. While such mechanisms are often similar from country to country, differences tend to emerge at a more detailed level. They target different phases of the administrative and judicial decision-making processes and address various challenges related to the effective resolution of administrative disputes.

The mechanisms for improving the effectiveness of legal protection in administrative disputes, as presented in this article, have led to a greater role of administrative courts in safeguarding the fundamental rights of the parties, especially the right to effective legal protection. Administrative courts minimise the risk of unnecessary procedural repetition by anticipating developments following the issuance of a judgment and by addressing potential complications that may arise in repeated administrative proceedings in a timely manner. This ensures that parties can expect their cases to be comprehensively resolved by the administrative court and that, even in the event of repeated proceedings, they can still expect a fast decision from the administrative authority due to clear and binding instructions derived from the administrative court's judgment. Such structuring of administrative disputes contributes to a higher level of rights protection and a more efficient and responsive administrative and judicial system.

As demonstrated, most progress in this field has been carried out by countries with longer-standing traditions of judicial control over administrative actions. However, recent reforms

in countries such as Slovenia, Hungary, and Poland indicate the growing importance of the principle of effective legal protection in the administrative judiciaries of countries in Central and Eastern Europe.

However, reforming administrative disputes must respect each state's constitutional order. This research found that certain measures to improve judicial effectiveness may risk violating fundamental principles such as the separation of powers or judicial impartiality. Therefore, any future reforms should carefully balance the need for efficiency with the preservation of core constitutional values.

This contribution aspires to serve as a foundation for further reform and the broader adoption of the measures presented and analysed herein. Such adoption, however, must be made with due consideration to the specifics of each legal system, recognising that not all measures discussed may be compatible.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАБЕЗПЕЧЕННЯ ЕФЕКТИВНОГО СУДОВОГО ЗАХИСТУ В АДМІНІСТРАТИВНИХ СПОРАХ ШЛЯХОМ ЗДІЙСНЕННЯ ПОВНОВАЖЕНЬ АДМІНІСТРАТИВНОГО СУДОЧИНСТВА ЩОДО СКАСУВАННЯ АДМІНІСТРАТИВНИХ АКТІВ

Бруна Жубер* та Тілен Майнік

АНОТАЦІЯ

Вступ. *Судовий контроль за адміністративними діями традиційно зосереджувався на законності адміністративних актів, мало зважаючи на наслідки адміністративного спору. Цей підхід був змінений Європейським судом з прав людини (ЄСПЛ) внаслідок тлумачення права на доступ до суду відповідно до статті 6 Європейської конвенції з прав людини. ЄСПЛ розширив це право, передбачивши можливість виконання рішень адміністративного суду, що спонукало до зміни ролі адміністративного судочинства в бік забезпечення ефективного вирішення спорів. Це вплинуло на реформи в європейських країнах, багато з яких запровадили механізми підтримки адміністративних судів у забезпеченні більш ефективного судового захисту.*

Ця стаття має дві основні мети: по-перше, дослідити, як адміністративні спори еволюціонували від простої оцінки законності адміністративних актів до забезпечення ефективного судового захисту осіб за допомогою розширення права на справедливий суд, і по-друге, проаналізувати, як ця зміна вплинула на національне законодавство, зосередившись на механізмах, які надають судам повноваження виконувати свої рішення та остаточно вирішувати спори.

Методи. *За допомогою історичного методу було відстежено розвиток судового контролю в адміністративних спорах та вплив прецедентного права ЄСПЛ. Логічний метод підтримує аналіз ключових судових рішень, демонструючи еволюцію тлумачення права на справедливий суд. Порівняльний метод використовувався для оцінки того, як різні європейські правові системи адаптували свою нормативно-правову базу для посилення примусового виконання рішень адміністративних судів. Системний метод допоміг забезпечити внутрішню узгодженість висновків, а догматичний — тлумачення відповідних правових норм. Нарешті, аксіологічний метод застосовується для критичної оцінки реформ та їх узгодження з основними правовими цінностями.*

Результати та висновки. *Виконання рішень адміністративних судів набуло особливого значення у справі Хорнсбі, що розглядалась ЄСПЛ, у якій визнано, що право на справедливий судовий розгляд передбачає виконання рішень. Це розуміння призвело до*

суттєвих реформ у всій Європі для підвищення ефективності адміністративної юстиції. Хоча ці реформи покращили захист прав людини та вирішення спорів, вони повинні здійснюватись в межах конституційних принципів, зокрема поділу влади та неупередженості судів.

Ключові слова: *адміністративний спір; адміністративна юстиція; виконання рішень адміністративного суду; скасування адміністративних актів; остаточне вирішення спору; право на ефективний судовий захист.*

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Research Article

INHERITANCE AND ONE-TIME FINANCIAL ASSISTANCE FOLLOWING THE DEATH OF A SERVICEMEMBER: LEGAL STATUS ISSUES OF DE FACTO SPOUSES IN UKRAINE

Bozhena Oliyarnyk

ABSTRACT

Background: *The military aggression of the russian federation[1] against Ukraine has led to a rise in inheritance disputes involving de facto spouses of deceased servicemen. The increasing prevalence of such partnerships in Ukrainian society, coupled with the lack of proper legislative regulation, creates legal uncertainty, compelling individuals to seek judicial recognition of the status and right to inherit. Judicial practice shows inconsistency in resolving such cases due to the absence of uniform criteria for assessing evidence and procedural mechanisms. Within this context, addressing the issue of one-time financial assistance to de facto spouses of deceased servicemen becomes significant. Given Ukraine's prolonged military involvement, comparative analysis with the legal frameworks of the United States and South Korea offers valuable insights to assessing Ukraine's domestic model. Thus, the premises of this study are shaped by wartime realities, the legal imperfections of existing inheritance law, and the urgent need to adapt Ukrainian legislation to emerging challenges.*

Methods: *The study employs various methods, including analysis and synthesis for studying legal norms, adjudications, and scientific works, as well as summarising the obtained results. Inductive and deductive reasoning support the development of general conclusions based on judicial practice. Abstraction is used to refine and generalise key concepts and legal categories related to inheritance law. The formal-legal method is applied to analyse norms of civil and family law of Ukraine, while the comparative-legal method facilitates the review of foreign experiences in common-law marriage inheritance issues (particularly focusing on the USA and South Korea. The historical-legal method provides insight into the evolution of Ukrainian inheritance legislation, and the teleological (purposive) method to analyse the objectives underlying legal norms and judicial precedents in this area.*

1 In this article the words "Russian Federation", "Russian", etc. are written in lowercase under the author's decision and should not be considered as a spelling error.

Results and conclusions: *The research identified the main issues regarding inheritance disputes involving the de facto spouses of deceased servicemen. Judicial practice demonstrates a standardised approach to the assessment of evidence, contributing to the uniform application of the law. An analysis of current legislation and case law showed that the main challenge remains the fact of common-law cohabitation, which often requires substantial evidentiary support. International experience confirms that Ukraine's model of financial assistance in the event of a servicemember's death aligns with global standards. The findings lead to the conclusion that domestic legislation needs to be amended.*

1 INTRODUCTION

"Say not you know another entirely till you have divided an inheritance with him"—Johann Kaspar Lavater.[1]

Succession is a fascinating field—essentially the story of how the richness and diversity of human life should be manifested in the devolution of property upon death. Succession law undoubtedly arouses strong emotions and is first encountered by many people at a very distressing time.[2]

In light of the aggressive and cynical war waged by the russian federation against Ukraine, the issue of inheritance has become acutely significant. With the rising number of common-law marriages, there is an increasing problem of legal uncertainty regarding such relationships in the context of inheritance disputes. The war not only claims lives but also compels a reassessment of the legal tools and mechanisms used to balance the interests of the deceased's family with the rights of de facto partners.

In 2023, trial courts adjudicated 37,455 cases related to inheritance disputes, with 8,676 cases concerning testamentary succession and 20,261 cases involving intestate succession.[3] The issue of inheritance rights for de facto spouses, and subsequent disputes following the death of a combatant, is not a sign of legal nihilism or pathology. Rather, it represents a necessary legal response to the challenges posed by the war. The judiciary, as the guarantor of justice, faces the critical task of ensuring the adequacy of the rights and interests of such vulnerable groups, including domestic partners, in these challenging times.

This issue is particularly pressing when legislation fails to fully account for current social realities and remains unadapted to contemporary circumstances. This raises the question:

1 Susan Ratcliffe (ed), *Oxford Essential Quotations* (4th edn, OUP 2016) 156.

2 Brian Sloan, *Borkowski's Law of Succession* (4 th edn, OUP 2020).

3 'Report of Trial Courts on the Consideration of Cases in the Order of Civil Judicial Proceedings in 2023 (Form no 1-c)' (*Ukrainian Judiciary*, 31 January 2024) <https://court.gov.ua/inshe/sudova_statystyka/zvit_dsau_2023> accessed 7 October 2024.

can the state, through its judicial authority, effectively address legal vacuums and ensure the proper protection of residents' rights and interests under wartime conditions?

This article seeks to analyse the procedural peculiarities of inheritance cases involving de facto spouses in the event of a servicemember's death. It examines the legal status of domestic partnership in the context of inheritance and identifies the challenges associated with proving the existence of a family-like relationship between a man and a woman without a formal marriage license. Moreover, the article aims to shed light on foreign practices concerning the allocation of benefits in the event of a servicemember's decease.

2 RESEARCH METHODOLOGY

The methodology employed in this research integrates multiple approaches to comprehensively analyse inheritance disputes involving common-law partners in Ukraine. Initially, a comprehensive literature review focused on the legal regulation and judicial practice in inheritance disputes, with particular emphasis on Ukrainian legal norms and relevant international models. The descriptive-analytical method was applied to clarify concepts, legal status, and procedural aspects of inheritance by de facto spouses, which provided a detailed understanding of contemporary legislative and judicial practices.

Secondly, the case analysis method was utilised to examine specific judicial rulings of Ukrainian courts, with the aim of assessing judicial interpretation and application of inheritance law, particularly in cases involving the common-law partners of deceased servicemen. This analysis offered practical insights into the challenges associated with the application of current legislation.

Thirdly, historical and comparative methods were employed to trace the development of the model for awarding one-time financial assistance in the event of a servicemember's death in Ukraine, identifying key legal reforms and precedents. A comparative legal analysis was conducted to compare Ukraine's approach to the issue of financial assistance payments to common-law partners with corresponding legal models in other countries, particularly the United States and South Korea. This comparison allowed the identification of similar features and the conclusion that Ukrainian legislation in the area aligns with international standards.

This multifaceted approach provides a comprehensive understanding of the current legal environment and prospects for its improvement.

3 INHERITANCE IN UKRAINE

Inheritance law is an institution of private law.[4] The foundation of inheritance relations is established by the norms of the Civil Code of Ukraine,[5] specifically in Book 6. According to Article 1216 of the Civil Code of Ukraine, inheritance is defined as the transfer of rights and obligations (inheritance) from a deceased individual (the testator) to other persons (heirs).

Modern inheritance law encompasses a system of interrelated institutions, united around the institution of general provisions on inheritance, which is structurally located in Chapter 84 of the Civil Code of Ukraine. These include the institution of inheritance by law, inheritance by will, the exercise of the right to inheritance, among others.[6]

During the Soviet era, the legal understanding of inheritance was coloured by the ideology of that time, which regarded inheritance by will as unjust—particularly when it enriched an unrelated person. From this standpoint, granting a testator the right to gratuitously transfer property to a single individual was denied, as it was seen as promoting unearned enrichment and social inequality.[7]

Despite the existence of legal provisions supporting testamentary freedom, the practice of making wills remains limited in Ukraine, as indicated by relatively low statistical data. For instance, in 2021, notaries registered 158,969 wills,[8] whereas the number of deceased individuals was 714,263—indicating that only approximately one in four individuals sought notarial services for the execution of a will.[9] In 2022, the number of registered wills decreased by almost half. However, in 2023, this figure increased again, with 122,329 wills registered, even as the overall mortality rate in Ukrainian-controlled territories approached almost half a million.[10]

Legal doctrine recognises that conditions can serve socially beneficial functions, especially when the conditions imposed aim to cease unlawful or immoral behaviour known in advance by the beneficiary.[11]

The issue of the precedence of inheritance by will has been extensively examined by scientists, including the preferential inheritance rights of individuals named in the will and

4 Svitlana Yaroslavivna Fursa (ed), *Inheritance law: Notary, Advocacy, Court* (KNT 2007).

5 Civil Code of Ukraine no 435-IV of 16 September 2003 (amended 3 September 2024) <https://zakon.rada.gov.ua/laws/show/435-14#Text> accessed 4 October 2024.

6 Yevhen Olehovych Kharytonov and Olena Ivanivna Kharytonova, *Updating (Codification and Recodification) of the Civil Legislation of Ukraine: Experience, Problems and Prospects* (Feniks 2020).

7 Oleksandr Yevhenovych Kukhariev, *Theoretical and Practical Problems of Dispositiveness in Inheritance Law* (Alerta 2019).

8 '15 % Increase in Notarial Inheritance Certificates this Year' (*Opendatabot*, 19 August 2024) <https://opendatabot.ua/en/analytics/wills-inheritances-2024> accessed 4 October 2024.

9 'Mortality in Ukraine' (*Minfin*, 21 March 2022) <https://index.minfin.com.ua/ua/reference/people/deaths/2021> accessed 4 October 2024.

10 'Notaries Registered over a Million Inheritance Rights in 2023' (*Opendatabot*, 19 January 2023) <https://opendatabot.ua/en/analytics/notary-forms-2023> accessed 4 October 2024.

11 Zoryslava Vasylivna Romovska, *Ukrainian Civil Law. Inheritance Law* (Alerta 2009).

the priority of the will as the testator's final expression of intent. Judicial practice has developed the following approaches to statutory inheritance: the first-order heir has preferential rights to the inheritance, while the fourth-order heir is given priority over the fifth-order heir in receiving the estate.[12]

The acceptance of inheritance is regarded as a legal act, namely a unilateral legal transaction performed by the heir, through which they express their consent or refusal to be recognised as the testator's successor.[13] Consequently, partial acceptance of patrimony is not permitted.

When the law regulates property inheritance after death, notions of individual autonomy and familial obligation readily come into conflict.[14] In inheritance disputes, claimants may be any individuals with a legitimate interest in the succession matter. The primary grounds for initiating legal proceedings typically involve the violation or contestation of such individuals' rights and interests. In most cases, such individuals are heirs by will and/or by law.

In cases of inheritance by will, heirs can be any physical or legal persons named in the will, whereas inheritance by law, as stipulated in Chapter 86 of the Civil Code of Ukraine, clearly defines the group of subjects of inheritance according to each of the five classes of heirs. From this, the following conclusions can be drawn: (1) heirs by law can only be natural persons, and (2) inheritance occurs in order of precedence. In the absence of or removal of heirs from a prior line, the order of inheritance may be altered based on an agreement or a court decision.

A complex and ambiguous category of claimants in inheritance disputes is the heirs of the fourth class. Article 1264 of the Civil Code of Ukraine includes persons who have lived with the testator as a family for at least five years prior to the opening of the inheritance in the fourth class of heirs. This class also encompasses cohabitation (so-called domestic partnership), where a man and woman live together in a de facto marital relationship without a marriage license.

Notwithstanding, the concept of fourth-class heirs should not be limited solely to this definition. According to the Resolution of the Plenary Supreme Court of Ukraine from 30 May 2008, heirs of the fourth class include not only women (or men) who lived with the testator as a family without marriage but also other individuals who cohabited with the testator, shared a common household, and had mutual rights and obligations. These may include stepparents, stepchildren, foster children, or other persons who assumed familial roles—such as taking a child into their care as a family member.[15]

12 Inna Valentynivna Spasybo-Fatieieva (ed), *Inheritance Law: Through the Prism of Judicial Practice* (ECUS 2022).

13 Iryna Holubenko, O Hrachova and M Maslova, 'Features of the Procedure for Receiving an Inheritance under the Conditions of Marital State' (2023) 2 Juridical Scientific and Electronic Journal 125, doi:10.32782/2524-0374/2023-2/26.

14 Suzanne Lenon and Daniel Monk (eds), *Inheritance Matters: Kinship, Property, Law* (Hart Publishing 2023).

15 Resolution of the Plenum of the Supreme Court of Ukraine no 7 of 30 May 2008 'On Judicial Practice in Inheritance Cases' (2008) 6 Bulletin of the Supreme Court of Ukraine 17.

4 LEGAL ISSUES IN INHERITANCE DISPUTES OF DE FACTO SPOUSES

The legal institution of cohabitation between a man and a woman without marriage can be traced back to the Roman Empire. The concept of *concubinage* (Latin *concubinatus* – cohabitation, from *concubo* – to lie together) in Ancient Rome was interpreted as a legalised (permitted) extramarital union, namely the prolonged cohabitation of a man and a woman who were free from marital obligations, based solely on a bare agreement (*nudus consensus*). This institution emerged during the Republican period as a response to the prohibition under Roman law of legal marriages between different social categories within the state. However, concubinage lacked key characteristics of the traditional Roman marriage, such as "complete lifelong companionship between a man and a woman" (*affection maritalis*) and "marks of respect for the marital partner" (*honor martimonii*). Within such unions, no proprietary or personal non-proprietary rights arose between the man and the woman, including the right to inheritance. As a result, concubinage was considered an inferior form of marriage (*inaequale coniugium*).[16]

Nowadays, individuals in common-law marriage may encounter significant legal challenges when crossing jurisdictions, particularly where their relationships are not formally recognised. Upon entering a foreign legal system that does not necessarily recognise their status, they may face difficulties in asserting their rights and obligations—both between partners and in relation to third parties.

Recognising these challenges, the Hague Conference on Private International Law added the topic to its agenda in 1987, initiating the study of private international law issues related to "unmarried couples" (later referred to more broadly as "cohabitation outside marriage, including registered partnerships").[17] While initial research focused on applicable law, by 1995, the scope expanded to include "jurisdiction, applicable law, and recognition and enforcement of judgments in respect to unmarried couples."[18]

It should be emphasised that the international law term "cohabitation outside marriage" encompasses "unmarried cohabitation" and "registered partnerships". The former refers to *concubinage* or *de facto union* without a union registered with an authority—formed through the parties' actual cohabitation.[19]

16 Olena Nadiienko and Olha Voronova, 'Inheritance Right of a Man and a Woman, Living as a Family Without Marriage' (2021) 8 Juridical Scientific and Electronic Journal 90, doi:10.32782/2524-0374/2021-8/19.

17 'Cohabitation Outside Marriage' (*HCCH - Hague Conference on Private International Law*, 2016) <https://www.hcch.net/en/publications-and-studies/details4/?pid=8997> accessed 5 October 2024.

18 ibid, Private International Law Aspects of Cohabitation Outside Marriage and Registered Partnership (Prel Doc no 9 of May 2000).

19 ibid, Questionnaire on Private International Law Issues Relating to cohabitation Outside Marriage (Including Registered Partnerships).

Ukrainian legislation does not currently define the terms "concubinage" or "de facto spouses," nor does it provide a comprehensive legal framework to regulate such relationships. Nevertheless, Article 74 of the Family Code of Ukraine establishes the legal regime of property relations between a man and a woman who live as a family but are not married. Thus, the provisions on joint property ownership apply to the joint property of de facto spouses, thereby creating legal consequences for common-law partners.

However, the development of Ukrainian legal doctrine in this area should not aim to equate the rights and obligations of de facto spouses with those of married couples. Instead, it should afford such partners rights and obligations as individuals living together as a family unit. While these rights may be substantively identical in content, the legal grounds for their establishment remain fundamentally distinct.[20] By framing cohabitation within the context of family unity instead of official marital status, the law elucidates the conceptual distinction between registered marriage and de facto unions, thereby excluding the possibility of legal uncertainty.

In this case, the legislator seeks to preserve a delicate balance of interests between the rights of a lawful spouse and those of a partner in a de facto marriage. A balance of interests refers to a legal relationship characterised by the proportionality of the parties' rights and obligations, thereby ensuring a state of equilibrium between the subjects. However, this concept should not be understood as an absolute equality, identical rights, or a mandatory equivalence of interests. In certain cases, it is both reasonable and necessary to prioritise one interest over another.[21]

Notably, Ukrainian legal regulation does not equate common-law partners with first-order heirs. As affirmed by the Supreme Court, living together as a family without formal marriage registration does not entitle a partner to inheritance rights as a first-order heir under Article 1261 of the Civil Code of Ukraine.[22]

According to data published by the Ukrainian Ministry of Justice for the first half of 2024, over 72,000 marriages were registered—representing a 15% decrease compared to the previous year, and more than one-third less than in 2022. Statistics indicate that one in ten couples in Ukraine are in common-law marriage.[23] The growing number of cohabitations is leading to further contentious inheritance relations, particularly in cases involving the deaths of servicemen.

20 Zoryslava Vasylivna Romovska, *Family Code of Ukraine: Scientific and Practical Commentary* (2nd edn, In Yure 2006).

21 Kukhariev (n 7).

22 Case no 401/2614/17 (Civil Court of Cassation of the Supreme Court of Ukraine, 21 October 2021) <https://reyestr.court.gov.ua/Review/100456741> accessed 5 October 2024.

23 'In the Second Year of the Full-Scale War, the Number of Marriages in Ukraine has Decteased' (*Opendatabot*, 11 August 2023) <https://opendatabot.ua/analytics/marriages-divorces-half-2023> accesed 6 October 2024.

Judicial practice reveals several recurring categories of cases concerning the inheritance rights of common-law partners in the event of a servicemember's decease. These can be classified as follows:

1. Establishing the fact of cohabitation as a family without formal marriage registration typically resolved through separate proceedings.
2. Recognition of ownership of property as a share of the joint property of a man and a woman who lived together without marriage registration through adversary proceedings.
3. Recognition of the right of ownership to real estate as part of the inheritance through claim proceedings.

The legislator establishes a mandatory rule stipulating that disputes concerning inheritance must be considered exclusively under the rules of general action proceedings. The Supreme Court has repeatedly underscored the inadmissibility of resolving such cases through summary proceedings. In one case, the claimant filed a lawsuit seeking the recognition of ownership rights through inheritance. The trial court dismissed the claim, and the court of appeals upheld the decision, reasoning that the case was insignificant under the applicable legal provisions and thus could be resolved through summary proceedings. The claimant's cassation appeal was grounded in the assertion that the appellate court improperly examined the case under summary proceedings, despite its mandatory consideration under general action proceedings. The Supreme Court ultimately agreed, holding that under current civil procedural law, inheritance-related disputes cannot be resolved through summary proceedings solely on the basis of the case file, and must involve notifying and hearing the parties involved.[24]

In inheritance disputes, establishing the claimant's legal standing (in this context, as a de facto spouse) significantly depends on the formal recognition of cohabitation between a man and a woman as a family, absent any illicit relationship. This recognition is typically pursued through separate proceedings, whereas any associated legal disputes—particularly those involving property rights—must be resolved under the rules of general action proceedings.

According to official judicial statistics for 2023, Ukrainian trial courts received 48,668 applications in separate proceedings aimed at establishing legally significant facts. Of these, 33,163 cases concerned various legal facts, including cohabitation as a family.[25] Although precise data on applications related to cohabitation determination remain unknown, these figures provide insight into the approximate scale of applications in this legal category.

24 Case no 278/2797/19 (Civil Court of Cassation of the Supreme Court of Ukraine, 19 May 2021) <https://reyestr.court.gov.ua/Review/97393665> accessed 7 October 2024.

25 Report of Trial Courts (n 3).

In the adjudication of inheritance disputes involving a common-law spouse, a crucial issue arises concerning the appropriate procedural route: whether to file an application under separate proceedings or to initiate a claim under general claim proceedings. The Supreme Court has clarified that if the right to inheritance depends on establishing certain facts, an individual may file a claim to recognise the facts. In the absence of a legal dispute, such a claim should proceed under the rules of separate proceedings.[26]

This procedural guideline has been consistently applied in judicial practice. For instance, the Ivano-Frankivsk City Court of Ivano-Frankivsk Oblast considered an application for the recognition of cohabitation as a family for at least five years prior to the opening of the inheritance following the death of a military servicemember. The application was grounded on the necessity of establishing the fact to confirm cohabitation as a family unit, specifically as a man and a woman living together without marriage, to acquire the status of a fourth-line heir. The court held that recognising such status was necessary not only for inheritance rights but also for access to related entitlements, including a one-time financial aid. Given that the recognition of the applicant's right would directly affect the composition of eligible heirs, the court determined that such circumstances indicate the existence of a legal dispute, thereby requiring the case to be considered under the rules of general action proceedings.[27]

The determining factor for considering an application in separate proceedings concerning the recognition of cohabitation as a family between a man and a woman without marriage is the absence of any subsequent civil-law dispute arising from the establishment of the fact. If the court determines that recognising such a fact would infringe upon the rights and interests of other persons involved in the case, the application is subject to dismissal without consideration. Under the general claim proceedings framework, the applicant is informed of their right to file a claim.

In these cases, the subject matter of proof is defined not by the legal relationship itself, but by the factual circumstance to be established—namely, the cohabitation as a family. The recognition of this fact may, in turn, influence the emergence, alteration, or termination of the applicant's rights. To define the legal nature of the fact in question, it is essential to ascertain the purpose of its establishment. The applicant outlines the subject of proof through the content of the submitted application, while its scope is determined by applicable legislation. Various evaluations, contingent conditions, and interests significantly influence the formation of the subject of proof. Consequently, the specific subject of proof is established individually based on the circumstances of each application.

In this category of cases, the burden of proof lies with the applicant, who must demonstrate the existence of characteristics typically associated with a marital relationship—as

26 Case no 200/14136/17 (Civil Court of Cassation of the Supreme Court of Ukraine, 22 April 2020) <https://reyestr.court.gov.ua/Review/88909705> accessed 7 October 2024

27 Case no 344/10217/23 (Ivano-Frankivsk City Court of Ivano-Frankivsk Oblast, 7 August 2023) <https://reyestr.court.gov.ua/Review/111370053> accessed 7 October 2024.

understood within the social and legal institution of the family. The recognition of such a fact must entail certain legal consequences for the claimant in the future. The court will not consider evidence that falls outside the established subject of proof.

The Constitutional Court of Ukraine has established that, in addition to the fact of cohabitation, the recognition of individuals as family members requires the actual establishment of a shared household. This includes joint expenses, a common budget, shared meals, purchasing property for mutual use, contributing to housing maintenance and repairs, providing mutual assistance, and other concrete circumstances evidencing the reality of family relationships.[28] The Supreme Court further stresses that what must be proven is a set of established circumstances and relationships. The mere existence of a close personal relationship between a man and a woman, their joint attendance at social events, money transfers, occasional vacations together, living at the same address, or being officially registered at that address, in the absence of other indicative factors, cannot be considered sufficient proof of a marital-type relationship.[29]

For example, in one case, an application was submitted to the court requesting the recognition of cohabitation as a family between a man and a woman without marriage. The applicant claimed that from December 1999 until the death of her partner on 1 May 2022, who had participated in Ukraine's defence efforts, they lived together at the same residence. In support of the application, the following evidence was provided regarding cohabitation with the deceased: an extract from the Unified Register of Pre-trial Investigations, an extract from the order of the military unit commander, an extract from the list of irrecoverable losses of the personnel, and a certificate from a village council deputy confirming their cohabitation. However, the court found this evidence insufficient to establish the fact of shared domestic life, and thus rejected the application.[30]

It is important to recall that, under the regulations of the Civil Procedure Code of Ukraine, valid means of evidence include explanations by the parties and third parties, witness testimony, documentary and material evidence, electronic evidence, and expert conclusions. Therefore, when evaluating evidence, courts apply the criteria of relevance, admissibility, and credibility and assess their sufficiency and interconnection collectively.

Ukrainian law does not specifically define which specific pieces of evidence are considered indisputable grounds for confirming cohabitation as a family. Therefore, the assessment of the relevance and admissibility of such evidence is entrusted to the court, which conducts a direct and contextual evaluation of each item of evidence.

28 Case no 1-8/99, decision no 5-рп/99 (Constitutional Court of Ukraine, 3 June 1999) <https://zakon.rada.gov.ua/laws/show/v005p710-99#Text> accessed 8 October 2024.

29 Case no 759/14906/18 (Civil Court of Cassation of the Supreme Court of Ukraine, 17 January 2024) <https://reyestr.court.gov.ua/Review/116606829> accessed 8 October 2024.

30 Case no 481/289/24 (Novobuzkyi Raion Court of Mykolayiv Oblast, 11 July 2024) <https://reyestr.court.gov.ua/Review/120480429> accessed 9 October 2024.

In particular, a letter from the Supreme Court of Ukraine provides interpretative guidance on this matter. It affirms that relevant and admissible forms of evidence may include, but are not limited to: children's birth certificates, certificates of residence, witness testimony, personal and business correspondence, and so on. Additional evidentiary materials may include death certificates of one of the partners, birth certificates of children where the man is voluntarily listed as the father; extracts from household registration books regarding registration or residence; evidence of joint property acquisition, both movable and immovable (receipts, certificates of ownership); statements, questionnaires, receipts, wills, personal and business correspondence that demonstrate the couple considered themselves husband and wife and cared for one another; certificates from housing authorities, village councils regarding cohabitation and joint management of a household.[31]

Thus, the evidence submitted must not only address the factual nature of the alleged relationship but also fully substantiate the claim for establishing the legal fact.

As evidenced in judicial practice, in this category of cases, a frequently used method of evidence is witness testimony, for example, from relatives, friends, colleagues, or neighbours. However, this gives rise to an important question: Can the fact of cohabitation as a family be established solely on the basis of witness testimony, or must such testimony be considered in conjunction with other presented evidence? The Supreme Court has pointed out that witness testimony cannot serve as the only purpose for establishing the fact of cohabitation as a family without marriage.[32] The Supreme Court maintains the same position regarding the claimant's submission of joint photos of the cohabiting couple as evidence.

Another critical factor in establishing cohabitation between a man and a woman without marriage is the duration of the relationship. Ukrainian courts have established that the fact of cohabitation must be long-term; however, the specific duration of such cohabitation to be proven by the claimant is not explicitly defined. In light of the military mobilisation of Ukrainian citizens, an apparent question arises: how should the duration of cohabitation be calculated if one of the de facto spouses is serving in the military?

In a notable case, the Khmelnytskyi Court of Appeal considered the appeal against the decision of the city district court regarding the establishment of the fact of cohabitation between a man and a woman as a family. The claimant, the deceased servicemember's partner, stated that from 10 January 2018 until his death during combat operations in Bakhmut, they had lived together as de facto spouses. This fact was necessary to gain inheritance rights under the fourth line of succession. In her appeal, the deceased soldier's mother requested the reverse of the trial court's decision. She claimed that from February

31 Letter from the Supreme Court of Ukraine of 1 January 2012 'Judicial Practice in Cases Concerning the Establishment of Facts with Legal Significance (Excerpt)' <https://wiki.legalaid.gov.ua> accessed 9 October 2024.

32 Case no 129/2115/15-ц (Civil Court of Cassation of the Supreme Court of Ukraine, 14 February 2018) <https://reyestr.court.gov.ua/Review/72269217> accessed 12 October 2024.

2022 until September 2022, he had been under the command of a military unit. Although he returned and lived with the claimant from September 2022 until his death in January 2023, the appellant contended that the court's conclusion that they had lived as a family for at least five years was erroneous.[33]

In response, the Supreme Court clarified that the husband's military service, registration, and permanent residence in the military unit cannot be construed as evidence that the parties were not in actual family relations, as such a fact merely indicates the fulfilment of the individual's military duty.[34] The Supreme Court has repeatedly emphasised the distinct legal nature of property and inheritance relations in its legal positions. In cases involving the establishment of the fact of cohabitation as spouses without marriage, in inheritance disputes, there is a need to prove that the parties have lived together for at least 5 years in accordance with Article 1264 of the Civil Code of Ukraine. However, in cases concerning property rights, the law does not impose such an obligation.

In examining the establishment of cohabitation as a family without marriage within the framework of contentious proceedings, an important distinction emerges in Ukrainian law between inheritance rights and property claims. As previously mentioned, inheritance under national law follows a sequential order, with common-law partners falling under the fourth line of heirs. In cases where there is an interest in the deceased's estate and the presence of heirs from the preceding queues, protecting an individual's lawful interest by establishing a fact in separate proceedings or recognising a fourth-line heir will not produce any legal consequences for the claimant. However, based on the provisions of Article 74 of the Family Code of Ukraine, an individual may file a claim in contentious proceedings to establish the fact of cohabitation as a family, to recognise the claimant's ownership of the deceased's property as part of the joint ownership rights of a man and woman who cohabited without formal marriage registration, with the subsequent exclusion of such property from the inheritance.

A compelling illustration of this principle is the decision of the Vinnytsia Court of Appeal. In this case, the claimant—a woman who had lived with a deceased servicemember—filed a lawsuit requesting the court to: (1) establish the fact of her and the deceased servicemember's cohabitation as a family without formal marriage registration, (2) recognise her ownership of part of a residential building, and (3) recognise her ownership of part of a cargo truck. The trial court dismissed her claim, citing an insufficient evidentiary basis for establishing cohabitation. However, the Court of Appeal overturned this decision, not on the grounds that cohabitation had been sufficiently proven, but rather because the legal remedy sought—establishing a legal fact—did not provide effective protection of the claimant's rights.

33 Case no 688/4944/23 (Khmelnytskyi Court of Appeal, 5 September 2024) <https://reyestr.court.gov.ua/Review/121424739> accessed 12 October 2024.

34 Case no 279/2014/15-ц (Civil Court of Cassation of the Supreme Court of Ukraine, 23 September 2019) <https://reyestr.court.gov.ua/Review/84545086> accessed 13 October 2024.

Citing a ruling of the Grand Chamber of the Supreme Court, the court indicated the following: granting the claim for the establishment of cohabitation as a family without marriage registration in a property division case involving spouses is erroneous, and the claim in this part should be dismissed. The reasoning for the court's position regarding the confirmation or refutation of the fact of cohabitation without formal marriage in property division cases must be provided in the reasoning section of the decision. This section should include the factual circumstances established by the court, the content of the disputed legal relations, and a reference to the evidence on which the relevant facts were established. Importantly, in the dispositive part of the ruling, the court must explicitly state whether each claim has been granted or denied, either in full or in part. The court stressed that claims for establishing a legal fact are not claims that provide effective protection of rights in property division cases between spouses, but merely serve as a basis for resolving such cases.[35]

5 GRANTING OF ONE-TIME FINANCIAL ASSISTANCE IN THE EVENT OF THE DEATH OF DEFENDERS OF UKRAINE

A key legal distinction between a de facto marriage in a civilian context and cohabitation with a combatant lies in the entitlement to one-time financial assistance in the event of the service member's death. Specifically, the surviving de facto spouse of a deceased military personnel may be eligible to receive a lump-sum benefit, a right that does not extend to partners in ordinary common-law marriage. This distinction underscores the unique legal considerations applicable to relationships involving members of the armed forces, particularly in matters of financial support and survivor benefits.

The establishment of the fact of cohabitation as a family—between a man and a woman without formal marriage registration—thus assumes significant legal importance in the context of granting one-time financial assistance (hereinafter OFA) in the event of death. However, it should be noted that such payments do not form part of the inheritance. The disbursements are made in accordance with the Law of Ukraine "On Social and Legal Protection of Military Personnel and Their Families",[36] the Resolution of the Cabinet of Ministers of Ukraine No. 168 dated 28 February 2022, and the Order of the Ministry of Defence of Ukraine No. 45 dated 25 January 2023.

Further legal refinement came with the adoptionof Resolution No. 714 of the Cabinet of Ministers of Ukraine, dated 18 June 2024, which amended both Resolutions No. 975 (25 December 2013) and No. 168 (28 February 2022) concerning the payment of OFA. The

35 Case no 134/64/24 (Vinnytsia Court of Appeal, 3 October 2024) <https://reyestr.court.gov.ua/Review/122151156> accessed 13 October 2024.

36 Law of Ukraine no 2011-XII of 20 December 1991 'On Social and Legal Prptection of Military Personnel and Their Families' (amended 25 August 2024) <https://zakon.rada.gov.ua/laws/show/2011-12#Text> accesed 14 October 2024.

Cabinet of Ministers standardised regulatory acts in line with the Law of Ukraine "On Social and Legal Protection of Military Personnel and Members of Their Families." The right to receive OFA, including the maximum amount payable—UAH 15,000,000—as stipulated in Resolution No. 168.

Under Resolution No. 975, a service member may prepare a written personal directive regarding the OFA in the event of their death, specifying beneficiaries and indicating the percentage share each person is entitled to receive. However, regardless of the contents of such a personal directive, the right to receive and be granted OFA is guaranteed to minor, underage, or legally incapacitated adult children, a legally incapacitated spouse, and legally incapacitated parents of the deceased. Each of whom is entitled to 50% of the share they would have received in the absence of a personal directive.

Where no personal directive exists, or where a percentage of the OFA remains undistributed, the remaining sum is allocated in equal parts among the following legally recognised categories:

- children, including adopted children, children conceived during the deceased's lifetime and born after their death, and children whose deceased parent had been deprived of parental rights;
- a widow or widower;
- the deceased's parents or adoptive parents, provided they were not deprived of parental rights or had their parental rights restored before the date of death;
- grandchildren of the deceased, if their parents had died before the service member's death;
- a partner with whom the deceased lived as a family without marriage registration, provided this fact has been established by a court ruling; and dependents as defined by the Law of Ukraine "On Pension Provision for Persons Discharged from Military Service and Certain Other Persons".[37]

Notably, the Resolution establishes a prohibition against refusing the appointment and receipt of OFA on behalf of legally incapacitated persons, persons with limited legal capacity, as well as minor and underage children of the deceased servicemember.

In light of this framework, a common-law spouse may claim OFA assistance in the event of a service member's death only if the fact of cohabitation as a family is established through a court ruling. Since the OFA payment is made based on a decision by the Social Security Department Commission of the Ministry of Defence of Ukraine, courts sometimes misinterpret the jurisdiction of the cases.

37 Resolution of the Cabinet of Ministers of Ukraine no 714 of 18 June 2024 'On Amendments to the Resolutions of the Cabinet of Ministers of Ukraine dated 25 December 2013 no 975 and 28 February 2022 no 168' [2024] Official Gazette of Ukraine 60/3565.

A recent case received by the Supreme Court of Ukraine illustrates these complications. The applicant sought the establishment of cohabitation as a family without marriage, and the fact of being financially dependent, asserting that these facts were essential to secure OFA after the death of her common-law partner, a fallen service member. However, both the courts of first instance and appellate instance mistakenly refused to open proceedings, concluding that the case did not fall under the jurisdiction of civil proceedings. They reasoned that, based on its subject matter and possible legal implications, the dispute pertained to public-law relations and should be resolved through administrative court proceedings.[38]

In its landmark decision, the Grand Chamber of the Supreme Court emphasised that the lower courts failed to consider that cases concerning the establishment of legally significant facts are subject to consideration and resolution by civil jurisdiction courts under the provisions of the Civil Procedure Code of Ukraine. Accordingly, the lower courts erroneously concluded that the case was not subject to judicial review and denied initiating proceedings based on Article 186(1)(1) of the Civil Procedural Code of Ukraine.

In its ruling, the Grand Chamber of the Supreme Court definitively resolved the jurisdictional issue concerning the relevant category of applications. It disagreed with the conclusion reached by the Civil Cassation Court, which had held that the applicant's claims related to proving grounds for acquiring a certain socio-legal status, unconnected to any civil rights or obligations, their creation, existence, or termination. Therefore, the Civil Cassation Court concluded that, due to the subject matter and potential legal consequences, such claims fell within the scope of public-law relations between the applicant and the state and were thus not subject to consideration under civil proceedings.

However, in its decision, the Great Chamber emphasised the following: according to Part 1 of Article 293 of the Civil Procedure Code of Ukraine, separate proceedings constitute a type of non-contentious civil procedure through which civil cases are examined to confirm the existence or absence of legally significant facts essential for protecting individual rights, freedoms, and interests, or for enabling the exercise of personal non-property or property rights, or confirming the existence or absence of undisputed rights. Pursuant to Clause 5 of Part 2 of Article 293 of the Code, the court considers cases concerning the establishment of legally significant facts in separate proceedings. The list of such facts under Article 315 of the Code is not exhaustive. Specifically, Clause 5 of Part 1 of Article 315 provides that the court hears cases concerning the establishment of the fact of cohabitation between a man and a woman without marriage.

An analysis of these legal provisions indicates that there are two procedures for establishing legally significant facts: extrajudicial and judicial. The Supreme Court stressed that if an individual's request for recognition of a legal fact—intended to be established through an

38 Case no 212/5550/23 (Civil Court of Cassation of the Supreme Court of Ukraine, 7 February 2024) <https://reyestr.court.gov.ua/Review/117015428> accessed 15 October 2024.

extrajudicial procedure—is denied by the relevant authority and subsequently appealed in court, such disputes fall under the jurisdiction of administrative proceedings. In these cases, courts primarily review whether the challenged decision of the public authority complies with the criteria specified in Part 2 of Article 2 of the Code of Administrative Procedure of Ukraine. Moreover, according to Part 2 of Article 77 of the Code, the respondent in administrative cases involving the illegality of a public authority's decisions, actions, or inaction must prove the legality of its decision, action, or inaction.[39]

An analysis of proceedings involving the Ministry of Defence of Ukraine (MoD) as an interested party in cases concerning the establishment of the fact of cohabitation with a deceased servicemember reveals instances of procedural abuse by MoD representatives. For instance, the Chornobai District Court of Cherkasy Region received an application seeking to establish cohabitation between a man and a woman without marriage. In response, a representative of the MoD submitted a written statement asserting that, given the presence of other individuals potentially entitled to receive the OFA, establishing such a fact would involve resolving a contested right. Therefore, the representative argued that the application should not be considered under separate proceedings and should be dismissed without consideration. The court rejected this assertion, emphasising that the establishment of the fact in such cases is not inherently linked to resolving a contested right. The Supreme Court, through its legal opinions, has explicitly clarified the proper approach to handling such cases. Thus, the court proceeded with the application in accordance with the procedural norms established by law.[40]

6 FOREIGN PRACTICES IN LUMP-SUM PAYMENTS IN THE EVENT OF A SERVICEMEMBER'S DEATH

The global trend of rising cohabitation without formal marriage registration is becoming increasingly evident. For instance, in the USA, premarital cohabitation has increased from 10% in 1970 to over 60% after 2000.[41] According to scientific predictions, in 2031, one in every four couples will cohabit as a family without officially registering their marriage.[42]

39 Case no 560/17953/21 (Grand Chamber of the Supreme Court of Ukraine, 18 January 2024) <https://reyestr.court.gov.ua/Review/116512563> accessed 15 October 2024.

40 Case no 709/806/24 (Chornobaivskyi Raion Court of Cherkasy Oblast, 4 July 2024) <https://reyestr.court.gov.ua/Review/120195612> accessed 15 October 2024.

41 Michael J Rosenfeld and Katharina Roesler, 'Cohabitation Experince and Cohabitation's Association with Marital Dissolution'(2019) 81(1) Journal of Marriage and Family 42, doi:10.1111/jomf.12530.

42 Permanent Bureau of the Hague Conference on Private International Law, 'Update on the Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships (Prel Doc no 5 of March 2015)' (*HCCH - Hague Conference on Private International Law*, March 2015) <https://www.hcch.net/en/publications-and-studies/details4/?pid=8997> accessed 16 October 2024.

The legal regulation of de facto marriages develops in accordance with specific features of each state's legal system and cultural factors. Some countries have established a comprehensive legal framework that governs common-law marriages, whereas others do not formally recognise or address such unions within their national legal provision. As an example, in the UK, married couples and de facto spouses have certain legal rights and obligations. However, common-law marriages are significantly more limited within the legal framework. Upon death, cohabitants do not automatically inherit from their partner.[43] Notwithstanding the legal reality, many people continue to believe in the so-called "common law marriage myth"—the erroneous belief that after living together, the law treats cohabitants as if they were married.[44]

Contrary to this, in Finland, there are over 70 statutes across all administrative sectors that include references to cohabiting couples.[45] State recognition of de facto marriage not only affects inheritance rights but also eligibility for certain social security benefits, such as a lump-sum payment in the event of the death of a servicemember.

Given this context, the focus is placed on countries that have developed robust legal frameworks for addressing military-related inheritance disputes, largely due to prolonged histories of military engagement and the subsequent need to regulate the distribution of financial benefits to servicemembers' families—such as the United States and South Korea.

In the United States, the law provides a tax-free death gratuity program for military personnel, amounting to $100,000 for family members of a deceased servicemember who dies during active duty or in certain reserve statuses. The death gratuity payment is not dependent on the cause of death. This ensures that family members can meet their financial needs immediately following the servicemember's death, prior to receiving further benefits or entitlements.[46]

Regarding common-law partnerships, U.S. law generally recognises that death gratuity payments are made to the deceased's spouse. However, as civil unions and domestic partnerships are not always treated the same way as marriage, eligibility for such benefits depends on the specific recognition of the partnership by the relevant state or military regulation. In some cases, partners in legally recognised civil unions may be

43 UK Law Commission, 'Intestacy and Family Provision Claims on Death: Executive Summary Law Com no 331' (*GOV.UK*, 14 December 2011 <https://www.gov.uk/government/publications/intestacy-and-family-provision-claims-on-death> accessed 28 October 2024.

44 UK Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown, Law Com no 307' (*GOV.UK*, 31 July 2007) <https://www.gov.uk/government/publications/cohabitation-the-financial-consequences-of-relationship-breakdown> accessed 28 October 2024.

45 Salla Silvola, 'Informal Relationships – Finland: Nartional Report' (*Commision on European Family Law*, January 2015) <https://ceflonline.net/informal-relationships-reports-by-jurisdiction/>accessed 28 October 2024.

46 USA Department of Defense, 'Death Gratuity' (*Military Compensation*, 2024) <https://militarypay.defense.gov/benefits/death-gratuity/> accessed 29 October 2024.

eligible for death gratuity, though this is subject to state-level recognition and the military's policies on dependents.

According to Subsection (a) of Section 1477, Title 10 of the United States Code, death benefits—outlined in Sections 1475 and 1476—are paid to the closest surviving relative in the following order of priority:

1. The lawful spouse of the deceased;
2. The children of the deceased, in equal shares, as provided in subsection (b);
3. If specified by the deceased, any of the following individuals:

   (a) The parents of the deceased, or individuals fulfilling parental duties as outlined in subsection (c);
   (b) The deceased's brothers;
   (c) The deceased's sisters.[47]

Given the federal nature of the United States' governmental structure, the interpretation of the term "lawful spouse" is determined by the individual laws of each state. Common-law partners are recognised as lawful spouses only if the state in which they reside recognises such relationships—examples include Colorado or Texas. It is important to note that the circumstances that confirm the fact of cohabitation are not universal and are determined on a legislative level by each state individually. If partners reside in a state that does not recognise de facto spouses, such as Florida, individuals will not be eligible for the benefits.

Nonetheless, due to the principles governing interstate recognition, common-law marriages carry legal significance across all US states. The majority of these rules recognise common law marriages that have been established, which is of great practical significance, given how many people move from state to state.[48]

In the case *Burden v. Shinseki*, Mr Burden, a Vietnam War veteran, served in the U.S. Army for 20 years. He officially married Mrs Burden on 27 April 2004, but passed away two months later. In August of that same year, Mrs Burden applied for death benefits from the Department of Veterans Affairs. However, her claim was denied because she had not been married to the deceased for at least a year before his death, as required by law. Mrs Burden argued they had lived together as de facto spouses for five years. She provided witness testimony and a church wedding invitation from 2001, listing their names and confirming their cohabitation as a couple. The federal court concluded that for death benefits, the validity of the marriage is determined according to the laws of the place where the parties resided at the time of marriage or when the right to the benefit arose. Since the Burdens lived in Alabama, the Department of Veterans Affairs was required to apply the laws of that

47 10 US Code Subtitle A - General Military Law (1948) § 75 <https://www.law.cornell.edu/uscode/text/10/subtitle-A> accessed 1 November 2024.

48 Goran Lind, *Common Law Marriage: A legal Institution of Cohabitation* (OUP 2008).

state to determine the existence of a civil marriage. Ultimately, the court approved the benefits for Mrs Burden as the civil spouse.[49]

A somewhat similar approach to the issue of providing financial assistance to deceased de facto spouses can be found in the hands-on practice of South Korea. Under Subparagraph (e) of Paragraph 4, Part 1, Article 3 of the Military Pensions Act, eligible family members of a deceased military servicemember include the spouse—including a person in a de facto marriage—provided the servicemember was not legally married at the time of military service.[50] Of particular interest is the provision regarding individuals claiming the right to financial assistance, stipulating that there must be no official spouse or other common-law partner of the deceased service member.

In its ruling No. 9631 dated 30 September 2010, the Supreme Court of South Korea affirmed that, in light of the principles of lawful marriage and the prohibition of polygamy under Korean law, the provision in question encompasses individuals who have been in de facto marital relationships as persons entitled to benefits. This applies to those who have effectively lived as spouses and exhibited all the characteristics of a marital relationship but did not register their union and are therefore not recognised as spouses by the court. The Court highlights that a de facto marriage cannot compete with a legally registered marriage.[51] However, it is important to note that even if the sui iuris marriage (de facto) is illegal (for example, due to polygamy), it will be considered valid until it is annulled by a court decision.

7 CONCLUSION

The findings of the study highlight the existence of certain issues regarding the inheritance rights of de facto spouses in the event of the death of a combatant. The lack of legislative recognition of common-law partners necessitates judicial proceedings to establish cohabitation between a man and a woman as a familial unit. Clearly defining the subject matter jurisdiction between different procedural types—namely, separate and general claim procedures—ensures a more effective mechanism for protecting the claimant's rights. As the body responsible for maintaining consistency and unity in case law, the Supreme Court bears the duty of developing unified standards of proof in cases involving the establishment of the fact of cohabitation between a man and a woman as a family. An evidentiary threshold that is unpredictable or unreasonably high undermines the proper protection of individual rights and interests in such cases.

49 *Burden v Shinseki* App no 12-7096 [2013] Court of Appeal for the Federal Circuit <https://law.justia.com/cases/federal/appellate-courts/cafc/12-7096/12-7096-2013-07-16.html> accessed 1 November 2024.

50 Militare Pension Act (1994) 4705 <https://www.law.go.kr/법령/군인연> accessed 1 November 2024.

51 Case no 9631 (Supreme Court of South Korea, 30 September 2010) <https://legalengine.co.kr/cases/2aqfMrSOoJWI8gBcmN5Hrg> accessed 2 November 2024.

In its legal positions, the Supreme Court has not only determined the standard of proof but also established that claims concerning the establishment of legal facts do not constitute a direct mechanism for property division. Rather, they serve as a legal basis for resolving such cases. However, establishing the fact of cohabitation is essential for the allocation of a one-time financial assistance in the event of a combatant's death.

Ukraine's approach to providing financial assistance to the relatives of deceased servicemembers is not new in international practice. An analysis of the models adopted in the United States and South Korea illustrates a shared recognition of the importance of financial assistance for surviving family members. However, the recognition of de facto spouses differs somewhat between the two jurisdictions, indicating a difference in how such relations are viewed by the law. It should be noted that the Ukrainian legislative approach to the procedure for providing assistance in the event of a servicemember's death aligns with the global standards, as it ensures social assistance rights even for the common-law partners.

While domestic legislation in Ukraine contains both positive and negative sides in safeguarding the rights of de facto spouses, the need for legislative reform to adapt to contemporary conditions remains open. Despite the flexibility of the judicial system in Ukraine, it is not feasible to place the function of norm-setting on the courts.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СПАДКУВАННЯ ТА ОДНОРАЗОВА ГРОШОВА ДОПОМОГА ПІСЛЯ ЗАГИБЕЛІ (СМЕРТІ) ВІЙСЬКОВОСЛУЖБОВЦЯ: ПИТАННЯ ПРАВОВОГО СТАТУСУ ФАКТИЧНОГО ПОДРУЖЖЯ В УКРАЇНІ

Божена Оліярник

АНОТАЦІЯ

Вступ. *Військова агресія російської федерації проти України призвела до зростання кількості спадкових спорів за участю одного з фактичного подружжя загиблих (померлих) військовослужбовців. Поширення таких партнерств в українському суспільстві, на тлі відсутності належного законодавчого врегулювання, створює правову невизначеність, що змушує людей звертатися до суду за визнанням статусу та права на спадкування. Судова практика демонструє непослідовність у вирішенні таких справ через відсутність єдиних критеріїв оцінки доказів та процесуальних механізмів. У цьому контексті вирішення питання одноразової грошової допомоги фактичному подружжю у разі загибелі (смерті) військовослужбовця набуває важливого значення. З огляду на тривалу війну проти України, порівняльний аналіз із правовими системами Сполучених Штатів та Південної Кореї пропонує цінні знання для оцінки внутрішньої моделі України. Таким чином, передумови цього дослідження ґрунтуються на реаліях воєнного часу, недосконалості правового регулювання спадкових відносин та нагальній потребі адаптації українського законодавства до нових викликів.*

Методи. *У дослідженні використовуються різні методи, зокрема аналіз та синтез, для вивчення правових норм, судових рішень та наукових праць, а також метод узагальнення отриманих результатів. Індуктивні та дедуктивні міркування задіяні у розробці загальних висновків на основі судової практики. Абстрагування застосовується для уточнення та узагальнення ключових понять та правових категорій, пов'язаних зі спадковим правом. Формально-правовий метод використовується для аналізу норм цивільного та сімейного права України, тоді як порівняльно-правовий метод сприяє огляду зарубіжного досвіду у питаннях спадкування у цивільному шлюбі (зокрема у США та Південній Кореї). Історико-правовий метод задіюється для вивчення еволюції законодавства України у сфері спадкування, а телеологічний (цільовий) метод – для аналізу цілей, що є джерелом правових норм та судових прецедентів у цій сфері.*

Результати та висновки. *У дослідженні було визначено основні проблеми щодо спадкових спорів за участю одного з фактичного подружжя загиблих (померлих) військовослужбовців. Судова практика демонструє уніфікований підхід до оцінки доказів, що забезпечує*

однакове застосування права. Аналіз чинного законодавства та судової практики показав, що основною проблемою залишається доведення факту проживання чоловіка та жінки однією сім'єю без шлюбу, які часто потребують значної доказової бази. Міжнародний досвід, зокрема приклади США та Південної Кореї, підтверджує, що українська модель виплат грошової допомоги у разі загибелі (смерті) військовослужбовця відповідає світовим стандартам, адже забезпечує права одного з фактичного подружжя на отримання допомоги. Результати дослідження дозволяють зробити висновок про необхідність внесення змін до національного законодавства.

Ключові слова: *спадкові спори, цивільний шлюб, один з фактичного подружжя, загибель (смерть) військовослужбовця, предмет доказування, виплата у разі загибелі (смерті), одноразова грошова допомога.*

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Research Article

CONSENT TO PROCESSING PERSONAL DATA IN ONLINE BEHAVIOURAL ADVERTISING AS PER THE GDPR AND EXPERIENCE IN VIETNAM

Hau Vo Trung

ABSTRACT

Background: *The advent of computers has transformed personal information into a valuable asset. Online behavioural advertising seeks to match advertising with Internet users. However, many online behavioural advertising companies often use data collection and processing methods that violate the rights of Internet users when extracting and analysing personal data to track and profile online behavioural advertising. These risks may be related to discrimination, inequality, stereotyping, stigmatisation, and inaccuracy in decision-making. This affects the privacy of users. EU law has clear regulations on consent to process personal data in online behavioural advertising. In contrast, Vietnamese law has notable limitations, especially in recording consent to process personal data. It is necessary to improve Vietnamese law on the issue of consent to process personal data based on the provisions of EU law.*

Methods: *The article uses the analytical method to clarify the concept of personal data processing and the characteristics of online behavioural advertising. The analytical method also indicates the possibility that online behavioural advertising can hurt personal information. This method is also used to analyse EU law protecting personal data in online behavioural advertising, thereby finding experiences that Vietnamese law can learn from.*

The article also uses the comparative method. This method is mainly used to compare EU law and Vietnamese law related to the provisions on consent to process personal data in online behavioural advertising. Combined with the above analysis method, the comparative method shows the advantages of EU law compared to Vietnamese law on the issue of consent to process personal data in online behavioural advertising. From there, the article can make policy recommendations to improve Vietnamese law on this issue.

Results and conclusions: *The article concludes that Vietnam can learn from the EU on the requirement that consent to process personal data in online behavioural advertising must be given freely, with knowledge, specifically, and clearly. The article proposes policy recommendations for Vietnam on personal data consent in online behavioural advertising. First, the law must consistently define "personal data" and "personal data protection." Second, it specifies the adequate time for the data subject's consent.*

1 INTRODUCTION

The advent of computers has significantly transformed personal information into a valuable asset, fundamentally impacting the collection of personal information. Computers can store vast amounts of raw data relatively quickly, cheaply, and virtually indefinitely at incredible speeds. Processing often creates new information that serves as the basis for human or computer decision-making.

The development of telecommunications technology and the integration of computers with the Internet have further amplified the importance of information. With interconnected systems enabling the seamless transmission of data, the collection and use of personal information have become increasingly widespread. Personal data can now be shared across different computer users on the network, increasing accessibility but also raising significant privacy concerns.

Using computers to process personal information carries risks, including data being accessed or disclosed inaccurately, incompletely, or used for purposes beyond the original intent. A person's home, finances, mental state, physical condition, and thinking can be exposed to the most casual observer. Financial institutions, for example, collect and provide extensive information on individuals' creditworthiness, drinking habits, health, characteristics, reputation, extramarital relationships, religious beliefs, criminal records, race, and sexual preferences. As a result, they can reveal a complete profile of an individual's ability to repay a loan and personal life. In addition, direct marketing agencies leverage such data for online behavioural advertising.

2 METHODOLOGY AND RESEARCH METHODS

The current legal analysis focuses on the regulations governing online behavioural advertising in the European Union and Vietnam. This methodology follows a legal approach, focusing on the legislative frameworks currently in force. Specifically, the study analyses the EU and Vietnamese legislation on consent to processing personal data in online behavioural advertising, with particular attention to its negative impacts on users' privacy, information self-determination, and autonomy.

The analysis considers the current EU framework, namely the General Data Protection Regulation (GDPR), which has been effective since 25 May 2018.[1] The current legal framework of Vietnam includes the 2013 Constitution of Vietnam, the 2015 Civil Code of Vietnam, the 2016 Law on Access to Information, the 2016 Law on Children, and Decree No. 13/2023/ND-CP, issued by the Government on 17 April 2023, concerning the protection of personal data.[2]

This study hypothesises that the regulation of consent to processing personal data in online behavioural advertising under the provisions of GDPR is complete. In contrast, the provisions of Vietnamese law on this issue are sketchy. Therefore, Vietnamese law can benefit from the EU's experience regulating consent to personal data processing.

3 OVERVIEW OF PERSONAL DATA PROCESSING AND ONLINE BEHAVIOUR ADVERTISING

3.1. Overview of Personal Data Processing

According to the European Commission's classification personal data[3] is divided into: (i) contact information such as home address, place of work of the individual, email address, telephone number; (ii) technical data such as IP address, device-related data on type, international mobile equipment identity (IMEI), browser information; (iii) demographic data such as age, ethnicity, gender, education level, occupation, household income, number, gender, age of household members; (iv) location data such as mobile device, GPS data and travel history entered into satellite positioning system, radio frequency identification (RFID) sensor data; (v) interest and behavioural data such as history of websites visited and

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L 119/1.

2 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) <https://lawnet.vn/en/vb/Constitution-dated-November-28-2013-of-the-socialist-republic-of-Vietnam-362FD.html> accessed 28 November 2024; Law no 91/2015/QH13 of 24 November 2015 'Civil Code' <https://lawnet.vn/en/vb/Law-No-91-2015-QH13-The-Civil-Code-4A07E.html> accessed 28 November 2024; Law no 102/2016/QH13 of 5 April 2016 'Children Law' <https://lawnet.vn/en/vb/Law-102-2016-QH13-children-4C457.html> accessed 28 November 2024; Law no 104/2016/QH13 of 6 April 2016 'Access to Information' <https://lawnet.vn/en/vb/Law-104-2016-QH13-access-to-information-4C458.html> accessed 28 November 2024; Decree no 13/2023/ND-CP of 17 April 2023 'On Protection of Personal Data' <https://lawnet.vn/en/vb/Decree-No-13-2023-ND-CP-dated-April-17-2023-on-protection-of-personal-data-89C77.html> accessed 28 November 2024.

3 Regulation (EU) 2016/679 (n 1); 'Data Protection: Rules for the Protection of Personal Data Inside and Outside the EU' (*European Commission*, 2024) <https://commission.europa.eu/law/law-topic/data-protection_en> accessed 28 November 2024.

number of clicks on advertisements, which may include searches on sensitive topics such as health issues or religious views, games and apps used, telecommunications data from car insurance companies, social media posts, professional websites, email exchanges; (vi) financial transaction data such as history from utility providers, service contract details, income and credit rating information, loyalty card purchase history, prices paid, income and credit rating information; (vii) social media data such as profile information and posts, connections between family members and friends, photos, videos; and (viii) public records such as birth records, death records, marriage records, land registration records.

Personal data can also be distinguished into first-party and third-party data. First-party data is collected directly by businesses from their audiences and customers—individuals who directly interact with them, such as in a commercial transaction. In contrast, third-party data can be obtained from first or third parties through purchase or exchange, as well as from public records or social media analysis. Finally, third parties may collect data directly when users visit the first-party website. Under the GDPR, personal data is further divided into ordinary and sensitive personal data. Much of the data collected for advertising purposes can reveal sensitive personal information about consumers. Therefore, personal data protection can be understood as a legal safeguard, ensuring that another individual or organisation processes individuals' data responsibly.

3.2. Overview of Online Behavioural Advertising

According to the European Commission, online behavioural advertising[4] encompasses (i) advertising based on the content of the website visited or the keywords entered into the search engine; (ii) advertising based on information provided by the individual when registering on a website, such as gender, age, or location; and (iii) advertising based on observing the behaviour of individuals over time through the behaviour of accessing the website repeatedly, interacting, keywords, producing online content... to develop a specific profile to provide individuals with advertisements tailored to their interests. Online behavioural advertising can be understood as using personal data to select and display digital content to introduce goods, services, or traders of goods and services to Internet users.

The online behavioural advertising market operates by matching advertising to Internet users through personal data processing procedures based on various technologies. This process involves any operation performed on personal data such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, alignment or combination, blocking, deletion, or

4 'Consumer Market Study on Online Market Segmentation Through Personalised Pricing/Offers in the European Union' (*European Commission*, 19 July 2018) <https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalized-pricingoffers-european-union_en> accessed 28 November 2024.

destruction of such data.[5] The primary goal of online behavioural advertising is to deliver more personalised, relevant, and engaging advertising content to improve the online experience of consumers.

In the past, Internet users passively consumed information from a few local media sources. Today, they can actively search for news from multiple sources that can actively align with their interests.[6] The Internet's filtering mechanisms, whether user-selected or algorithmically driven, play a crucial role in determining the content users see. Trade associations representing the advertising industry often claim that the entire Internet ecosystem is supported by online behavioural advertising.[7] After all, without the constant flow of money from online behavioural advertising, all the free services, news, videos, and apps would disappear.[8]

Online behavioural advertising publishers argue that tracking, profiling, and targeting are simply about better understanding customers, directly providing them with tailored services, and displaying more appropriate ads. However, these companies often employ data collection and processing methods that violate Internet users' rights, extracting and analysing personal data for online behavioural advertising tracking and profiling.

4 THE IMPACT OF ONLINE BEHAVIOURAL ADVERTISING ON HUMAN RIGHTS

4.1. Online Behavioural Advertising Invades Privacy

The Internet has provided an unprecedented space for new forms of advertising to flourish and for ordinary people to collect and share information at a meagre cost. While newspapers in the late 19th century were the only ones that could effectively discover and disseminate personal stories, the digital age has made personal data collection and processing accessible

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L 281/31.

6 Emily Bell, CW Anderson and Clay Shirky, 'Post-Industrial Journalism: Adapting to the Present' (*Columbia Journal Review*, 27 November 2012) <https://www.cjr.org/behind_the_news/post_industrial_journalism_ada.php> accessed 28 November 2024.

7 IAB Europe, *Consumers Driving the Digital Uptake: The Economic Value of Online Advertising-Based Services for Consumers* (*EDAA*, September 2010) <https://www.youronlinechoices.com/white_paper_consumers_driving_the_digital_uptake.pdf> accessed 28 November 2024.

8 Internet Advertising Bureau UK, *The Data Deal: How Data-Driven Digital Advertising Benefits UK Citizens* (IAB UK 2014) <https://www.iabuk.com/policy/data-deal-how-data-driven-digital-advertising-benefits-uk-citizens> accessed 28 November 2024.

to almost anyone.[9] This raises a crucial question: how can privacy threats to big data, often associated with processing personal data, be compromised?

Tene and Polonetsky develop the concept of a piecemeal process through which profiles relating to individuals can become more visible as personal data accumulates. Ohm argues that if separate pieces of information from an anonymised database are entirely linked, they can be unlocked if just one of those pieces is linked to a person's real identity, ending up with a vast database.[10] Armed with a massive database of detailed personal information and data mining technologies, any organisation or individual can effortlessly uncover details about a person's employment, leisure activities, favourite supermarkets, or even highly sensitive information such as medical conditions, sexual orientation, and religious views.[11] Thus, tracking a person's online activities is like paparazzi taking photos of a celebrity's home.

The European Convention on Human Rights (ECHR) does not explicitly mention the "right to privacy"; however, Article 8 provides the right to respect private life, family, home, and correspondence.[12] Similarly, Article 7 of the Charter of Fundamental Rights of the European Union provides the right to respect private and family life, home, and communications.[13] At the national level, the constitutions of many European countries have incorporated the protection of privacy or private family life as a fundamental right.[14] While Article 7 of the Charter provides for the right to privacy, Article 8 provides the right to data protection, distinguishing but interlinking these two concepts. Similarly, Article 1(1) of the Data Protection Directive (DPD) provides for the right to privacy concerning the processing of personal data,[15] whereas Article 1(2) of the General Data Protection Regulation (GDPR) uses the term "right to personal data protection".[16]

9 Kim McNamara, 'The Paparazzi Industry and New Media: The Evolving Production and Consumption of Celebrity News and Gossip Websites' (2011) 14(5) International Journal of Cultural Studies 515, doi:10.1177/1367877910394567.

10 Paul Ohm, 'Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization' (2010) 57 UCLA Law Review 1746-8.

11 Carter Jernigan and Behram FT Mistree, 'Gaydar: Facebook Friendships Exposing Sexual Orientation' (2009) 14(10) First Monday, doi:10.5210/fm.v14i10.2611.

12 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013).

13 Charter of Fundamental Rights of the European Union (2012/C 326/02) [2012] OJ C 326/391.

14 These include the Belgian Constitution (2014), art. 22; the Bulgarian Constitution (2007), art. 32; Constitution of Croatia (2010), art. 35; Constitution of Estonia (2011), art. 26; Constitution of Finland (2011), para. 10; Constitution of Greece (2008), art. 9; Constitution of Hungary (2011), art. 6; Constitution of Latvia (2014), art. 96; Constitution of Lithuania (2006), art. 22; Constitution of the Netherlands (2008], art. 10; Constitution of Poland (2009), art. 47; Constitution of Portugal (2005), art. 26(1); Constitution of Romania (2003), art. 26; Constitution of Slovakia (2014), art. 19; Constitution of Spain (2011), para. 18. English versions of these Constitutions are available at: *CONSTITUTE* <https://www.constituteproject.org/?lang=en> accessed 28 November 2024.

15 Directive 95/46/EC (n 5).

16 Regulation (EU) 2016/679 (n 1).

In the case of online behavioural advertising, user data is almost always collected and analysed through fully automated systems. Traditionally, privacy concepts underpin the rationale for providing legal protection for personal information based on the assumption that people care about how others perceive them. These "*others*" can be just one person, such as in wiretapping cases or a broader audience, as with media disclosures. Importantly, privacy concerns arise when a human—not a machine—observes personal data. Some argue that computers themselves do not violate privacy; rather, privacy is only threatened when another person observes a person, so processing by wholly automated means should not be considered a threat to privacy. From a technical perspective, online behavioural advertisers, much like traditional media entities such as *The New York Times,* maintain vast databases but are often less focused on tracking individual customer data. Nonetheless, certain forms of automated processing of personal data are more sensitive, necessitating human oversight.

On the other hand, in addition to the websites that users intentionally visit, other third parties are involved in the tracking, profiling, and targeting process. Most of these activities are not carried out directly between services but through the user's browser. Technically, the communications are "*requested*" by the browser in response to instructions embedded in web pages. This raises important questions: Should this be considered part of a person's "*private and family life*" as defined in the ECHR or the Charter? Or do they fall within the private sphere of a person's "*leaving alone,*" as defined by Warren and Brandeis? Different perspectives yield opposing interpretations that lead to opposite perceptions of the extent to which the rights of Internet users are violated. Even if a user's interaction with a website is deemed private and confidential, third-party interference may strip away that privacy. Theoretically, the most common form of third-party tracking can only occur with permission from the web page and the browser. However, a counter-argument is that the average user, in most cases, needs to be made aware of third-party tracking, does not have the skills to turn off tracking, or is concerned about the limited functionality. Hence, their expectation remains that communications should be protected as private conversations.

With the proliferation of online behavioural advertising, digital reputations are becoming increasingly challenging to manage. User data can be merged with private and public profiles, as well as those of other individuals, effectively erasing the wall that exists between private and public life. While the digital landscape enables advertisers to build user profiles, it offers little to no tools for users to manage their online presence. If creating a technological item unfairly unbalances the current distribution of benefits, then a reformulation of the relevant legal policy is necessary. An electronic device is the property of its owner, but it serves the owner and online behavioural advertisers. Tracking, profiling, and targeting are all done in a decentralised, multi-level manner. Advertisers, publishers, and advertising service providers can all store user profiles, contributing to a situation where big data renders an individual's reputation nearly

impossible to manage. Unlike a credit score, where individuals can quickly figure out how to avoid negative factors based on their credit history, it is impossible for a person to access the scoring system based on a complex array of private activities, hidden records, external sources, and other customers.

4.2. Online Behavioural Advertising Violates the Right to Information Autonomy

The ability to control one's own information is a prerequisite for forming a unique "*self*" in a relatively homogeneous social context. Lynskey argues that an individual's public information can have many aspects, the combination of which can hinder their self-development.[17] Similarly, Rouvroy and Poullet have pointed out the importance of informational autonomy as an absolute element in a person's personality and the construction of personal identity.[18] Cohen views privacy as a comfortable space for individuals' personalities to form.[19] Posner argues that forced disclosure of personal information is sometimes desirable if the nature of the information will lead to external effects or if the transaction costs of voluntary information collection are too high.[20] Solove also advocates a similar approach, arguing that privacy issues should be decided based on a balance of interests from both sides.[21]

At the same time, forming personal characteristics is not just a product of individual subjectivity. Social patterns and constraints also play an essential role in maintaining a stable society. Therefore, Cohen observes that subjectivity will emerge "*gradually, in significantly constrained ways but not rigidly determined by social shaping.*"[22] In today's digital landscape, internet users have little control over data collected about them. In the era before online behavioural advertising, marketing research was conducted primarily through surveys, where consumers could decide whether to participate and provide their answers. In contrast, online behavioural data is collected automatically with only the best protections of "*opt-out*" or "*implied consent*." There is no easy way to tailor the data to an individual's wishes before sending it.

17 Orla Lynskey, 'Deconstructing Data Protection: The Added-value" of a Right to Data Protection in the EU Legal Order' (2014) 63 (3) International and Comparative Law Quarterly 569, doi:10.1017/S0020589314000244.

18 Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer 2009) 51, doi:10.1007/978-1-4020-9498-9_2.

19 Julie E Cohen, 'What Privacy is For' (2013) 126(7) Harvard Law Review 1927-32.

20 Richard A Posner, 'The Right of Privacy' (1978) 12(3) Georgia Law Review 397-401.

21 Daniel J Solove, *Understanding Privacy* (Harvard UP 2009) 50.

22 Cohen (n 19) 1910.

Individuals may be subjected to algorithmic systems where data is secretly collected and used to inform some form of decision-making, often without their explicit consent.[23] Posner, from an economic perspective, argues that making one's data public can be seen as a way to manipulate information about that person. However, manipulation is only sometimes something entirely negative. Posner believes that others can demand an individual's private information as a demand for information about an asset to inform their decision-making process.[24]

4.3. Online Behavioural Advertising Personal Autonomy

Online behavioural advertising can threaten a person's autonomy when data subjects cannot consciously identify themselves as being tracked online. The principle of equality can also be undermined by unfair treatment based on the use of personal data. Unfairness can arise from inaccurate information or overly general classifications on the one hand, from accurate but unverifiable information, and more apparent distinctions on the other.[25] All of these potential adverse effects can pose severe risks to data subjects. As personal data becomes more widely used, a helpful approach to maintaining autonomy is to address the issue of liberty and equality in the context of big data. It is easy to see why autonomy lies at the heart of liberty and equality. As Rawls paraphrases Kant's concept of autonomy, "*A man is acting autonomously when the principles of action he chooses are the fullest expression of his nature as a rational, accessible, and equal being.*"[26] The values of freedom and equality are inherently linked to autonomy.[27] A man who acts under external influence cannot be said to act autonomously. Benn presents a view of an autonomous man as one whose consistent life is rooted in a set of beliefs, values, and principles by which his actions are regulated. For him, choice and rational criticism are necessary conditions for autonomy, stating that "*being a chooser is not enough to be autonomous.*"[28]

With another approach, Raz presents the essence of personal autonomy as "*the vision of those who control, to some extent, the destiny of the individual himself, shaping the individual himself through successive decisions throughout his life.*"[29] To satisfy the element of autonomy, three conditions must be met: minimal mental capacity, full range of choices, and independence from coercion.[30] For Raz, "*the environment in which autonomous life can*

23 John Danaher, 'The Threat of Algocracy: Reality, Resistance and Accommodation' (2016) 29(3) Philosophy & Technology 245, doi:10.1007/s13347-015-0211-1.

24 Posner (n 20) 396.

25 Jiahong Chen, 'The Dangers of Accuracy: Exploring the Other Side of the Data Quality Principle' (2018) 4(1) European Data Protection Law Review 36, doi:10.21552/edpl/2018/1/7.

26 John Rawls, *A Theory of Justice* (Harvard UP 2009) 222.

27 Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 12-20.

28 SI Benn, 'Freedom, Autonomy and the Concept of a Person' (1976) 76(1) Proceedings of the Aristotelian Society 123.

29 Joseph Raz, *The Morality of Freedom* (OUP 1988) 369.

30 ibid 369-78.

develop" is essential for achieving autonomy.[31] Accordingly, a desirable model of freedom must be one that "*protects those pursuing different lifestyles from intolerance and calls for the provision of conditions of autonomy without which autonomous living is impossible.*"[32]

Between these two approaches lies Dworkin's theory of autonomy, which focuses heavily on the individual's ability to reflect on life decisions. He sees autonomy as an intermediary between a person's particular preferences and the general, principled values that the person possesses. For him, autonomy is conceived as a second-order human capacity to critically reflect on preferences and desires and accept or attempt to change these by higher-order preferences. By exercising such a capacity, humans define their nature, give meaning and coherence to their lives, and take responsibility for who they are. Dworkin points out that "*a state may be required to recognise the autonomy of its citizens. That is, it may only restrict the freedom of individuals if it can justify such restrictions by arguments that the individual himself can consider accurate.*"[33]

Raz's theory may be intrinsically relevant to data protection because it views autonomy as a matter of lifestyle rather than specific decisions. The emphasis on the role and limitations of law in promoting autonomy fits well with the ongoing debate about the model of data protection law. Much of Raz's work on legal theories concerns the seemingly conflicting normative requirements of human reason and authority. In short, his question is if the nature of law requires that organisations and individuals in society obey it without questioning its rationale, how can this be compatible with human autonomy? In everyday life, it is not uncommon for us to give up our final decision-making power or limit future choices by, for example, committing to a contract or setting a speed limit. The point is that there are many other ways to achieve the fundamental value of being able to act on our judgment by reason. For Raz, obedience to authority "*is not a denial of people's ability to act rationally, but simply a means if the authority allows the subject to confirm better reasons.*"[34]

5 EU LEGAL REGULATION ON CONSENT TO PROCESSING PERSONAL DATA IN ONLINE BEHAVIOURAL ADVERTISING

Information about EU law relating to personal data protection and the authorities ensures this law is applied consistently. It includes separate regulations in each specific aspect related to e-commerce. Specifically, (i) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning processing personal data and protecting privacy in the electronic communications sector (Directive on privacy and electronic communications).

31 ibid 391.
32 ibid 425.
33 Dworkin (n 27) 40.
34 Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 140, doi:10.1093/acprof:oso/9780199562688.001.0001.

(ii) Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. (iii) Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). (iv) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

However, direct regulation of personal data consent in online behavioural advertising is detailed in the General Data Protection Regulation (GDPR). EU data protection law applies when a company processes "personal data," information relating to an identified or identifiable data subject.[35] The definition of "processing" is comprehensive, and almost anything that can be done with personal data falls within its scope. Online behavioural advertising requires the processing of personal data. Pseudonymised data attached to cookies are personal because they "*allow data subjects to be identified, even when their real names are* unknown."[36] This is consistent with the case law of the Court of Justice of the European Union. European data protection law applies when a company is established in the European Union. The law also applies if a company is not based in Europe but uses European-based equipment to process data.[37] Alternatively, it uses cookies to track EU citizens.[38] Consent is the sole legal basis for processing personal data collected by cookies;[39] it is also the sole legal basis for processing data during the tracking period.

Under Clause 11, Article 4, according to the GDPR, consent is "*any freely given, specific, informed and unambiguous indication of the data subject's wishes which, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to the data subject*."[40] The GDPR also establishes stricter requirements for legal consent regarding children's data, sensitive data, and data used in automated decision-making. The GDPR requires that consent be a freely given, specific, informed, and unambiguous indication, by a statement or by an explicit affirmative action, by the data subject. Consent must be specific,

35 Regulation (EU) 2016/679 (n 1) art 80(2).

36 European Commission Opinion 2/2010 on Online Behavioural Advertising (adopted on 22 June 2010) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/index_en.htm> accessed 28 November 2024.

37 Lokke Moerel, *Binding Corporate Rules: Corporate Self-Regulation of Global Data Transfers* (OUP 2012) 72, doi:10.1093/acprof:oso/9780199662913.001.0001.

38 European Commission Opinion 1/2008 on Data Protection Issues Related to Search Engines (adopted 4 April 2008) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/index_en.htm> accessed 28 November 2024.

39 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications) [2002] OJ L 201/37, para (25).

40 Regulation (EU) 2016/679 (n 1) art 4, s 11.

comprehensive, based on clear and specific requirements, and be demonstrable by the controller. Specifically, consent must be freely given, consent must be specific, consent must be informed, and consent must be unambiguous.

5.1. Consent Must Be Freely Given

First of all, consent must be "*freely given*."[41] Previously, the DPD did not provide criteria for what constitutes or does not constitute "*freely given*" consent. However, the GDPR has clarified that "*consent is not considered to be freely given if the data subject does not have a genuine or free choice or is unable to refuse or withdraw consent without detriment.*"[42] The Taskforce considers that "*if the data subject does not have a genuine choice, feels obliged to give consent or would suffer negative consequences if they do not give consent, then the consent is invalid.*" [43]

Consent requirements must include (i) the availability of appropriate options and (ii) withholding consent does not result in detriment. Statements of consent prepared in advance by data controllers must be provided in an easily accessible, understandable form using clear, easy-to-understand language.[44] If the data subject's refusal to consent would put them at a disadvantage, then the consent cannot be considered freely given. The Working Group considers that "*if withdrawing the consent would result in a downgrade of the performance of the service to the detriment of the user, then consent was never lawfully given.*"[45]

Article 7.4 of the GDPR states: "*When assessing whether consent has been freely given, due regard shall be paid to whether, among other things, the performance of the contract is conditioned on consent to the processing of personal data.*"[46] In other words, if the processing of personal data is not necessary for providing a service but the provider still requests it as a condition, the consent will be considered invalid because the situation will be subject to "*due regard*." The draft GDPR proposed that "*the performance of a contract or the provision of a service shall not be conditioned on consent to the processing of data*

41 Noor Ashikin Basarudin and Ridwan Adetunji Raji, 'Implication of Personalized Advertising on Personal Data: A Legal Analysis of the EU General Data Protection Regulation' (2022) 7(22) Environment-Behaviour Proceedings Journal 109, doi:10.21834/ebpj.v7i22.4160.

42 Regulation (EU) 2016/679 (n 1) art 7.

43 European Commission, *Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679 (wp251rev.01)* (adopted 3 October 2017, last revised and adopted 6 February 2018) 10 <https://ec.europa.eu/newsroom/article29/items/612053> accessed 28 November 2024.

44 Eroupean Data Protection Board, *Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR Version 1.0* (adopted 8 October 2024) <https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2024/guidelines-12024-processing-personal-data-based_en> accessed 28 November 2024.

45 European Commission Guidelines on Automated Individual Decision-Making (n 47) 10.

46 Regulation (EU) 2016/679 (n 1) art 7, s 4.

which is not necessary for the performance of the contract or the provision of the service."[47] This proposal was rejected but reintroduced with softer wording and reworded into the current GDPR.[48] That is, consent to processing personal data for the performance of a contract is only sometimes valid, and the data controller will need to demonstrate a legitimate reason for the data processing request.[49] Therefore, for the consent to be valid, the online behavioural advertising company must demonstrate that if the Internet user expresses a refusal to consent to data processing, the online behavioural advertising company will not deny the service; otherwise, it will lead to the conclusion that this case is not "*freely given consent*."

The Task Force suggests that when determining the validity of consent, the requirements set out by other laws should be considered.[50] It states, "*Article 7.4 of the GDPR seeks to ensure that the purpose of processing personal data is not disguised nor is it accompanied by the provision of a service contract for which the personal data are not necessary*."[51] Online behavioural advertising is a separable purpose and is not necessary for the provision of online services.[52] In other words, requiring Internet users to consent to the use of their personal data for advertising as a condition for accessing a service would likely violate the provisions of the GDPR.[53]

However, users often have to click on links and read in-depth documents to understand how their data is used for online behavioural advertising. For example, Facebook requires users to click on its cookie policy to learn how they may be tracked online. The only alternative is

47 Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (21 November 2013) amendment 82 <https://www.europarl.europa.eu/doceo/document/A-7-2013-0402_EN.html> accessed 28 November 2024.

48 Council of the EU, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) - Preparation for Trilogue* (27 November 2015) 2 <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjzebx068vy6> accessed 28 November 2024.

49 Information Commissioner's Office, *Consultation: GDPR Consent Guidance* (ICO 2017) 19-21 <https://ico.org.uk/media/about-the-ico/consultations/2013610/gdpr-consent-guidance-consultation-form-word-201703.docx> accessed 28 November 2024; Philipp Hacker, 'Personal Data, Exploitative Contracts, and Algorithmic Fairness: Autonomous Vehicles Meet the Internet of Things' (2017) 7(4) International Data Privacy Law 266, doi:10.1093/idpl/ipx014.

50 European Commission Opinion 15/2011 on the Definition of Consent (adopted 13 July 2011) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/index_en.htm> accessed 28 November 2024.

51 Frederik J Zuiderveen Borgesius and others, 'Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the ePrivacy Regulation' (2017) 3(3) European Data Protection Law Review 360-1.

52 European Commission Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/index_en.htm> accessed 28 November 2024.

53 Zuiderveen Borgesius (n 51) 360-1.

to click the "*manage data settings*" button to navigate through a more complex interface that makes it easier for users to opt out of specific cookies. Data subjects often need to be allowed to give separate consent for their data to be processed by different parties for online behavioural advertising purposes.[54]

In summary, consent is not considered to be freely given in the following cases:

(i) There is an imbalance between data subjects and data controllers. Unbalanced situations arise when one party has a dominant market position, as with online behavioural advertising companies.[55] In all these cases, the online behavioural advertising company must demonstrate no risk of "*deception, intimidation, coercion or significant negative consequences if the data subject does not consent*."
(ii) The consent given is not sufficiently specific. That is, the personal data subject does not have the opportunity to give separate consent for different personal data processing activities.
(iii) Consent to processing personal data is considered a condition of the contract's performance. That is, the performance of the contract, including the provision of services, is entirely dependent on consent, even if such consent is not necessary for the performance of the contract. The control that EU agencies exercise over national authorities in the matter of consent is also clearly reflected in the judgment of the General Court dated 29 January 2025.[56]

On 7 March 2024, the European Court of Justice issued a critical decision on the scope of the definition of "personal data" under EU data protection law. Case C-604/22 aimed at a more objective approach to the concept of personal data. The case primarily addressed the issue of whether the European IAB, which provides its members with a framework to enable them to comply with the GDPR, could be considered a (joint) controller. The Court decided that the TCF string, a combination of letters and characters, could be regarded as personal data. The Court also assessed that combining the TCF string with additional data, such as an IP address, could help with re-identification. The Court's decision opened the door to a more "objective" approach to personal data. This "protective" approach is realiSed by considering that regardless of who holds the additional data, if the data can be re-identified through additional information, then the

54 Centre for Information Policy Leadership, *The Limitations of Consent as a Legal Basic for Data Processing in the Digital Society* (CIPL 2024) <https://thelivinglib.org/the-limitations-of-consent-as-a-legal-basis-for-data-processing-in-the-digital-society/> accessed 28 November 2024.

55 Eroupean Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679* (adopted 4 May 2020) <https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_en> accessed 28 November 2024.

56 Case T-70/23 (Joined Cases T-70/23, T-84/23, T-111/23) *Data Protection Commission v European Data Protection Board* (General Court (EU), 29 January 2025) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=294757&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1971675> accessed 28 November 2024.

data must be regarded as personal data.[57] In addition, consent can be withdrawn, according to the Court's judgment of 4 October 2024, Case C-200/23.[58]

5.2. Consent Must be Explicitly Given

The requirement that consent must be given through a specific act was addressed by the ECJ in Case C-673/17(57-58).[59] In it, the Court stated that consent is invalid if information storage or access to information already stored in the website user's terminal is permitted by a checkbox pre-checked by the service provider, which the user must uncheck to refuse. In this decision, the Court linked affirmative action to specificity, stating that consent must relate specifically to the processing of the data in question and cannot be inferred from the data subject's indication of his or her wishes for other purposes. Consent that is freely given, specific, informed, and unambiguous can only be the user's explicit consent, given with full knowledge of the facts and after providing complete information about the use of their data. In Case C40/17,[60] the ECJ dealt with a third-party social add-on (a Facebook-like button) included in a website. The add-on caused the visitor's browser to request content from the owner of the add-on (Facebook) and transmit personal data about the visitor to that owner.

The Court affirmed that the website operator should only request consent to transmit the add-on to the owner. This requires the owner of the add-on to specify the legal basis for any further processing. Another relevant case was recently decided by the French Council of State, which heard Google's appeal against a fine imposed by the French National Data Protection Commission (CNIL). The judges upheld the fine, stating that Google violated the requirement that consent must be informed, specific, unambiguous, and based on affirmative action as provided in Article 4 of the GDPR. Users are provided with a pre-ticked box allowing advertising personalisation, contrary to affirmative action; they cannot easily access the information for processing, contrary to the requirement of freedom of expression, and the information is not specific and too vague. Therefore, the processing of user data, especially in the case of online behavioural advertising, lacks a legal basis according to Article 6, GDPR provisions.

57 Case C-604/22 *IAB Europe v Gegevensbeschermingsautoriteit* (CJEU (Fourth Chamber), 7 March 2024) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=283529&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1971675> accessed 28 November 2024.

58 Case C-200/23 *Agentsia po Vpisvaniyata* (CJEU (First Chamber), 4 October 2024) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=290701&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1971675> accessed 28 November 2024.

59 T Van Canneyt and others, 'Data Protection: CJEU Case Law Review – 1995-2020' (2021) 56 Computerrecht 78.

60 Case C-40/17 *Fashion ID GmbH & Co KG v Verbraucherzentrale NRW eV* (CJEU (Second Chamber), 29 July 2019) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=216555&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1971675> accessed 28 November 2024.

5.3. Consent Must Be Given in an Informed Manner

The third criterion for the validity of consent is whether the consent is given "*informed*"? The Task Force explains that "*for consent to be informed, it is necessary to inform the data subject of certain elements that are important for making a choice and that such information is clear, distinguishable from other matters and provided in an understandable and accessible form.*"[61] There is a close connection and even overlap between the "specific" and "*informed*" requirements.[62] The GDPR stipulates that "*for consent to be informed, the data subject must at least know the controller's identity and the intended purpose of processing personal data.*"[63]

On the other hand, the information that the data controller is obliged to provide is broader in scope than what the "*specific*" element requires. According to Article 13 and Article 14 of the GDPR, the data controller must provide details such as: "*information about the data controller; the purposes and legal basis for the processing; the categories of personal data concerned; the identity or categories of data recipients; the period for which the personal data is stored; the right of the data subject to withdraw consent; the existence of automated decision-making and the potential for influence on the data subject.*"[64]

All of these elements must be mentioned in the privacy policy for online behavioural advertising. The collection of personal data in online behavioural advertising often occurs not only on the intended website of the user but also on the advertiser's server. Information about the advertiser, the publisher, the advertising service provider, and other relevant parties must be made clear to the data subject, including the scope of the data processed and how the personal data is processed. To express consent, at a minimum, the data subject must know the controller's identity and the purposes for which the personal data are being processed. The GDPR states that "*consent shall cover all processing operations carried out for the same or more purposes. Where processing has multiple purposes, consent shall be required for all processing operations for the same or more purposes*". Informed consent is also linked to the idea of transparency since data subjects can be said to be informed only when a person has a real opportunity to know the processing features, i.e., when the information provided is detailed but also specific and understandable.

A company may process personal data for online behavioural advertising when the data subject has given "*explicit consent.*"[65] Explicit consent is interpreted as meaning that the condition that an authorised entity, to be able to bring a representative action under that provision, must assert that it considers the rights of a data subject provided for in that

61 Eroupean Data Protection Board, *Guidelines 05/2020* (n 55) para 67.
62 Information Commissioner's Office (n 49) 21-2.
63 Regulation (EU) 2016/679 (n 1) para 42.
64 ibid, art 13.
65 Regulation (EU) 2016/679 (n 1) art 80(2).

regulation to have been infringed "as a result of the processing", within the meaning of that provision, is satisfied where that entity asserts that the infringement of the data subject's rights occurs in the course of the processing of personal data and results from the controller's infringement of its obligation, under the first sentence of Article 12(1) and Article 13(1)(c) and (e) of that regulation, to provide the data subject, in a concise, transparent, intelligible and easily accessible form, in clear and plain language, with information relating to the purposes of that data processing and the recipients of such data, at the latest when they are collected. This was made clear in the court judgment of 11 July 2024, dispute C-757/22.[66]

Transparency is a prerequisite for data subjects to have some control over how online behavioural advertising companies use their data. Articles 10 and 11 of the GDPR require online behavioural advertising companies to provide at least information regarding their identity and processing purposes and provide additional information to ensure fair processing. Companies must always be transparent about processing personal data, regardless of whether they rely on consent. Internet users must be provided with additional information that is easy to read, and they must act affirmatively to give consent. These regulations have a significant impact on the way stakeholders present information online and ask for user consent.

6 VIETNAM CONTEXT OF ONLINE BEHAVIOURAL ADVERTISING

According to the 2023 E-commerce White Book, the size of Vietnam's retail e-commerce market will reach 20.5 billion USD, an increase of 4 billion USD (equivalent to 25%) compared to 2022, and Vietnam's e-commerce growth rate is among the top 10 countries with the fastest trade growth rate in the world.[67] Many major e-commerce sites in Vietnam have been hacked, and their data has been stolen.[68] The shortage of specialised human resources and security technology makes dealing with cyber security threats difficult.[69] Sometimes, businesses intentionally share customer

66 Case C-757/22 *Meta Platforms Ireland (Action représentative)* (CJEU (Fourth Chamber), 11 July 2024) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=288148&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=143131> accessed 28 November 2024.

67 Minitry of Industry and Trade of the Socialist Republic of Vietnam, *E-commerce White Book 2023* (Department of E-commerce and Digital Economy 2024) 40.

68 Bui Thi Nguyet Thu, 'Some Solutions to Contribute to Improving Personal Data Protection in Vietnam' (2024) 26 Vietnam Integration Journal 339.

69 Manh Chung, 'Consecutive Attacks on Vietnamese Businesses: "Just the Tip of the Iceberg"' *VnEconomy* (Hanoi, 6 April 2024) <https://vneconomy.vn/lien-tiep-cac-vu-tan-cong-mang-vao-doanh-nghiep-viet-chi-la-phan-noi-cua-tang-bang.htm> accessed 28 November 2024.

information with third parties without their consent.[70] In addition, information disclosure also occurs due to subjective reasons from consumers.[71]

When participating in activities on the Internet platform, the right to ensure the safety and confidentiality of consumers' information is stipulated in Article 6 of the Law on Protection of Consumer Rights 2010. However, these regulations only acknowledge the legal protection of Internet users' information—a small part of the concept of privacy. The lack of clear rules on the specific responsibilities of related parties, such as publishers and advertising networks, in users' activities on the Internet platform leads to a lack of legal tools to force associated entities to comply. Because advertising activities on the Internet platform today still have a huge gap compared to traditional advertising methods. Online advertising has many loopholes, such as difficulty in control, the lack of legal basis for organisations providing this activity, and specific responsibilities or conditions for online advertising activities. This form is gradually becoming a tool for illegal advertising, as well as advertising in forms that do not meet the conditions prescribed by law, to appear more and more and cause significant harm to consumers.

Vietnam's data protection law must ensure that data owners have a complete choice about whether to consent to the use of their data. This is important because, currently, in Vietnam, online behavioural advertising systems lack three technical elements that affect the consent of personal data owners, as described below.

First, there is a need for alternative services. In key online sectors such as search engines and video streaming, a few service providers control the market. In effect, Internet users often have no viable alternatives, as the most essential features are available only through these platforms.

Second, there is a lack of alternative data processing models. While some "pay-as-you-go" or "freemium" (free + premium) business models are gaining popularity in some sectors,[72] "free" services supported by online behavioural advertising continue to dominate the Internet environment. For example, in the social media sector, major service providers are still primarily funded by online behavioural advertising revenue.[73]

70 Phong Linh, 'Panicking about Personal Information Disclosure: 80% of the Causes Come from this Reason…' *Thanh Nien* (Hanoi, 18 August 2023) <https://thanhnien.vn/phat-hoang-vi-lo-thong-tin-ca-nhan-80-nguyen-nhan-xuat-phat-tu-ly-do-nay-185230817164650831.htm> accessed 28 November 2024.

71 Thu Huong, 'Be Careful to Avoid Being Scammed When Buying Online' *Quảng Ngãi* (Quang Ngai, 14 March 2024) <https://baoquangngai.vn/phap-luat/202403/canh-giac-tranh-bi-lua-dao-khi-mua-hang-online-06d1722/> accessed 28 November 2024.

72 Mark Sweney, 'Online Paid-content Market Poses Threat to Traditional Advertising' *The Guardian* (London UK, 1 November 2012) <https://www.theguardian.com/media/2012/nov/01/online-paid-contect-rise-8-billion-pounds> accessed 28 November 2024.

73 Kurt Wagner, 'Pinterest Expects to Make More than $500 Million in Revenue this Year' (*CNBC*, 21 March 2017) <https://www.cnbc.com/2017/03/21/pinterest-revenue-projected-at-500-million-this-year.html > accessed 28 November 2024.

Third, there is a need for alternative data networks. When a data subject withdraws consent, the data controller is obliged to delete the relevant data immediately[74] unless another legal basis for processing applies or an exception is in place.[75] At the same time, if the data has been shared with third parties and the data subject requests its deletion, the data controller must "*take reasonable steps, including technical measures,*" to notify them of the request.[76] Notably, the data controller must ensure that withdrawing consent is as easy as giving consent.[77]

7 CONCLUSIONS

Online behavioural advertising has been shown to negatively impact consent for processing personal data. The article's analysis shows that this can lead to privacy violations, information self-determination violations, and user autonomy violations. EU law has addressed these concerns through regulations that govern consent for personal data processing, requiring that consent be freely given, explicit, and informed. Vietnam can learn some lessons from these regulations.

Online behavioural advertising has been shown to be negligent in obtaining consent to process personal data. The article's analysis shows that this can lead to privacy violations, information self-determination violations, and user autonomy violations. EU law has controlled these issues through regulations that prescribe the appropriate obtaining of consent for processing personal data. Consent must be given freely, explicitly, and informedly. Vietnam can learn some lessons from these regulations.

Vietnam has 69 legal documents related to personal data protection. First, the 2013 Constitution of Vietnam stipulates the right to protect information about private life, family secrets, and personal secrets. Then, the 2015 Civil Code, the 2016 Law on Access to Information, and the 2016 Law on Children also use "information about private life, personal secrets, and family secrets" but do not define these terms. Decree No. 13/2023/ND-CP, dated 17 April 2023, defines "personal data" and "personal data protection," but its scope does not cover all areas of society.[78]

74 Regulation (EU) 2016/679 (n 1) art 17, para 1.

75 ibid, art 17, para 1, (b).

76 ibid, art 17, s 2.

77 ibid, art 17, s 3.

78 Law on Cyber Security 2015; Law on Denunciation 2013, Decree No. 146/2018/ND-CP dated October 17, 2018, detailing and guiding measures to implement several articles of the Law on Health Insurance; Decree No. 85/2016/ND-CP on ensuring information system security at different levels; Decree No. 72/2013/ND-CP dated July 15, 2013, on management, provision and use of internet services and information on the network; Decree No. 52/2013/ND-CP dated May 16, 2013, on e-commerce; Decree No. 64/2007/ND-CP on the application of information technology in the activities of government agencies.

Legal documents are not unified in terms of personal data protection, and many different terms are used to express this issue. The lack of uniformity in terminology has caused difficulties in application. Therefore, Vietnamese law needs to unify the use of the term "personal data" to ensure compatibility in content, scope, method, and specific application cases. Vietnam should refer to the provisions of the GDPR to develop a definition for the term "personal data."

In addition, the provisions of Vietnamese law are also unclear on the consent of the personal data subject. Article 11 of Decree 13/2023/ND-CP, dated 17 April 2023, stipulates the data subject's consent in a list-based manner. Specifically, the consent of the data subject is only valid when: (i) the data subject voluntarily and knows the content of the data type, the purpose of processing personal data, and the person who will receive the data; (ii) the data subject's consent must be clearly and specifically expressed in writing or by voice; (iii) the consent must be given for the same purpose; (iv) consent is expressed in a verifiable format; and (v) the data subject's silence or non-response is not considered consent.

However, these provisions are insufficient to fully protect the data owner's rights. Therefore, Vietnamese law could strengthen consent regulations by adopting clearer and more specific provisions on voluntary consent, drawing inspiration from the GDPR.

Besides, Vietnamese law needs to be more specific on the following issues:

First, telecommunications service providers should be required to strictly censor and ensure the accuracy of information, humane content, and conformity with cultural traditions before coordinating with service users to post advertisements on electronic media.

Second, it is necessary to quickly complete and supplement more specific qualitative and quantitative regulations and directly mention advertising on electronic media.

Third, relevant parties must ensure that systems running in browsers can more accurately identify the current user interacting with the system. One option is to use keystroke dynamics, which can be changed depending on each user. Another option is to identify the current user based on the last few pages viewed immediately. That is, if a user visits several websites related to children in a short period, the current user is likely a child rather than an adult, so timely solutions can be taken to prevent and limit online behavioural advertising at that time. This is also the social responsibility of businesses towards consumers, especially children.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗГОДА НА ОБРОБКУ ПЕРСОНАЛЬНИХ ДАНИХ У ПОВЕДІНКОВІЙ ОНЛАЙН-РЕКЛАМІ ВІДПОВІДНО ДО GDPR ТА ДОСВІД В'ЄТНАМУ

Хау Во Трунг

АНОТАЦІЯ

Вступ. *Поява комп'ютерів перетворила особисту інформацію на цінний актив. Поведінкова онлайн-реклама прагне адаптувати рекламу до користувачів Інтернету. Однак багато компаній, що займаються цим питанням, часто використовують методи збору та обробки даних для відстеження та профілювання поведінкової онлайн-реклами, які порушують права користувачів Інтернету. Ці ризики можуть бути пов'язані з дискримінацією, нерівністю, стереотипами, стигматизацією та неточністю у прийнятті рішень. Це впливає на конфіденційність користувачів. Законодавство ЄС чітко регламентує згоду на обробку персональних даних у поведінковій онлайн-рекламі. Натомість в'єтнамське законодавство має значні обмеження, особливо щодо питань згоди на обробку персональних даних, тож це необхідно вдосконалити, взявши за основу положення законодавства ЄС.*

Методи. *У статті використовується аналітичний метод для з'ясування поняття обробки персональних даних та характеристик поведінкової онлайн-реклами. Цей метод вказує на можливість того, що поведінкова онлайн-реклама може завдати шкоди персональним даним. Аналітичний метод також використовується для аналізу законодавства ЄС щодо захисту персональних даних у поведінковій онлайн-рекламі, що дає змогу дізнатись про досвід, який може бути використаний у в'єтнамському законодавстві.*

У дослідженні було застосовано також порівняльний метод. Цей метод в основному використовується для порівняння законодавства ЄС і законодавства В'єтнаму щодо положень про згоду на обробку персональних даних у поведінковій онлайн-рекламі. У поєднанні з наведеним вище методом аналізу порівняльний метод показує переваги законодавства ЄС над законодавством В'єтнаму щодо питання згоди на обробку персональних даних у поведінковій онлайн-рекламі. На основі цього в статті можна сформулювати рекомендації щодо політики для покращення в'єтнамського законодавства з цього питання.

Результати та висновки. *У статті було зроблено висновок, що В'єтнам, з огляду на досвід ЄС, може повчитися ставити вимоги стосовно того, що згода на обробку персональних даних у поведінковій онлайн-рекламі повинна надаватися вільно, зі знанням справи, конкретно та чітко. У дослідженні пропонуються рекомендації щодо політики В'єтнаму стосовно надання згоди на персональні дані в поведінковій онлайн-рекламі. По-перше, закон має узгодити визначення понять «персональні дані» та «захист персональних даних». По-друге, має бути визначенно відповідний час для отримання згоди суб'єкта даних.*

Ключові слова: *поведінкова онлайн-реклама, підстави для згоди, персональні дані.*

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Research Article

LEGAL CHALLENGES OF AI AND AUTOMATION IN THE WORKPLACE

Abdulaziz Abdulrhman Mohammed Alkhalifa

ABSTRACT

Background: *In recent years, the development of AI has increased, and employers have begun to rely on AI to deliver tasks such as recruiting, mentoring, and training. This reliance has raised concerns about the legal challenge AI may impose in the workplace. Several countries have established certain guidelines to minimise this implication and ensure benefits from such technologies. Other countries have not taken any action to address the issue. This creates ambiguity for employers, employees, and third parties on how to navigate AI technologies without violating relevant laws.*

Methods: *The paper contributes and aims to remove the ambiguity surrounding automation and the workplace by examining how artificial intelligence affects employment and exploring possible solutions to overcome these challenges. To achieve this, the study analyses each legal issue through legal opinions, court rulings, and a review of existing laws. The research primarily focuses on the US experience while incorporating insights from other jurisdictions, including the UK, Ukraine, Korea, Japan, Australia, and Saudi Arabia. Ultimately, the study aims to examine whether AI can be effectively integrated within current legal frameworks.*

Results and conclusions: *The study finds that AI imposes various challenges on the workplace that challenge laws and regulations. However, it concludes that it is possible to achieve the most beneficial outcome with the adoption of several legal alterations that ensure protection, justice, and values.*

1 INTRODUCTION

AI technology has experienced notable developments in recent days, reaching a stage where it can produce innovative ideas and solutions comparable to those of humans. It operates with greater speed and efficiency than human beings. This was not the case in 1956 when the renowned mathematician John McCarthy laid the foundation for the field of Artificial Intelligence.[1] Since its inception, AI has gone through enormous development, culminating in groundbreaking developments such as the introduction of ChatGPT by OpenAI. Today, AI can produce innovative responses in seconds and perform a progressive range of activities, including passing the bar exam. Its capacities now extend to data processing, medical diagnostics, customer service, predictive maintenance, fraud detection, financial trading, and more. This has encouraged governments and corporations to adopt and increase their reliance on AI technologies in the workplace.

Automation in the labour market has been on the rise in recent years. It is anticipated that 40% of employment will be impacted by AI, while machine learning will affect 60%. Certain occupations are at higher risk of automation.[2] According to the Organization for Economic Cooperation and Development (OECD), automation has been most prevalent in the construction and extraction industries,[3] where 28% of employment across OECD countries is now automated.

In contrast, employment in community and service jobs, education, legal, and management are at the least risk of automation. This does not indicate the disappearance of humans in higher-risk occupations; rather, AI will be complemented by AI. Regardless of whether AI replaces or supports human workers, automation raises significant legal concerns. Legal scholars and experts around the globe have shed light on the possible legal challenges of this shift—not only for workers but also for the companies that create these technologies. As Danial Bron, Co-Founder of Deployo AI, states, "Companies investing in and developing these automated technologies also face daunting legal questions about liability, taxation, intellectual property protections, and ethical obligations to their workforce. This complex legal landscape demands nuanced solutions that enable ongoing innovation and productivity gains while also safeguarding broader

1 Coursera Staff, 'The History of AI: A Timeline of Artificial Intelligence' (*Coursera*, 25 October 2024) <https://www.coursera.org/articles/history-of-ai> accessed 17 December 2024.

2 Henrik Ekelund, 'Why There Will Be Plenty of Jobs in the Future – Even with AI' (*World Economic Forum*, 26 February 2024) <https://www.weforum.org/stories/2024/02/artificial-intelligence-ai-jobs-future/> accessed 17 December 2024.

3 Julie Lassébie and Glenda Quintini, *What Skills and Abilities Can Automation Technologies Replicate and What Does It Mean for Workers?: New Evidence* (Social, Employment and Migration Working Papers 282, OECD 2022).

societal interests."[4] This underscores the importance of crafting fair regulations and policies that are balanced and provide adequate protection for workers and ethics. This regulation can harness automation and ensure an equitable future.

Some current laws and regulations governing labour and employment were enacted before the age of AI and automation, making them potentially ineffective in governing AI and automation. Additionally, these laws may struggle to keep up with these rapid advancements in AI and automation, [5] challenging their application to these technologies.

The adoption of automation in the workplace introduces complex legal issues that could disrupt the labour market. Failing to address these issues is likely to result in costly litigation. While automation has the potential to enhance accuracy and productivity in the workplace, this is only achievable if it is carefully implemented impeccably and continuously monitored.[6] Otherwise, it may give rise to significant legal concerns.

One significant concern that results from automation is discrimination and bias in the workplace. The White House, along with the National Institute of Standards and Technology (NIST) and the Equal Employment Opportunity Commission (EEOC), has established that critical dependence on AI can lead to biased and discriminatory decisions.[7] The workplace has benefited from AI in recruiting, training, monitoring, dismissal, and innovation. While the workplace can benefit from AI in producing innovative expression and creation, it can raise legal challenges, particularly concerning intellectual property and potential infringements.

Furthermore, the concept of integrating AI in the workplace presents legal concerns related to health and safety, data protection, emerging legal requirements, unjust dismissal, and intellectual property. This paper navigates the possible effects of integrating AI technologies in the workplace and examines the legal challenges it poses to labour law and intellectual property law.

4 Daniel Bron, 'Automation's Legal Maze' (*LinkedIn*, 12 September 2023) <https://www.linkedin.com/pulse/automations-legal-maze-daniel-bron/> accessed 17 December 2024.

5 Anish Kumar, 'Navigating Labor Law in the Age of Artificial Intelligence and Automation' (*The Legal Quorum*, 7 June 2024) <https://thelegalquorum.com/navigating-labor-law-in-the-age-of-artificial-intelligence-and-automation/> accessed 17 December 2024.

6 Priyanshu Sahu, 'AI in Labour Relations: Legal Implications and Ethical Concerns' (*Academike*, 26 August 2024) <https://www.lawctopus.com/academike/ai-in-labour-relations-legal-implications-and-ethical-concerns/> accessed 17 December 2024.

7 Christopher Wilkinson and others, 'How AI and Automated Systems Use Can Lead to Discrimination in Hiring' (*Perkins Coie*, 17 February 2023) <https://perkinscoie.com/insights/update/how-ai-and-automated-systems-use-can-lead-discrimination-hiring> accessed 17 December 2024.

2 METHODOLOGY

The paper follows a doctrinal legal research method, examining relevant laws, regulations and court rulings to clarify the legal challenges AI imposes on the workplace. It studies relevant laws in the US and Saudi Arabia while referring to other jurisdictions. It analyses relevant court rulings and their reasoning to support the author's argument. The research also presents data from the UK, Ukraine, Korea, Japan, Australia, and Saudi Arabia, with particular emphasis on the American experience.

The study determines the possible challenges arising from AI and automation, analysing them through legal opinions, court rulings, and legal observation of current laws. The paper divides the study into several sections, including an introduction, an analysis of AI's legal challenges in the workplace—such as discrimination, privacy violations, liability determination, and intellectual property concerns—and a conclusion.

The study begins with an overview of automation and its impact on the workplace and intellectual property (IP) sector. Then, it analyses the possible challenges of AI in the workplace and illustrates how it may contradict labour laws. Each challenge is independently analysed using insights from leading jurisdictions, such as the US and the UK, before proposing resolutions to each challenge based on the experience of the international communities. Finally, the study explores the challenges of AI on intellectual property law, drawing from successful practices of different countries, including the US, UK, Ukraine, Korea, Japan, Australia, and Saudi Arabia, and offers solutions.

3 THE LEGAL CHALLENGES OF AUTOMATION IN THE WORKPLACE

Adopting an automated workplace environment can lead to various legal challenges, which include discrimination, privacy violation, ambiguity in liability determination and challenges with intellectual property ownership and infringements.

3.1. Automation and Discrimination in the Workplace

Discrimination resulting from automation is a growing concern because the training data for AI may contain biases, leading to prejudiced algorithms.[8] In 2021, a 40-year-old woman in Germany attempted to purchase clothing from an online retailer but could not complete the order because the website rejected it. She was surprised as she had no red flags with credit agencies. Later, she discovered that credit agencies use a system that considers women her age not to be creditworthy.[9]

8 Sahu (n 6).

9 Jessica Wulf, *Automated Decision-Making Systems and Discrimination: Understanding Causes, Recognizing Cases, Supporting Those Affected : A Guidebook for Anti-Discrimination Counseling* (AlgorithmWatch 2022).

This kind of discrimination is not limited to online retail—it also extends to the workplace, where AI plays a role in employment decisions. Job advertising algorithms, for instance, target users based on predicted engagement rather than fairness. A 2020 experiment examining job postings for truck drivers and educators demonstrates this bias. On Facebook, the truck driver job ads were shown to 4,864 men compared to 386 women, while childcare job postings targeted 6,456 women compared to just 258 men.[10] This indicates how AI-driven automation can contribute to gender discrimination in employment. The issue does not lie in the algorithms utilised by the AI themselves but in their potential to cover unequal and discriminatory practices.

A recent lawsuit was filed in the *US vs Workday*, alleging its AI recruitment screening tool is prejudiced.[11] The court denied the defendant's motion for dismissal. The plaintiff argued that since 2017, he had applied for over 100 jobs at entities using Workday's screening tools, yet his applications were rejected despite meeting all the required qualifications. He alleged that he provided information about the college he graduated from, a historically Black college and that he had completed some required tests disclosing his experiences with anxiety and depression.

Workday contended that, as a software vendor, it could not be held liable for employment discrimination. Nevertheless, the court rejected this claim, asserting that, under the law, Workday could be considered an agent of employers. At the same time, the court also found that the plaintiff had failed to submit sufficient evidence to prove intentional discrimination and ultimately decided not to proceed with the case.

Despite this ruling, the lawsuit highlights concerns about automation bias in AI-driven decision-making systems. It underscores the potential for AI-driven decision systems to be questioned and scrutinised for discrimination claims.

Countries and governments have enacted laws and regulations to eliminate workplace discrimination. The US, for instance, has a unique legal system that sheds light on discriminatory practices through civil rights laws that can govern AI-driven practices.[12]

10 Stephanie Grasser, 'Impact of Artificial Intelligence on Women's Human Rights: An International Legal Analysis' (Diploma thesis, Karl-Franzens University of Graz, Institute of Law 2024) <https://www.netidee.at/impact-artificial-intelligence-womens-human-rights> accessed 19 January 2025.

11 Emilie Shumway, 'Lawsuit Alleging Workday's AI Tools Are Discriminatory Can Move Forward, Court Says' (*HR Dive*, 17 July 2024) <https://www.hrdive.com/news/workday-ai-tools-discrimination-lawsuit-california/721482/> accessed 17 December 2024.

12 Xukang Wang and others, 'Algorithmic Discrimination: Examining Its Types and Regulatory Measures with Emphasis on Us Legal Practices' (2024) 7 Frontiers in Artificial Intelligence 1320277, doi:10.3389/frai.2024.1320277.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees or applicants based on religion, sex, colour, and race.[13] This law applies to all processes related to employment, including screening, transfers, and evaluating recruitment decisions.[14] However, liability is reliant on whether an employer's procedures result in adverse impacts that violate Title VII.

In the process of hiring using AI-driven decision tools, two existing legal doctrines may serve as the basis for discrimination claims: disparate treatment and disparate impact.[15] Disparate treatment occurs when employees receive different treatment based on gender, sex, origin, etc.[16] This claim cannot be established solely by proving that the employer intentionally inputs discriminatory data that are biased against protected characteristics. Plaintiffs must meet certain conditions to establish this claim. According to the U.S Courts of Appeals for the Ninth Circuit, "to establish a prima facie case of disparate treatment under Title VII, a plaintiff must show: (1) he is a member of a protected class; (2) he was qualified for his position; and (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably."[17]

Disparate impact, on the other hand, refers to unintentional discrimination arising from policies that appear neutral but disproportionately affect protected groups.[18] This type of disparate treatment becomes a concern when automated hiring systems require applicants to submit data that may correlate with protected characteristics. For example, software that tracks applicants based on their geographical location could unintentionally result in the exclusion of applicants of a particular race, as they are less likely to live in the required location.

In disparate impact claims, plaintiffs will often encounter some obstacles: determining a policy or a practice that specifically led to the conflicted decision, achieving the statistical requirement to prove that the policy results in disparate impact, and refuting the employer's argument that the policy or the practice is a business necessity.[19]

13 'Civil Rights Act @60: Title VII of the Civil Rights Act of 1964: Requiring Discrimination-Free Workplaces for 60 Years' (*US Equal Employment Opportunity Commission*, 2024) <https://www.eeoc.gov/title-vii-civil-rights-act-1964-requiring-discrimination-free-workplaces-60-years> accessed 17 December 2024.

14 Ifeoma Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention the Paradox of Automation as Anti-Bias Intervention' (2020) 41(5) Cardozo Law Review 1671, doi:10.2139/ssrn.2746078.

15 ibid.

16 'What is Disparate Treatment Discrimination – and How is it Proven?' (*Thomson Reuters*, 10 May 2022) <https://legal.thomsonreuters.com/en/insights/articles/the-basics-of-disparate-treatment-discrimination-under-title-vii> accessed 17 December 2024.

17 Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit: 10.1 Civil Rights–Title VII–Disparate Treatment–Without Affirmative Defense of "Same Decision"* (US Court for the Ninth Circuit 2017, Last Updated November 2024) 276 <https://www.ce9.uscourts.gov/jury-instructions/node/167> accessed 17 December 2024.

18 Wilkinson and others (n 7).

19 Ajunwa (n 14).

To address these difficulties, Professor Ifeoma Ajunwa, a legal scholar at the University of North Carolina, suggested a new theory for liability, which is discrimination per se. According to Professor Ajunwa, "The discrimination per se would allow for a third cause of action under Title VII, and the purpose is to aid plaintiffs who cannot show proof of disparate treatment or who would have difficulty obtaining the means to show the statistical proof of disparate impact. Title VII requires intent for liability to attach, or in the absence of intent, a clear demonstration of disparate impact with no excuse of business necessity for the disparity."[20] This theory would shift the burden of proof from the plaintiff to the defendant. Under the discrimination per se doctrine, a plaintiff could declare that an employment procedure, combined with its potential impact on a protected group, is inherently unlawful.

To minimise the possibility of discrimination resulting from automation, the US has established guidelines for employers to follow. For instance, the **Equal Employment Opportunity Commission** (**EEOC**) has provided guidelines to minimise potential discrimination. These guidelines allow an employer to assess their automated decision-making system by evaluating whether a given practice results in a significantly lower selection rate for one group compared to another.[21] If an automated system disproportionately impacts a protected group, it violates the law.

The selection rate refers to the percentage of candidates who are hired. It is calculated by dividing the number of hired candidates from the group by the total number of individuals in that group. To illustrate, consider a scenario where 120 applicants—80 white and 40 black—take a test evaluated by an algorithm. Assuming the result shows that only 12 black applicants have succeeded to the next level compared to 48 white, this indicates that the selection rate is 60% for the white group and 30% for the black group. This discrepancy could indicate potential bias in the system.

Furthermore, the EEOC guidelines clarify that an employer may still be liable for bias caused by an automated system, even if the system was designed or operated by a third party, such as a software vendor. Employer liability is dependent on whether the employer administers the hiring practice or allows agents to act on their behalf. Thus, employers should take into consideration whether the selection rate for the protected group has been tested for potential bias before implementation. However, even if the vendor provides inaccurate results, the employer can still be liable.

20 ibid 1727.

21 US Equal Employment Opportunity Commission, 'Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures under Title VII of the Civil Rights Act of 1964' (*US EEOC*, 18 May 2023) <https://data.aclum.org/wp-content/uploads/2025/01/EOCC_www_eeoc_gov_laws_guidance_select-issues-assessing-adverse-impact-software-algorithms-and-artificial.pdf> accessed 17 December 2024.

Moreover, the EEOC guidelines introduce the four-fifths rule, a measure to determine whether the selection rate significantly differs between groups.[22] If the ratio is less than four-fifths (80%), it indicates a substantial disparity. In the mentioned example above, the selection rate for white applicants is 60%, while for black applicants, it is 30%. Applying the four-fifths rule, the ratio is calculated as 30/60 (50%), below the four-fifths (80%) threshold. This rule can prove a potentially discriminatory practice against the black group by highlighting a significant difference in selection rates.

However, while the four-fifths rule can help identify possible discrimination, it may not always be sufficient. According to the EEOC, "Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance.[19] As a result, the EEOC might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination".[23] As a result, compliance with the rule alone may not be sufficient to establish the charges against discrimination since it may be challenged in court.

To mitigate the risk of discrimination, the EEOC encourages employers to perform frequent self-assessments to detect any unlawful practices. If the bias is identified, employers should alter their hiring practices by shifting to alternative algorithms developed during the tool's creation. This proactive approach will support the efforts in minimising bias practices and discrimination charges, allowing employers to address adverse impacts before they escalate into legal consequences.

The EEOC's efforts to combat discrimination are accompanied by other international efforts, such as the UN Guiding Principles on Business and Human Rights. These principles emphasise that "states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[24] These fundamental principles are compulsory for all states, requiring them to prevent human rights violations not only in public agencies but also in private operations. Importantly, the scope of these principles is not limited to human-driven actions; they also apply to human rights violations resulting from automated systems.

Furthermore, the guiding principles encourage member states to support businesses and enterprises, including those not directly involved in human rights violations, by helping

22 ibid.

23 ibid.

24 United Nation, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN 2011) 3, para 1 <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights> accessed 17 December 2024.

them determine and avoid high-risk activities. This obligation can be instrumental in preventing discrimination arising from automated decision-making systems. Finally, the principles obligate business enterprises to determine any adverse impact on human rights caused by their practice and provide a fair remedy.

Another international effort is in Europe, particularly through the European Union's General Data Protection Regulation (GDPR), which was enacted in 2018. The GDPR directly addresses concerns related to discriminatory practices resulting from automated systems. According to Article 22 of the GDPR, "The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."[25] This provision grants individuals the right to challenge an automated decision if it has an adverse impact on them. Additionally, companies are obligated to explain such decisions. In contrast, this obligation is not required in the US, meaning companies are generally not legally bound to justify automated decisions.[26]

Moreover, in Canada, automated decision-making tools are regulated through the federal government and private organisations under Bill C-27, which incorporates the Algorithmic Accountability Act. This law obligates private corporations to scrutinise possible adverse impacts that may result from their automated systems and take required steps to mitigate and address risks, including discriminatory biases in decision-making. In Australia, the AI Ethics Framework of 2019 reflects the country's minimising discrimination and bias practices resulting from automated decisions. Although these guidelines are not legally binding, they promote fair, non-biased, and accountability for adverse impacts. In Asia, states have also taken steps to address automated discrimination. For instance, China's 2017 AI Development Plan outlines legal and regulatory measures to ensure the safe and responsible use of AI, aiming to reduce adverse outcomes such as discrimination. Similarly, Japan introduced the AI Utilization Guidelines in 2019, shedding light on the importance of a transparent, accountable, and fair AI system.[27]

These international efforts indicate that discrimination in the workplace is a global mutual concern for the international community, with each country adopting a different approach based on its culture, policy, and regulation. Each approach offers unique experiences in the fight against discriminatory algorithms worldwide, and countries can benefit by learning from one another's experiences. This exchange of knowledge would be particularly beneficial for countries such as Saudi Arabia, which has yet to craft any laws that govern algorithmic discrimination. While Saudi Arabia's labour law prohibits discrimination in

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

26 Wang and others (n 12) 9.

27 ibid 9.

general, it does not address issues arising from automation. Article 3 of the labour law states: "Work is the right of every citizen. No one else may exercise such right unless the conditions provided for in this Law are fulfilled. All citizens are equal in the right to work without discrimination based on gender, disability, age, or any other form of discrimination, whether during their performance of work, at the time of employment, or at the time of advertising."[28] The article broadly prohibits discrimination during employment without explicitly limiting the scope to human workers, which could interpreted to include algorithmic discrimination. However, this may not be sufficient, given the rapid technological development in Saudi Arabia. The Kingdom has invested billions of dollars in developing technology, particularly AI, as part of its Vision 2030 initiative, which aims to establish Saudi Arabia as one of the leading global hubs for AI and technology.[29] In light of these advancements, Saudi Arabia should consider establishing a legal framework that addresses the potential legal implications of automation, including discrimination created by automated decisions.

3.2. Automation and Privacy Violation in the Workplace

In 2017, Uber's drivers' personal information was breached. The hackers downloaded sensitive information when they obtained access to the Amazon web service account, which Uber used.[30] This highlights another legal implication of automation. Infringement on data protection and privacy is a possible risk to automation. To improve algorithms, AI collects a significant amount of data, which can burden employers.[31] They are required to monitor the amount of data that is collected by the AI and how AI deals with it, as well as establish the applicable plan in case of a breach. This can be difficult because processing private data into AI increases the risk of public dissemination such data and information.[32]

Along with data breaches, monitoring employees can lead to punitive action and discrimination, providing undue benefits and leniency.[33] This relies on the fact that

28 Royal Decree no M/51 on Labor Law of Saudi Arabia of 23 Sha'ban 1426 Hejra (27 September 2005) <https://www.wipo.int/wipolex/en/legislation/details/14685> accessed 17 December 2024.

29 See, Saudi Data & AI Authority, 'National Strategy for Data & AI' (*SDAIA*, 2024) <https://sdaia.gov.sa/en/SDAIA/SdaiaStrategies/Pages/NationalStrategyForDataAndAI.aspx> accessed 17 December 2024.

30 Andre Ripla PgCert, 'AI and the Future of Privacy in the Workplace' (*LinkedIn*, 11 May 2024) <https://www.linkedin.com/pulse/ai-future-privacy-workplace-andre-ripla-pgcert-xmuae> accessed 17 December 2024.

31 'AI in Employment Law: Navigating the Legal Implications of Automation in the Workplace' (*Retail Technology Innovation Hub*, 8 July 2024) <https://retailtechinnovationhub.com/home/2024/7/8/ai-in-employment-law-navigating-the-legal-implications-of-automation-in-the-workplace> accessed 17 December 2024.

32 Sahu (n 6).

33 Jiwat Ram, 'Privacy and Security Challenges When Using AI in Project Management' (*IPMA*, 9 February 2024) <https://ipma.world/privacy-and-security-challenges-when-using-ai-in-project-management/> accessed 17 December 2024.

monitoring tools can be used to anticipate employee performance, behaviour, and work habits. Moreover, interpersonal dynamics can be disclosed based on the AI interpretation of collaboration patterns, the internal functioning of the project team, and the relationship that might be misused. Furthermore, some employers rely on AI tools to manage data and privacy, which may not be effective because automation can leak such data.[34] The imperfect management of users' rights, cybersecurity vulnerabilities, and inaccurate classification of data can prevent such automation from being successful. Employers can minimise such a breach of information when they comply with the applicable laws and regulations.[35]

There are several possible solutions to mitigate any risk to privacy in the workplace. Governments and the international community can work mutually to adopt a regulatory framework that regulates the use of AI in employment, ensuring employers implement AI systems responsibly while safeguarding data and privacy.[36] Furthermore, establishing ethical guidelines and principles that govern the integration of automation in the workplace can minimise risks as it would highlight ideals such as equality, accountability, transparency, and respect for human rights. By adopting this principle, employers can foster a work environment prioritising privacy and data protection, safeguarding employees' right to privacy.

Employers can also adopt a privacy-by-design approach to minimise privacy and data protection risks. In his article *AI and the Future of Privacy in the Workplace,* Andra PgCert advocates for this approach: "Employers should adopt a "privacy by design" approach when developing and deploying AI systems in the workplace. This means proactively considering privacy implications from the outset and building robust data protection measures, such as data minimisation, anonymisation, and secure storage and processing."[37] This means proactively considering privacy implications from the outset and building robust data protection measures.

Integrating transparency in the workplace and adopting automation can be highly effective in addressing privacy risks. AI systems that employers adopt should offer employees the opportunity to comprehend the decision-making process and the process to appeal these decisions.[38] Several methods can help accomplish this, such as datasheets, model cards, and interpretable machine-learning techniques. Also, educating employees about the AI system used in the workplace, their privacy rights,

34 'Data Privacy Automation Tools: Pros, Cons, and Pitfalls of Streamlining Compliance' (*VeraSafe*, 18 October 2023) <https://verasafe.com/blog/data-privacy-automation-pros-cons-and-pitfalls-of-streamlining-compliance/> accessed 17 December 2024.

35 'The Legal Implications of AI and Automation in Saudi Arabia' (*Hammad & Al-Mehdar Law Firm*, 30 April 2024) <https://hmco.com.sa/the-legal-implications-of-ai-and-automation-in-saudi-arabia/> accessed 17 December 2024.

36 PgCert (n 30).

37 ibid.

38 ibid.

and the security measures established to protect their private data can significantly reduce the risks of privacy infringement and data breaches.

Moreover, limiting AI's role in making final, major decisions that directly impact employees' lives and instead limiting such responsibility to humans can highlight accountability and minimise risks to employees' privacy. Furthermore, to determine possible risks and diminish these risks to employees' privacy, employers should assess the potential impact of AI on privacy before implementation. This process would offer employers indications of possible risks to privacy resulting from adopting AI in the workplace.

Employers should also establish effective channels for receiving complaints about privacy violations and ensure remedies are available for affected employees. The future of privacy in workplaces that adopt automated systems will rely on maintaining a balance between ethics and benefits. This balance can be achieved by prioritising privacy protection and upholding values such as fairness.

3.3. Automation and Liability in the Workplace

The potential for damages resulting from automated systems is a considerable risk associated with automation. As AI technology becomes more integrated into the workplace, liability concerns also arise. These concerns can extend beyond civil damages to physical harm, particularly when automated systems are combined with physical robotics in the workplace.[39] For instance, if there is a malfunction in the system, it could harm human workers. The manufacturing company or entity operating the system may also be liable if they inadequately train the users or neglect necessary maintenance.

When an automated system is responsible for harm to employees, clients, or other stakeholders, the question of who should take liability becomes crucial. To answer such a question, it is important to acknowledge that laws and regulations worldwide have differently addressed such issues. In some cases, damage caused by an automated system may be covered by insurance or the manufacturer of the technology.[40] In other instances, the employee may be held liable, especially if such damage results from their inability to maintain the system properly. However, in some countries, the issue of AI liability remains ambiguous. Saudi Arabia, for instance, lacks laws and regulations that govern AI liability. This gap could intensify issues related to AI and liability and overwhelm the judicial system with costly litigation.

39 Bron (n 4).

40 Aon Direct, 'Liability for Accountants in the Age of Automation' (*Aon*, 2024) <https://www.aondirect.com.au/sme-talk/professions/liability-in-automation> accessed 17 December 2024.

To overcome this issue, legislators worldwide should remove legal ambiguity related to AI and liability by enacting laws and regulations that set a legal framework. Such a framework would protect the growth of AI-adopted technologies and ensure justice and safety. Without an appropriate legal framework, the ambiguity regarding AI liability could intensify and inhibit the growth of AI integration. Furthermore, regulation plays a significant role in ensuring workplace safety.[41] The regulatory framework can diminish possible risks as it would set standards for AI in the workplace. These standards would address issues such as AI malfunctions and ensure that AI systems positively and safely impact the workplace.

Moreover, companies that operate AI and robotic systems perform extensive fail-safe tests, guarantee design reviews, and perform frequent maintenance that scrutinises security weaknesses and reliability risks.[42] As Daniel Bron, founder of Stealth Startup, discusses in his article *Automation's Legal Maze,* these risks can be minimised. He explains: "Ongoing performance audits and making code updates where issues are identified further bolsters safety. Physical safeguards like protective barriers, emergency stops, sensor-triggered automatic system shutdowns, and demarcating robot zones can also minimise injury risks. Finally, maintaining ample insurance coverage for potential harms remains imperative."[43] This indicates that the issues related to risks of liabilities on employers, employees, manufacturers, and operating companies are more likely to be resolved when a proper liability and safety protocol is followed.

3.4. Automation and IP in the Workplace

The rapid development of artificial intelligence has evoked legal implications for intellectual property. AI can author and innovate various IP works, which raises some legal concerns about protecting these works under IP laws. Intellectual property laws protect innovative expression and offer the owner exclusive financial and moral rights. One legal obstacle of IP and AI is whether AI is eligible for IP authorship and ownership. The answer to this question varies depending on jurisdiction and legal frameworks. For instance, countries such as the US limit authorship and ownership solely to humans, meaning AI is excluded from holding such rights. However, the issue of AI's role in IP extends beyond that. This section extensively studies possible legal implications between AI and IP.

41 'Workplace Safety in the Age of Automation: Protecting Workers' Rights' (*Law Offices of Vincent J Ciecka*, 3 June 2024) <https://ciecka.com/workplace-safety-in-the-age-of-automation-protecting-workers-rights/> accessed 17 December 2024.

42 Aon (n 40).

43 Bron (n 4).

3.4.1. Determination of Ownership

A significant challenge with innovative works created through AI and Automation is determining ownership,[44] particularly when employers and employees utilise AI to create and innovate. This evokes a major question about IP ownership. It is crucial to answer this question as owners are entitled to exercise their IP rights, which includes excluding others from using the protected work and pursuing legal action in the event of infringement. However, since automated systems themselves lack the capacity to practice these rights, the question of ownership becomes complex. Several possible candidates could presume ownership, including the system's developer, the automated system's owner, the system's user or operator, and the AI system's trainer. Another possible solution is to grant ownership based on the contractual provisions governing the system. For instance, OpenAI's service terms provide some clarity on this matter. It states that "As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output."[45] This may minimise ambiguity of ownership, but it does not resolve the issue in cases where these terms are absent.

In the US, courts have rejected the registration of innovative work created through AI when AI was listed AI as the author.[46] For instance, a picture titled "*A Recent Entrance to Paradise,*" created by an AI system was not granted copyright registration by the US Copyright Office because the law limits authorship to humans. The plaintiff moved for litigation, arguing that the law should be adaptive to technological development. The court rejected the argument and concluded the requirement of human authorship.

This limitation extends beyond copyright to other IPs as well. In a related case, Steven Thaler, inventor of DABUS (a device for the autonomous bootstrapping of unified systems), filed patent applications in 2019 for two inventions created by his AI system, DABUS. According to Thaler, DABUS is a "collection of source code or programming and a software program."[47] He listed DABUS as the inventor but was notified by the US Patent and Trademark Office that his application was incomplete due to the lack of a proper inventor. He challenged this in court, seeking patentability for the invention. The district court ruled that under US Patent Law, only humans can be listed as inventors, as the law explicitly states inventors must be individuals.

44 Jeremiah Chew and Justin Davidson, 'The Interaction between Intellectual Property Laws and AI: Opportunities and Challenges' (*Norton Rose Fulbright: Global law firm*, November 2024) <https://www.nortonrosefulbright.com/en/knowledge/publications/c6d47e6f/the-interaction-between-intellectual-property-laws-and-ai-opportunities-and-challenges> accessed 17 December 2024.

45 ibid.

46 Abdulaziz Alkhalifa, 'The Legitimacy of AI as a Copyright Author' (2025) 56 Journal of Law and International Affairs 974.

47 Christine M Morgan and Allison M Haas, 'Sorry, DABUS. AI Cannot Be an Inventor on a US Patent' (*Reed Smith LLP*, 24 August 2022) <https://www.reedsmith.com/en/perspectives/2022/08/sorry-dabus-ai-cannot-be-an-inventor-on-a-us-patent> accessed 17 December 2024.

This issue is not limited to the US. Thaler attempted to file applications in other jurisdictions, such as Australia, Europe, the UK, and South Korea, but his applications were rejected. In Australia, Judge Beach J stated that "[A]n inventor as recognised under the Act can be an artificial intelligence system or device. But such a non-human inventor can neither be an applicant for a patent nor a grantee of a patent. So, to hold is consistent with the reality of the current technology. It is consistent with the Act. And it is consistent with promoting innovation."[48] However, the Full Court of the Federal Court disagreed unanimously, asserting that reg 3.2C(2)(a) does not authorise AI to be listed as the inventor.

The court's ruling raised some significant questions for legislators and policymakers to address in dealing with AI and patentability. One key issue is whether the definition of inventor should be redefined to include AI. If so, another question arises: who should hold the patent rights? According to the court, the possible answer to this question is the person who inputs the data used by the AI, the owner of the AI, the owner of the source code, or the developer of the software. Furthermore, the court considered whether the standard for determining the innovative steps involved in a patent should be adjusted. Specifically, if AI were to be recognised as an inventor, should the standard no longer be based on the skills of an ordinary worker in the field, and if so, how would that standard be defined? Finally, the court highlighted the importance of determining the potential implications for the grounds of revocation in circumstances where the inventor is an AI, particularly concerning false suggestion or misrepresentation.

The most effective method to address these issues is by taking a legislative step that addresses and defines the role of AI in intellectual property. Interestingly, some countries have decided to assign *sui generis* rights to AI-generated work. For example, the UK Copyright, Designs, and Patents Act of 1988 provides that "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[49]

On the other hand, other countries, like Ukraine, have taken legislative steps beyond that. In 2022, Ukraine promogulated its copyright act, which assigns special rights to AI-generated work.[50] These rights include the capability to use, allow, or prevent third parties from using the work. Under this law, the person who owns the software or maintains the software license on agreements is the eligible party to obtain this special right.[51] These rights are protected for 25 years, starting from the first day of the year after the year of creation.

48 Kingsley Egbuonu, 'The Latest News on the DABUS Patent Case' (*IP STARS from Managing IP*, 20 December 2023) <https://www.ipstars.com/NewsAndAnalysis/The-latest-news-on-the-DABUS-patent-case/Index/7366> accessed 17 December 2024.

49 UK Copyright, Designs and Patents Act 1988, s 9(3) <https://www.legislation.gov.uk/ukpga/1988/48/section/9> accessed 17 December 2024.

50 Chew and Davidson (n 44).

51 Peter Bilyk, 'Legal Regulation of Artificial Intelligence in Ukraine: Latest Trends and Developments' (*Ukrainian Law Firms*, 29 July 2024) <https://ukrainianlawfirms.com/reviews/ai-regulation/> accessed 17 December 2024.

Meanwhile, countries like Saudi Arabia have taken a different stance, granting IP protection for AI-generated work if there is a significant human contribution. If a work is solely generated by AI, it falls into the public domain.[52]

While preventing AI from IP protection may seem effective at first, this approach may inhibit the development of AI technologies. AI systems can be expensive, and stripping them of IP rights may discourage investment in these technologies. However, granting AI the same IP rights as humans is not ideal, as AI lacks the human characteristics to exercise these rights—particularly the moral rights associated with authorship. Therefore, legislators should reform national legal frameworks to acknowledge AI's role in creativity and innovation. This means updating IP laws to treat AI as an author with limited rights that account for its lack of human nature. The experience of the Ukrainian copyright may be a perfect example to start with. Such a legal framework would help protect IP development while maximising its benefits for the community.

3.4.2. AI Infringement and Liability

One significant issue in the intersection of AI and IP is the infringement of protected IP content. When AI technology infringes on protected rights, who should be liable? Infringement may occur in the workplace due to the reliance on automation. Acknowledging infringement is a possible risk, especially with AI generative systems, is crucial. These systems may generate the requested content based on protected work, which may result in identical content to protected work. This may result in copyright violation. Therefore, it is crucial to identify the scope of liability. AI lacks human nature and legal personality; thus, it cannot be accountable for infringement. On the other hand, the stakeholders who participate in the training process of the AI system can be at risk. This may include a programmer, developer, system owner, company deploying the system, and users. However, this is dependent on each legal framework.

It is important to acknowledge that IP infringement by AI systems is increasing with the wide use of these technologies and the lack of regulation determining the scope of liability. Thus, legislators must move forward to address the issue and remove the ambiguity. Currently, steps can be taken to mitigate infringement risks.[53] Developers should adjust AI systems to reduce the risk of receiving identical output to protect work. Users can employ plagiarism-check software to determine any possible infringement. Additionally, employees should be trained to prevent actions that may result in IP violations, such as requesting AI to replicate the competitor's marketing or product descriptions. Finally, corporations adopting AI systems in their entity should ensure that contracts with the system's provider or owner include protection in case of infringement.

52 Draft Saudi Intellectual Property Law (April 2023).
53 Chew and Davidson (n 44).

4 CONCLUSION

The world has experienced significant development of AI technology in recent years, which has benefited employers and streamlined the employment process. However, its impact on the protected value of employment raises critical concerns. This paper emphasises these issues, such as discriminatory decisions, violation of privacy, and the implications for workplace safety and liability—issues that intersect with employment, privacy, and data protection laws. While countries like the US have established guidelines to mitigate these implications and maximise the benefits of AI technologies within the framework of their legal system, others, such as Saudi Arabia, have not yet taken significant steps. The paper proposes global cooperation, encouraging the international community to take mutual legislative steps to regulate the presence of AI in the workplace and benefit from existing legal frameworks.

Beyond employment, AI technologies threaten IP laws, as AI systems generate innovative works that raise questions about eligibility for IP protection. Current precedent shows that courts worldwide have rejected ownership and authorship of AI systems, as IP laws have traditionally been based on human creativity. These laws do not recognise the possibility of AI creativity. Therefore, this paper suggests that IP laws should be revised to both protect human creativity and foster the development of AI technologies by asserting limited rights for these technologies.

Finally, the paper acknowledges that AI's impact extends beyond its focus, and more in-depth studies are needed to explore its effect in different aspects.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВІ ПРОБЛЕМИ ШТУЧНОГО ІНТЕЛЕКТУ ТА АВТОМАТИЗАЦІЇ НА РОБОЧОМУ МІСЦІ

Абдулазіз Абдулрхман Мохаммед Альхаліфа

АНОТАЦІЯ

Вступ. *Останніми роками розробка ШІ зросла, і роботодавці почали покладатися на ШІ для виконання таких завдань, як підбір персоналу, наставництво та навчання. Ця залежність викликала занепокоєння щодо правових проблем, які може спричинити використання штучного інтелекту на робочому місці. Кілька країн встановили певні вказівки, щоб мінімізувати цей вплив і забезпечити переваги таких технологій. Інші країни не вжили жодних заходів для вирішення проблеми. Це створює неоднозначність для роботодавців, працівників і третіх сторін щодо того, як орієнтуватися в технологіях ШІ, не порушуючи відповідні закони.*

Методи. *Метою статті є усунення неоднозначності щодо автоматизації та робочого місця, за допомогою дослідження того, як штучний інтелект впливає на зайнятість, і які є можливі рішення для подолання цих проблем. Щоб досягти цього, у роботі було проаналізоване кожне правове питання через юридичні висновки, судові рішення та перегляд чинних законів. У статті увага, в першу чергу, зосереджена на досвіді США, одночасно враховуючи інформацію з інших юрисдикцій, включно з Великобританією, Україною, Кореєю, Японією, Австралією та Саудівською Аравією. Зрештою, у дослідженні поставлено мету перевірити, чи можна ефективно інтегрувати штучний інтелект у чинне законодавство.*

Результати та висновки. *У дослідженні показано, що штучний інтелект створює різні проблеми на робочому місці, які суперечать законам і нормам. Проте було зроблено висновок, що можна досягти більш сприятливого результату за умови прийняття низки законодавчих змін, які забезпечать захист, справедливість і дотримання цінностей.*

Ключові слова: *ШІ та ІВ, автоматизація та робоче місце, ШІ та дискримінація, ШІ та порушення конфіденційності, відповідальність за ШІ на робочому місці, право власності на ІВ, ШІ та порушення.*

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Research Article

THE ESTABLISHMENT OF AN ADMINISTRATIVE COURT: A NECESSITY FOR RESOLVING ADMINISTRATIVE DISPUTES IN THE REPUBLIC OF KOSOVO

Mervete Shala and Xhavit Shala*

ABSTRACT

Background: *Judicial control of public administration plays a crucial role in enhancing the quality of the administration's activities and good governance. This scientific paper aims to examine the current situation of judicial control of the public administration of the Republic of Kosovo and provide a comparative analysis of the legal framework of judicial control of public administration in the countries of the region. This paper aims to answer the following questions: How far has the Basic Court in Pristina managed to decide on the legality of acts and actions of public administration authorities? Is establishing the Administrative Court and the Supreme Administrative Court to handle administrative matters necessary? The establishment of the Administrative Court would improve judicial control over the legality of the public administration's work, increase the quality of administration and good governance, and increase citizens' trust in institutions.*

Methods: *In this study, various methodologies were employed, including qualitative, analytical, comparative-legal, descriptive and quantitative (statistical) methods. The qualitative research method analyses the Constitution, laws, by-laws, and other documents. The comparative legal method was applied when comparing provisions in the administrative dispute legislation in the countries of the region. Statistical methods have been used during the study of the annual reports of the Kosovo Judicial Council and the Courts, as well as in the empirical part of the paper.*

Results and Conclusions: *The research and analysis findings conclude that establishing administrative courts in the Republic of Kosovo is necessary for resolving administrative issues. The results provide insights that the existence of only one department at the Basic Court in Pristina with "jurisdiction" for the entire territory of the Republic of Kosovo is not the right solution. For this reason, the authors substantiate the necessity of establishing the Administrative Court in the Republic of Kosovo to resolve administrative issues. The Administrative Court of First Instance is based in Pristina, with branches in six major centers of Kosovo, and the Supreme Administrative Court is the second instance.*

1 INTRODUCTION

The court exercises control over the legality of acts and actions of public administration authorities that are challenged in court. Judicial control over public administration contributes to improving the quality of administration activities and promoting good governance. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that "Every person has the right to have his case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal."[1]

Within the Constitution of the Republic of Kosovo, two provisions—Articles 31 and 32—expressly stipulate that "everyone is guaranteed equal protection of rights in the proceedings in the courts, other state bodies and holders of public powers"; "Everyone has the right to a fair and impartial public hearing on decisions concerning rights and obligations or on any criminal charge brought against him/her within a reasonable time by an independent and impartial tribunal established by law"; and "every person has the right to use legal remedies against judicial and administrative decisions which violate his/her rights or interests in the manner prescribed by law."[2]

This paper is structured into three main parts. The first part analyses the legal framework and examines the current state of administrative justice in Kosovo, along with its challenges. The second part presents a comparative analysis of judicial control over public administration in neighbouring countries, including the Republic of Albania, Montenegro, Northern Macedonia and Serbia, identifying similarities and differences in their administrative judicial systems. The third part reviews empirical data, including the results of interviews with senior public officials, media and civil society representatives, as well as the findings from questionnaires conducted with senior public officials. Finally, it presents conclusions and recommendations.

The study's findings highlight that having only one department of Administrative Affairs at the Basic Court in Pristina, with jurisdiction over the entire territory of the Republic

1 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) [1955] UNTS 213/222, art 6.

2 Constitution of the Republic of Kosovo (with amendments I-XXVI) (adopted April 2008) arts 31, 32 <https://www.refworld.org/legal/legislation/natlegbod/2008/en/121392> accessed 10 December 2024.

of Kosovo, is not the right solution. Legal persons and other parties seeking to realise his/her rights and interests—violated by individual decisions or actions of public administration bodies—often have to wait for years. Furthermore, this article substantiates the need for judicial reform.

This paper aims to make a modest contribution to ongoing academic and political debates regarding the establishment of administrative courts and the analysis of legal and judicial reform. It serves as a reference for discussions on legal administrative justice, offering insights for future legal research and policy development on the benefits of implementing administrative justice. Additionally, it seeks to encourage researchers in the fields of law, public administration, political science, judges, lawyers, and other scientific professionals, to further enrich the literature on effective administrative judiciary and the functioning of good administration.

2 RESEARCH METHODOLOGY

The methodology of this paper is based on the collection and analysis of primary and secondary data. Primary sources include international conventions, constitutions, laws, by-laws, and legal analysis and comparison. Additionally, interviews with senior public officials, media, and civil society representatives, along with structured questionnaires with senior public officials contribute to this study. Secondary sources include scientific articles, written publications, and other relevant literature.

The present study employs a mixed-method approach, incorporating both qualitative and quantitative research methodologies. Quantitative or statistical methods have been applied in analysing various materials, including the annual statistical reports of the Kosovo Judicial Council and the courts from 2013 to 30 September 2024, particularly related to administrative cases. This method is also used in the empirical section of the paper. The authors have presented the processed data in graphs and tables to enhance clarity and comprehension.

The qualitative research method analyses the Constitution, laws, by-laws, and other documents of the Kosovo Judicial Council and the Supreme Court of Kosovo.

Further, the present study uses discussions and interviews with the purposive sample of senior public officials and local experts, media, and civil society to shed light on the needs for legal changes and additions, regarding the establishment of the Administrative Court and the Supreme Administrative Court.

The finalisation of this paper involved four steps:

1. Theoretical analysis of the literature.
2. Analysis of constitutional, legal acts, and judicial practice of the Republic of Kosovo and regional countries.
3. Empirical analysis of data from the Judicial Council and the Supreme Court reports, as well as empirical research.
4. Providing conclusions and recommendations for legal and institutional reform in Kosovo.

The methodology used in this study involves an in-depth analysis of the legal framework and constitutional provisions, along with a review of the legislation governing courts and the administrative disputes in the region. This includes examining relevant laws in Kosovo, the Republic of Albania, the Republic of Northern Macedonia, the Republic of Montenegro and the Republic of Serbia, specifically those pertaining to administrative dispute and specialised courts. In this regard, the comparative approach enables an analysis of these countries' similarities and differences in judicial control over public administration.

Based on these findings, interview questions and questionnaires were designed for senior public officials and civil society. The research sample consisted of 154 senior public officials and 10 representatives from civil society, totaling 164 participants.

The research was conducted through interviews and questionnaires with high-ranking officials and experts. Participants included former parliament members of the 6th legislature (2017-2019), the former Minister of the Ministry Public Administration, the President and judges of the Constitutional Court, judges from the Court of Appeals and Basic Courts of Kosovo, the People's Advocate and Deputy Ombudsman, senior management civil servants and management civil servants, political advisors to the Minister and President of the Republic of Kosovo, and the former Director of the Anti-Corruption Agency. Additionally, representatives from civil society— including leaders of institutes, non-governmental organisations and journalists—were interviewed, some of whom asked to remain anonymous. For a more detailed analysis, see Point 5: Analysis of Empirical Data.

A total of 37 senior public officials were interviewed in open interviews, along with 10 representatives from civil society. Additionally, structured questionnaires were administered to 24 deputies and 93 judges from Kosovo's Court of Appeals and Basic Courts. While some interviews were conducted directly with senior public officials, others were conducted electronically or in written form due to time constraints. The collected data comprises opinions from interviewed senior public officials, civil society representatives, and questionnaire responses.

The research encountered several obstacles during the interview process. Some senior public officials tended to give politically inclined answers or hesitated to respond. Others agreed to be interviewed but requested anonymity due to fear of repercussions. However, senior public officials were more willing to respond to questionnaires due to the anonymity and discretion provided. The purpose of interviewing senior public officials and using questionnaires was to derive results and compare individual findings with the opinions of senior public officials and field specialists.

Based on the conducted research and empirical data results, the hypothesis is confirmed: there is a clear need to establish the Administrative Court and the Supreme Administrative Court in Kosovo.

3 JUDICIAL CONTROL OF THE PUBLIC ADMINISTRATION

The effective functioning of the judiciary is the basis of the modern rule of law.[3] The judicial systems of the European Union member states are very diverse, reflecting differences in national judicial traditions.[4] Also, the judicial frameworks in the Western Balkans differ from those of the EU Member States.

In the Central and Eastern European countries, during the first decade of transformation, three types of efforts dominated the drive for administrative and court reform. First, a large number of legislative changes were made, including the adoption of new constitutions that outlined human rights and fundamental freedoms, provided for the separation of the legislature, executive, and judiciary, and guaranteed the independence of the judges.[5]

Furthermore, while disputes between citizens and public authorities may be settled through civil law proceedings in several states, administrative law is separate. In these cases, the settlement of administrative disputes can fall within the competence of specialised administrative law tribunals or units within a court of general jurisdiction or may be subject to separate administrative law procedures.[6]

In most contemporary states, judicial control of the administration represents the most developed form of external control.[7] This oversight is essential to prevent administrative authorities from overstepping their powers and to hold them accountable for violations of citizens' rights.[8] It plays a critical role in cultivating a legal spirit in the exercise of all actions by the administration.[9] Thus, judicial control of administrative activity and the right of individuals and legal entities to go to court is related not only to the application of general principles, but also to a clear and concrete definition, explicitly stated in special laws, circumstances, and conditions of concrete procedures for possible or mandatory investment of administrative jurisdiction.[10]

3 Iryna Izarova and others, 'Advancing Sustainable Justice through AI-Based Case Law Analysis: Ukrainian experience' (2024) 7(1) Access to Justice in Eastern Europe 144, doi:10.33327/AJEE-18-7.1-a000123.

4 'Legal systems - EU and National' (*European e-Justice Portal*, 2024) <https://e-justice.europa.eu/> accessed 10 December 2024.

5 Frank Emmert, 'Administrative and Court Reform in Central and Eastern Europe' (2003) 9(3) European Law Journal 288, doi:10.1111/1468-0386.00179.

6 CEPEJ, *European Judicial Systems Efficiency and Quality of Justice* (CEPEJ Studies 23, edn 2016, Council of Europe 2014) 208.

7 Agur Sokoli, *Kontrolli i punës se administratës dhe përgjegjësia politike e saj* (Universiteti i Prishtinës 2009) 250.

8 Fadil Memet Zendeli, Memet Seit Memeti and Agron Selman Rustemi, 'Judicial Control over Public Administration' (2012) 8(2) Acta Universitatis Danubius 93.

9 Mirlinda Batalli dhe Islam Pepaj, *Doracaku për Përgatitjen e Provimit të Jurisprudences* (Ministria e Drejtësisë 2015) 768.

10 Decision no 461 [2011] Civil College of the High Court of Albania.

The control of the formal validity of administrative acts, as well as the validity of administrative actions and responsibilities, has been addressed by many authors in the administrative field including Esat Stavileci (1997),[11] Ermir Dobjani (2004),[12] Agur Sokoli (2009),[13] Bajram Pollozhani, Esat Stavileci, Ermir Dobjani and Lazim Salihu (2010),[14] Esat Stavileci, Agur Sokoli and Mirlinda Batalli (2010),[15] Agur Sokoli (2014),[16] Mervete Shala (2015),[17] Fejzulla Berisha and Petrit Hajdari (2019),[18] Mervete Shala (2021)[19] and other notable authors.

According to the author Sokol Sadushi, the formal validity of administrative acts and actions is controlled for two primary reasons. First, it addresses incompetence, where the impugned administrative act is alleged to have been issued by a public authority or official without proper legal authorisation. Second, it concerns procedural competence *ultra virs*, meaning that the administrative act was made in violation of essential procedural norms, thereby directly violating the authority's competence.[20]

As for the control of the validity of administrative acts and responsibilities, Sadushi explains that the court exercises this control for two reasons: first, to review violations of the law, which can be divided into review due to errors in interpretation and application of the law and facts, or errors in assessing the facts, depending on the nature of the contested decisions; second, to review cases where there is an abuse of discretionary power by the public authority.[21]

Additionally, according to Mateja Heda, judicial control over the administration was established as a mechanism to restrict administrative action through impartial courts.[22] This paper analyses judicial control of public administration in Kosovo, which will be discussed in the following sections.

11 Esat Stavileci, *Hyrje në Shkencat Administrative* (Enti i Teksteve dhe i Mjeteve Mësimor i Kosovës 1997).

12 Ermir Dobjani, *E Drejta Administrative* (SHBLU 2004).

13 Sokoli (n 7).

14 Bajram Pollozhani dhe të tjerë, *E Drejta Administrative: Aspekte Krahasuese* (Shkup 2010).

15 Esat Stavileci, Agur Sokoli dhe Mirlinda Batalli, *E Drejta Administrative* (Universiteti i Prishtinës 2010).

16 Agur Sokoli, *E Drejta Administrative* (Universiteti i Prishtinës 2014).

17 Mervete Shala, 'Gerichtliche Überprüfung der Akten und Verwaltungsaktion' (The 8th International Conference on Private and Public Law, Vienna, Austria, 10 October 2015).

18 Fejzulla Berisha dhe Petrit Hajdari, *Administrata Publike dhe Kontrolli i Saj: (Aspekti krahasimor)* (Shoqata e Shkrimtarëve të Pejës 2019).

19 Mervete Shala, 'Instrumentet e Kontrollit të Administratës Publike në Republikën e Kosovës' (PhD dis, Universitetit Europian të Tiranës 2021).

20 Sokol Sadushi, *Gjykata Administrative dhe Kontrolli Ligjor mbi Administratën: Një Vështrim Krahasues mbi Drejtësinë Administrative* (Botimet Toena 2014) 169-70.

21 ibid 169-70.

22 Mateja Held, 'The Development of the Administrative Court Systems in Transition Countries and Their Role in Democratic, Economic and Societal Transition' (2022) 22(2) Hrvatska i Komparativna Javna Uprava 209, doi:10.31297/hkju.22.2.5.

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3.1. Judicial Control of the Public Administration in Kosovo

The court exercises control over the legality of the act and actions of public administration bodies challenged before the court. According to the plaintiff's claims, these acts have violated or restricted legitimate rights and interests, forcing the plaintiff to pay an obligation not based on law or the actual state of facts.[23]

Legal and structural reform was implemented in Kosovo with the adoption of Law No. 03/L-199 on Courts of the Republic of Kosovo on 22 July 2010 (hereinafter the Law on Courts) by the Assembly of the Republic of Kosovo.[24] According to Article 42 of the Law of Courts, which provides for the abrogation of other Laws, upon the entry into force of this Law, it repealed the Law on Regular Courts of KSAK (KSAK-Socialist Autonomous Province of Kosovo),[25] UNMIK (United Nations Mission in Kosovo) regulations[26] and the Law on Minor Offenses.[27]

Law No. 03/L-199 on Courts of the Republic of Kosovo regulates the organisation, functioning, and jurisdiction of the courts. This structural reform began to be fully implemented on 1 January 2013 with the Law on Courts, which, in accordance with Article 8, explicitly states that the court system of the Republic of Kosovo consists of Basic Courts, the Court of Appeals, and the Supreme Court.[28]

Administrative matters under Article 12 of the Law on Courts in Kosovo fall under the exclusive competence of the Basic Court of Pristina. Article 13 of this law establishes that the Department of Administrative Affairs (hereinafter the DAA) of the Basic Court of Pristina has jurisdiction over the entire territory of the Republic of Kosovo. Law No. 06/L-054 on Courts, Article 17, determines that the DAA of the Basic Court of Pristina adjudicates and decides on administrative disputes related to lawsuits against final administrative acts and other issues determined by law. It judges and decides on the resolution of conflicts of competencies and disputes arising between different public administration bodies.[29]

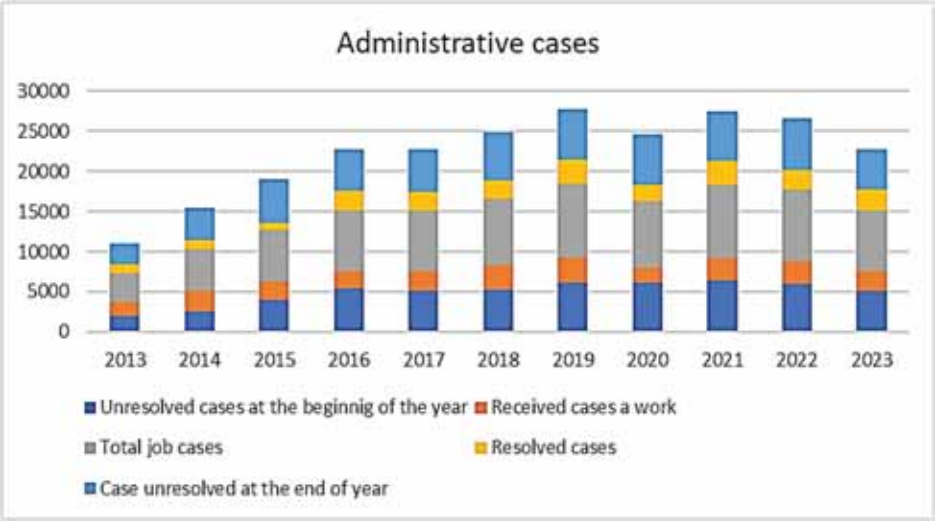
23 Decision no 3 (Unifier of the Joint Panels of the High Court of Albania, 02 December 2008).
24 Law of the Republic of Kosovo no 03/L-199 'On Courts' [2010] Official Gazette of RK 79/77.
25 Official Gazette of the SAP Kosovo, Nos. 21/78, 49/79, 44/82, 44/84, 18/87, 14/88 and 2/89.
26 UNMIK Regulations Nos. 1999/5 on the Establishment of an AD HOC Court of Final Appeal and an AD HOC Office of the Public Prosecutor (4 September 1999); 1999/7 on Appointment and Removal from Office of Judges and Prosecutors (7 September 1999); 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors (16 February 2000, amended 27 May 2000, extending these provisions to all courts in Kosovo), 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo Trust Agency Related Matters (13 June 2002), 2006/25 on a Regulatory Framework for the Justice System in Kosovo (27 April 2006).
27 Official Gazette of the SAP Kosovo, nos. 7/74, 43/74 and 23/79.
28 Law of the Republic of Kosovo no 03/L-199 (n 24).
29 Law of the Republic of Kosovo no 06/L-054 'On Courts' [2018] Official Gazette of RK 22/1.

For a dispute or conflict of jurisdiction between administrative bodies to arise, requiring the intervention of the competent court, three conditions must be met:

- The dispute or conflict arises between different administrative bodies.
- The dispute or conflict arises between bodies that declare the will of power.
- The disagreement arises over the definition of the sphere of competencies.[30]

Through the DAA, the Basic Court in Pristina is responsible for deciding on the legality of final administrative acts (Article 9). These acts, issued by administrative authorities in the exercise of public powers, determine the rights, obligations, and legal interests of natural and legal persons in administrative matters,[31] as well as the legality (Article 1) of administrative actions.[32] In this regard, administrative judicial jurisdiction covers all disputes of public law except those of a constitutional nature, which fall under the jurisdiction of the Constitutional Court.[33]

To provide a clearer picture of the administrative cases handled by the Basic Court in Pristina's Department of Administrative Affairs, the Court of Appeals, and the Supreme Court, the data is presented below in graphic and tabular form.



Graph 1. Administrative cases (cases) received, resolved and unresolved from January 2013 to December 31, 2023, in the Basic Court of Pristina

30 Mazllum Baraliu dhe Esat Stavileci, *Komentari: i Ligjit për Procedurën Administrative* (GIZ 2014) 84.

31 Law of the Republic of Kosovo no 03/L-202 'On Administrative Conflicts' [2010] Official Gazette of RK 82/28, art 9.

32 ibid, art 1.

33 Law of the Republic of Kosovo no 08/L-182 'On Administrative Disputes' [2024] Official Gazette of RK 3/1, art 4.

Graph 1[34] illustrates the workload of the DAA in the Basic Court of Pristina from 2013 to 2023. The department began operations in 2013 with 1,947 unresolved administrative cases. That year, 1,720 cases were received, bringing the total to 3,667 cases for judicial review. Of these, 1,107 were resolved, leaving 2,560 cases carried forward to 2014.

This pattern continued year after year, with an increasing number of cases for judicial review and a large backlog of unresolved cases at the end of each year. A total of 22,898 cases were resolved from January 2013 to 31 December 2023, yet 5,014 cases remained unresolved at the end of December 2023. As a result, natural, legal persons and other parties seeking to assert their rights or interests, which may have been violated by individual decisions or the actions of public administration bodies, have had to wait for years.

The Department initially had only three judges, and a very small number of judges were tasked with handling an increasing number of cases for judicial review. Consequently, while the number of cases resolved each year grew, so did the number of unresolved cases by the end of each year.

According to Kosovo Judicial Council from the DAA of the Appeals Court of Pristina, 668 cases were transferred to the Commercial Court in 2022.[35] The Commercial Court of Kosovo was established in August 2022 under Law No. 08/L-015 on the Commercial Court of Kosovo. The court adjudicates matters within its competence in its First Instance and Second Instance Chambers. Additionally, the Fiscal Department operates the Commercial Court,[36] with the Fiscal Division transferred from the Basic Court in Pristina. This transfer of 668 cases occurred because, according to Article 13, the Commercial Court has exclusive jurisdiction to adjudicate administrative disputes initiated by business organisations against final decisions made by the Tax Administration, Customs Authorities, the Ministry of Finance, and any other public body responsible for imposing taxes or other state duties.[37]

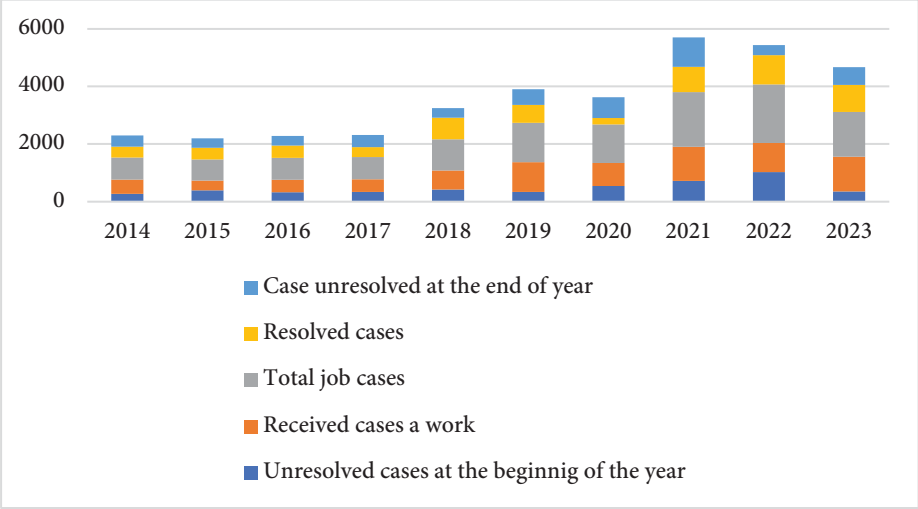
34 Source: based on data from the Statistical Reports and Annual Work Reports of the Kosovo Judicial Council (KJC) from January 2013 to December 31, 2023. The data processed by the authors of the paper. See 'All Reports of the Kosovo Judicial Council' (*Kosovo Judicial Council*, 2024) <https://www.gjyqesori-rks.org/reports/?lang=en&cYear=2024> accessed 10 December 2024.
KJC *Annual Report* (2014, p. 52; 2015, p. 59; 2016, p. 56); *Statistical Report of the Judicial Council for 2013 - 2017* submitted to the author of the paper on 02.02.2018; *Annual Court Statistical Report* (2017, p. 9; 2018, p. 9; 2019, p. 8); *Statistical Report of the Courts Annual* (2020, p. 7; trem-I 2021, p. 7; 2021, p. 7; 2022, p. 8-9).

35 Këshilli Gjyqësor i Kosovës, *Raporti Statistikor i Gjykatave Vjetor* - 2022 (KGK Departamenti i Statistikës 2022) 6.

36 Law of the Republic of Kosovo no 08/L-015 'On Commercial Court' [2022] Official Gazette of RK 7/3, art 10.

37 ibid, art 13, para 1.11.

Chart 2[38] shows the administrative cases in the Court of Appeals in Pristina, with data broken down by years.



Graph 2. Administrative cases received, resolved and unsolved from January 2014 to 31 December 2023 in the Court of Appeals in Pristina

The graph reflects the situation of the Court of Appeals, which holds second-instance jurisdiction over the entire territory of the Republic of Kosovo. In the DAA at the Court of Appeals in Pristina, there were 271 unresolved administrative cases at the beginning of 2014.

Over the following years, 7,606 cases were received, of which 5,976 were resolved. By the end of 2023, 620 cases remained unresolved. A contributing factor of this backlog is the small number of judges in the Court of Appeals, which makes it impossible to review and resolve cases within the prescribed time limits. This situation is due to the heavy workload, the limited number of judges handling administrative cases, and the growing number of unresolved administrative cases.[39]

38 Source: based on the data of the Annual Work Reports of the Kosovo Judicial Council (KJC) from January 2014 to December 31, 2023. The data processed by the authors of the paper. See 'All Reports of the Kosovo Judicial Council' (n 34). KJC *Annual Report* (2014, p. 48; 2015, p. 57; 2016, p. 54); *Annual Court Statistical Report* (2017, p. 7; 2018, p. 7; 2019, p. 6); *Statistical Report of the Courts Annual* (2020, p. 6; 2021, p. 6; 2022, p. 6; 2023, p. 6); *Court Statistical Report in the first quarter of 2021* (p. 6).

39 Ministry of Public Administration of the Republic of Kosovo, *Strategy on Modernization of Public Administration 2015-2020* (Office of the Prime Minister 2015) 24.

Additionally, Table 1[40] and Graph 3[41] provide data on administrative cases in the Supreme Court from 2007 to 2013.

Table 1. **Administrative cases for the years 2007-2013 in the Supreme Court**

Administrative cases for the years	Unresolved cases at the beginning of the year	Received cases at work	Total job cases	Resolved cases	Cases unresolved at the end of the year
2007	2,164	2,886	5,050	3,057	1,993
2008	1,993	1,402	3,395	2,308	1,087
2009	1,087	1,031	2,118	1,326	792
2010	792	1,244	2,036	1,008	1,028
2011	1,028	1,550	2,578	1,194	1,384
2012	1,384	1,637	3,021	1,405	1,616
2013	-	8,940	8,940	8,939	1
Total		18,690	27,138	19,237	

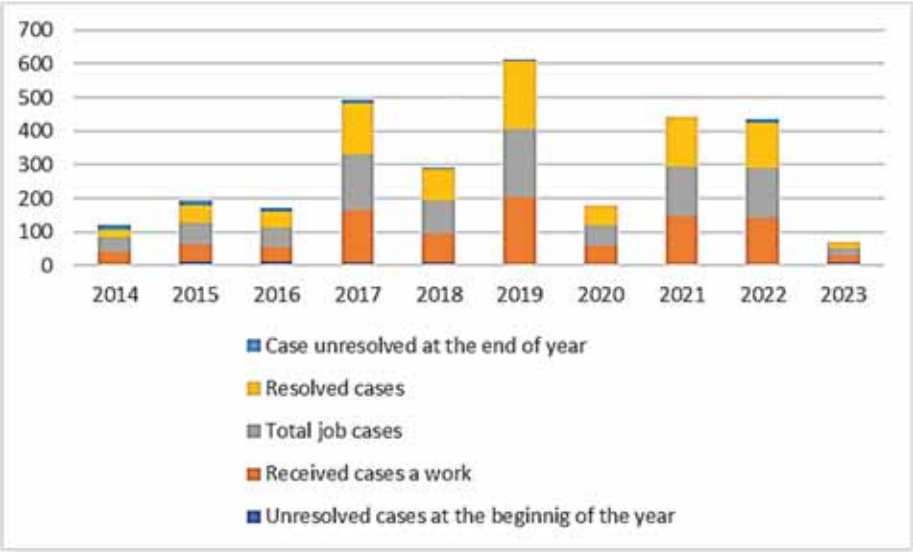
The chart above shows that from 2007 to the end of 2013, the Supreme Court handled a total of 27,138 cases, of which 19,237 administrative cases were resolved. Any cases in the Supreme Court that had not been resolved with a final decision by 31 December 2012, were transferred to the Court of Appeals for handling starting from 1 January 2013.[42]

Below, the data for administrative cases in the Supreme Court, after the reorganisation under the Law on Courts, which is currently in force, is presented in graphic form.

40 Source: based on data from the Statistical Report of the Supreme Court of Kosovo. Statistical reports provided to the author of the paper on January 25, 2018 by the Supreme Court of Kosovo. See 'Raporti i Punës' (Gjykata Supreme e Kosovës) <https://supreme.gjyqesori-rks.org/publikimet/raporti-i-punes/> accessed 10 December 2024.

41 Source: based on the data of the Annual Work Reports of the Kosovo Judicial Council (KJC) from January 2014 to December 31, 2023. The data processed by the authors of the paper. See 'All Reports of the Kosovo Judicial Council' (n 34). KJC *Annual Report* (2014, p. 45; 2015, p. 54; 2016, p. 51); *Annual Court Statistical Report* (2017, p. 4; 2018, p. 4; 2019, p. 4); *Statistical Report of the Courts Annual* (2020, p. 4; 2021, p. 4; 2022, p. 4; 2023, p. 4); *Court Statistical Report in the first quarter of 2021* (p. 4).

42 Gjykata Supreme e Kosovës, *Raporti i punës për vitin 2012* (Gjykata Supreme 2012) 1 <https://supreme.gjyqesori-rks.org/publikimet/raporti-i-punes/?cYear=2012> accessed 10 December 2024.



Graph 3. Administrative cases received, resolved and unresolved from January 2014 to 31 December 2023, in the Supreme Court of Kosovo

The graph reflects the cases presented to the Supreme Court of Kosovo, including received cases, resolved cases, and unsolved cases, from January 2014 to 31 December 2023. In 2014, this Court began the year with three administrative cases carried over from 2013. Over the following years, the Court received a total of 942 cases, with cases being resolved by the end of 2023.

Based on the analysis and results, the establishment of administrative courts is necessary. The Administrative Court of First Instance, based in Pristina, should have branches in six major centers of Kosovo, while the Supreme Administrative Court would serve as the second instance. These courts would help ensure the timely resolution of administrative cases, provide legal protection for the constitutional and legal rights, freedoms, and interests of individuals, and address violations arising from the exercise or failure to exercise public functions by administrative authorities. In addition, the Administrative Court would oversee the actions of government bodies and other public authorities responsible for implementing complex public policies.[43]

43 Timo Ligi, Andrej Kmecl and Villem Lapimaa, *The Functioning of Administrative Judiciaries in the Western Balkans* (SIGMA Papers 73, OECD Publ 2024) 50, doi:10.1787/6499dad5-en.

4 JUDICIAL CONTROL OF PUBLIC ADMINISTRATION IN THE COUNTRIES OF THE REGION

Judicial control of public administration is a principle accepted and applicable in best practices by European Union (EU) countries.[44] A functional administrative judiciary is also one of the essential elements of the rule of law, explicitly including "access to justice before independent and impartial courts, including judicial review of administrative acts".[45] For this reason, effective judicial protection by independent and impartial courts is a cornerstone of the rule of law.

Across the Western Balkans, judicial institutions continue to face many challenges.[46] While all Western Balkan administrations and judiciaries formally comply with the requirement for access to justice and legal protection against administrative actions, individuals can contest administrative actions before a specialised administrative judiciary or a judiciary of general jurisdiction.[47] The specific methods of judicial control of public administration in the region's countries will be discussed below.

In the Republic of Albania, Article 135 of the Constitution provides that judicial power is exercised by the High Court as well as by the Courts of Appeal and the Courts of First Instance, which are established by law.[48] According to Article 3 of the Law on the Organization of the Judiciary, courts with general jurisdiction include the Courts of First Instance and the Courts of Appeal. Special Courts consist of the Administrative Courts of First Instance and the Administrative Court of Appeal.

The Special Court of First Instance and the Court of Appeals are responsible for trailling criminal offenses related to corruption and organised crime. The Supreme Court adjudicates matters of both general and special jurisdiction.[49]

44 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Enlargement Strategy (10 November 2015) 20 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0611> accessed 10 December 2024.

45 Ligi, Kmecl and Lapimaa (n 43) 1.

46 Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: 2021 Communication on EU Enlargement Policy (19 October 2021) 8 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0644> accessed 10 December 2024; GIZ, '*Strengthening Rule of law in Serbia*' (*Gesellschaft für Internationale Zusammenarbeit (GIZ)*, January 2024) <https://www.giz.de/en/worldwide/139002.html> accessed 10 December 2024.

47 Ligi, Kmecl and Lapimaa (n 43) 3.

48 Constitution of the Republic of Albania (adopted 21 October 1998) <https://www.constituteproject.org/constitution/Albania_2012> accessed 10 December 2024.

49 Law of the Republic of Albania no 98/2016 'On the Organization of the Judiciary in the Republic of Albani' (amended 23 March 2021) art 3 <https://ild.al/en/laws/> accessed 10 December 2024.

The establishment of Administrative Courts serves two key purposes: First, it simplifies procedures aimed at resolving administrative disputes while ensuring the effective protection of individuals' subjective rights and legitimate interests of persons through a regular judicial process and within a timely and reasonable time.[50] Second, the courts act as guarantors for protecting subjective rights violated by the administration.[51] In addition, this control serves the normal course of administrative activity and, above all, constitutes a guarantee that the rights of individuals and legal entities are not violated.[52]

In the Republic of Northern Macedonia, Article 22 of the the Law on Courts stipulates that the judiciary consists of the Basic Courts, the Courts of Appeal, the Administrative Court, the High Administrative Court, and the Supreme Court of the Republic of North Macedonia, all of which exercise judicial power within the judicial system.[53]

According to Article 25, the Administrative Court[54] and the High Administrative Court exercise judicial power throughout the Republic of North Macedonia.[55] The High Administrative Court is competent to decide on appeals against the decisions of the Administrative Court, conflicts of competence between the municipalities of the City of Skopje, and holders of public authorisations, as provided by law (Article 34-a), unless the Constitution or other laws provide other forms of judicial protection.[56]

According to Article 4 of the Law on Administrative Dispute, administrative disputes in the Republic of Macedonia are decided by the Administrative Court as a court of first instance and the Supreme Court of the Republic of North Macedonia, which decides on extraordinary legal remedies.[57] The Administrative Court resolves appeals against administrative acts (Article 16), while the Supreme Court handles extraordinary legal remedies against decisions made by the Administrative Court. The Supreme Court also decides on conflicts of jurisdiction between the Administrative Court and other courts.[58]

In the Republic of Montenegro, Article 8 of the Law on Courts specifies that courts of general jurisdiction and specialised courts exist. The courts of general jurisdiction include minor offenses courts, high minor offenses courts, basic courts, supreme courts, the Court of Appeal, and the Supreme Court. The specialised courts include Commercial Courts and

50 Decision no 65 (Constitutional Court of the Republic of Albania, 07 November 2016) 5.

51 Sadushi (n 20) 27.

52 Unifying decision no 1 (United Colleges of the High Court of the Republic of Albania, 26 November 2010) 6.

53 Law of the Republic of Northern Macedonia 'On Courts' (into force 19 May 2016, amended 17 May 2019) art 22 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)016-e> accessed 10 December 2024.

54 ibid, art 25.

55 ibid, art 25-a.

56 ibid, art 34-a.

57 Law of the Republic of Northern Macedonia 'On Administrative Disputes' (into force 27 May 2006, amended 2010) [2006] Official Gazette of the Republic of Macedonia 62/2006 and 150/2010, art 4.

58 ibid, art 16.

Administrative Courts.[59] The Administrative Court has jurisdiction over the territory of Montenegro and is responsible for adjudicating administrative disputes and performing other duties defined by law (Article 21 and Article 22).[60]

In this regard, judicial control over the legality of public administration actions protects the rights of individuals from arbitrary state interference and prevents the overstepping of executive powers.[61] The Court decides on administrative disputes concerning the legality of administrative acts, the legality of other individual acts provided by law, and on extraordinary legal remedies against final and binding decisions in misdemeanour proceedings. Additionally, the court performs other tasks as defined by law (Article 23 and Article 24).[62]

In the Republic of Serbia, according to Article 134 of the Constitution, the judiciary is exercised by courts with general and specialised jurisdiction.[63] The Law on Courts, Article 10, specifies that the Courts of General Jurisdiction include Municipal and District Courts, Courts of Appeal and the Supreme Court of Serbia. The specialised courts include Commercial Courts, High Commercial Courts and Administrative Courts. [64]

The Administrative Court adjudicates administrative disputes and other duties defined by law (Article 26) in the first instance.[65] The court has jurisdiction over issues related to the legality of final acts executed by public administration authorities. In addition, the Administrative Court acts as a control mechanism for the entire executive branches. [66]

After a comparative review of the provisions of laws governing administrative judiciary, administrative disputes, the following conclusion is reached. In Albania, Montenegro, North Macedonia, and Serbia, jurisdictions follow the European model of functional specialisation for administrative disputes, with separate administrative courts established, at least at the first-instance level. Kosovo, however, is currently an exception, as it has separate departments for administrative disputes within the system of general jurisdiction courts.[67]

59 Law of the Republic of Montenegro no 23-1/14-18/17 'On Courts' of 26 February 2015 [2015] Official Gazette of Montenegro 11, art 8 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2015)049-e> accessed 10 December 2024.

60 ibid, arts 21, 22.

61 Ana Raičević, *Upravno sudstvo u Crnoj Gori: Razumni rok i izvršenje presuda Upravnog suda* (Građanska alijansa 2020) 5.

62 Law of the Republic of Montenegro no 23-1/14-18/17 (n 59) arts 23, 24.

63 Constitution of the Republic of Serbia (adopted 2006) art 143 <https://www.constituteproject.org/constitution/Serbia_2006> accessed 10 December 2024.

64 Law of the Republic of Serbia 'On Organization of Courts' (amended 2010) [2010] Official Gazette of RS 116/08, 104/09, 101/10.

65 ibid, art 26.

66 GIZ (n 46).

67 Ligi, Kmecl and Lapimaa (n 43) 13.

5 RESEARCH AND RESULTS

This section presents the analysis and research results from primary data collection instruments, including the analysis of the Kosovo Judicial Council's annual statistical reports from 2013 to 3 September 2024, as well as interviews, field questionnaires, and the main findings.

The purpose of using interviews, questionnaires, and carefully constructed questions is to address the three primary research questions.

1. How feasible is it for the Court of Pristina to resolve administrative cases within a reasonable timeframe?
2. To what extent has the Court decided on the legality of acts and actions of public administration?
3. Is establishing the Administrative Court and the Supreme Administrative Court necessary to deal with administrative matters?

This paper examines these questions and provides recommendations based on the empirical findings.

The research includes input from senior public officials, civil society representatives,[68] and questionnaires from senior public officials.[69] Interviews conducted with notable figures include Enver Hasani (President of the Constitutional Court of Kosovo, 2015),[70] Hilmi Jashari (The People's Advocate of the Republic of Kosovo, 2016),[71] Edita Tahiri (Minister of State for Dialogue with Serbia and former Minister of the Ministry of Public Administration in the Republic of Kosovo, 2016)[72] etc.

68 Clarification: For the Interviews of a number of senior public and civil society officials the names of the interviewers will not be published at their request.

69 Clarification: The paper will use the opinion of the Members of the Parliament (MPs) of the Republic of Kosovo, judges, prosecutors, senior management civil servants and management civil servants, political advisors and civil society interviewers.

70 Interview with Enver Hasani, former President of the Constitutional Court of Kosovo, conducted by the author paper on 13 September 2015.

71 Hilmi Jashari, the People's Advocate of the Republic of Kosovo in the interview conducted by the author of the paper on 20 January 2016.

72 Edita Tahiri, Minister of State for Dialogue with Serbia and former Minister of the Ministry of Public Administration in the Republic of Kosovo in the interview conducted by the author of the paper on 23 January 2016 (Pristine).

Table 2. **Senior public officials participating in this research**[73]

Institutions	Senior public officials participating in this research	No.
Assembly of Kosovo	Ex-President of Assembly of Kosovo and deputies	35
Ministry	Ex Minister of the Ministry Public Administration	1
Constitutional Court	President and judge	2
Court of Appeals	Judges	10
Basic Courts of Kosovo	Judges	92
Ministry	Civil Servants of senior-level management and Civil Servants of management level.	7
MPA and	Political Advisors of Minister and President of the Republic of Kosovo	4
IPA	The People's Advocate and Deputy Ombudsman	2
Anti-Corruption Agency	Ex- Director of Anti-Corruption Agency	1
Total senior public officials		154
Institutes, non-governmental organization and journalist	Civil society	10
Total		164

The research findings and analysis of empirical data indicate that the Department of Administrative Affairs in the Basic Court in Pristina is faced with a large number of cases and a small number of judges (for further details, see Table 3).

73 Source: authors of the research paper.

Table 3. **Basic Court of Pristina-administrative cases received, resolved and unsolved from January 2020 to 30 September 2024**[74]

Year	Cases received	Total job cases	Cases resolved	Cases unresolved	No. Judge
2020	1,905	8,285	1,947	6,338	
2021	2,816	9,163	2,951	6,212	12
2022	2,933	8,871	2,463	6,408	8
2023	2,418	7,571	2,557	5,014	8
30.09.2024	4,029	8,853	1,542	7,311	8

Table 4. **Court of Appeals in Pristina - administrative cases received, resolved and unsolved from January 2020 to September 30, 2024**[75]

Year	Cases received	Total job cases	Cases resolved	Cases unresolved	No. Judge
2020	797	1,341	620	721	
2021	1,180	1,901	877	1,024	3
2022	1,010	2,034	1,016	350	4
2023	1,207	1,557	937	620	4
30.09.2024	896	1,516	601	915	4

Based on the data and results, it can be concluded that while the number of cases resolved increases each year compared to the previous one, the number of cases has also risen, leading to a backlog of unresolved cases at the end of each year,[76] For this reason, the time taken for judgments (i.e., the average time from filing a court case to receiving a judgment) remains a cause for concern, as the overall duration is excessively long. For

74 Source: 'All Reports of the Kosovo Judicial Council' (n 34). KJC *Statistical Report of the Courts Annual* (2020, p. 7; 2021, p. 7; 2022, p. 8; 2023, p. 8); *Statistical Report of the Courts for the 9-month period* (2024, p. 8). The data processed by the authors of the paper.

75 Source: ibid. KJC *Statistical Report of the Courts Annual* (2020, p. 6; 2021, p. 6; 2022, p.6; 2023,p. 6); *Statistical Report of the Courts for the 9-month period* (2024, p. 6). The data processed by the authors of the paper.

76 Clarification: The data for year 2024 reflects only in those published in the reports of the Judicial Council of Kosovo.

example, in 2022, the disposition time for administrative cases in the first and second instance was 953 days (compared to 1,339 and 426 days in 2021, respectively).[77]

This delay means that natural and legal persons and other parties must wait years to realise their rights and interests. The empirical data is presented graphically below. Several questions were posed in the research, which are addressed here.

One key question was: Has the Court—specifically, the Department of Administrative Affairs (DAA)—fulfilled its duties and responsibilities? If not, what are the underlying reasons? How do the limited number of judges and the large volume of cases contribute to this?

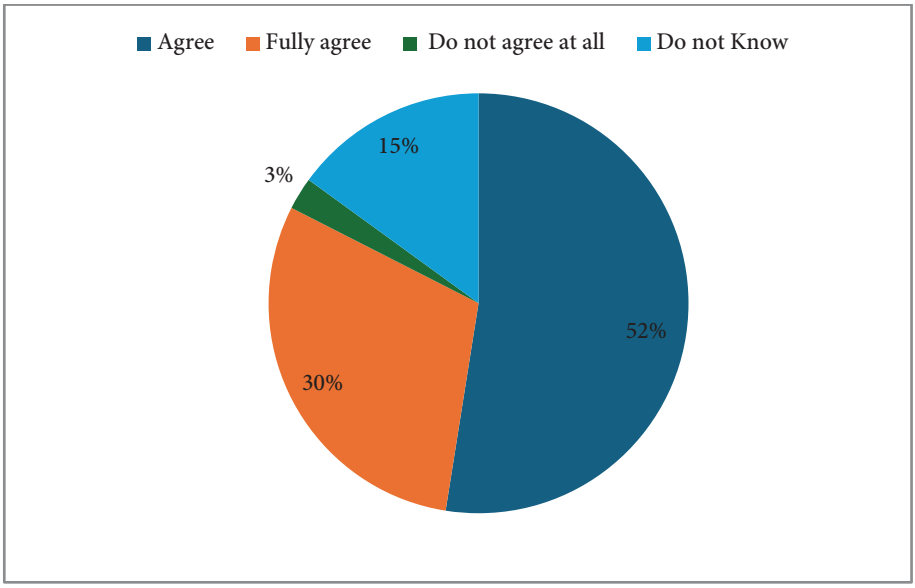


Figure 1. Judges' opinion on the Department of Administrative Affairs[78]

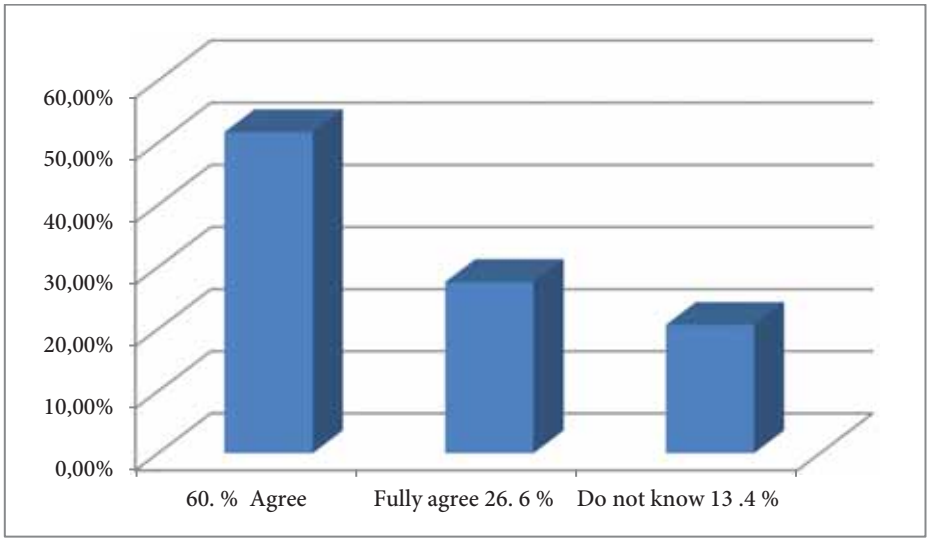
The data in Figure 1 above reflects the opinions of the judges participating in this study. Of the respondents, 52% agree, while 30% fully agree, indicating that a total of 82% of judges believe that the DAA has failed to fulfil its duties and responsibilities due to the small number of judges and a large number of pending cases On the other hand, 15% of the judges

77 European Commission Staff Working Document: Kosovo* 2023 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2023 Communication on EU Enlargement policy (Brussels, 8 November 2023) 22 <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52023SC0692> accessed 10 December 2024.

78 Source: author of the research-based paper.
Clarification: the research is part of the dissertation work of the author, see Shala (n 19).

interviewed expressed uncertainty, stating that they did not know whether the DAA had succeeded in fulfilling its duties and responsibilities, attributing the issue to the small number of judges and the large number of subjects.

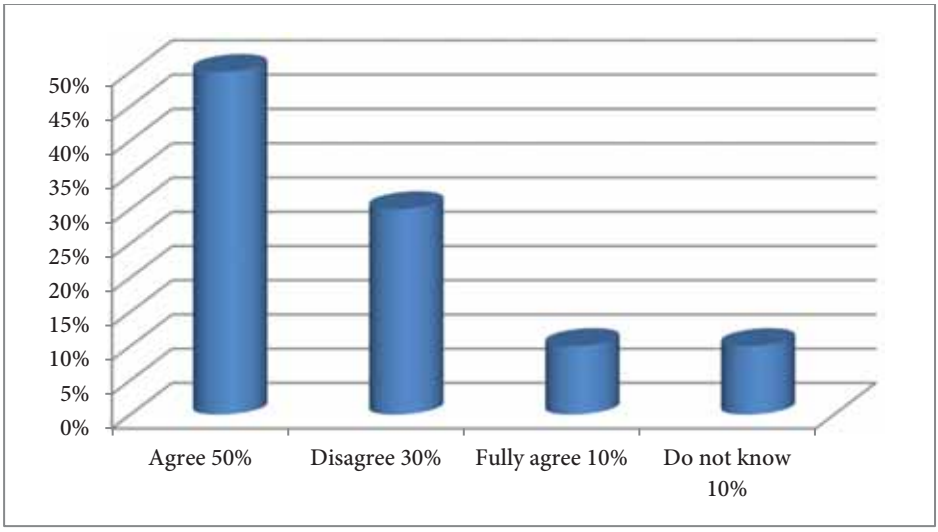
Regarding the question of whether the Administrative Court and the Supreme Administrative Court should be established, the opinions obtained and analysed for this purpose are given graphically.



Graph 4. Opinion of the deputies on the establishment of the Administrative Court and the Supreme Administrative Court[79]

The above graph reflects the opinions of the deputies of the Assembly of Kosovo, with a total of 86.6% of the delegates participating in this study agreeing that the Administrative Court and the Supreme Administrative Court should be established to make the administrative trial more efficient. On the other hand, 13.4% of the delegates expressed uncertainty about the necessity of establishing the Administrative Court and the Supreme Administrative Court of Kosovo.

79 Source: authors of the research paper.



Graph 5. Opinion of the judges of the Court of Appeals on the establishment of the Administrative Court and the Supreme Administrative Court[80]

The graph above reflects the opinion of the judges of the Court of Appeals. 60% of judges believe there is the need to establish the Administrative Court and the Supreme Administrative Court in Kosovo. Meanwhile, 10% of judges state that they do not know whether the Administrative Court and the Supreme Administrative Court should be established.

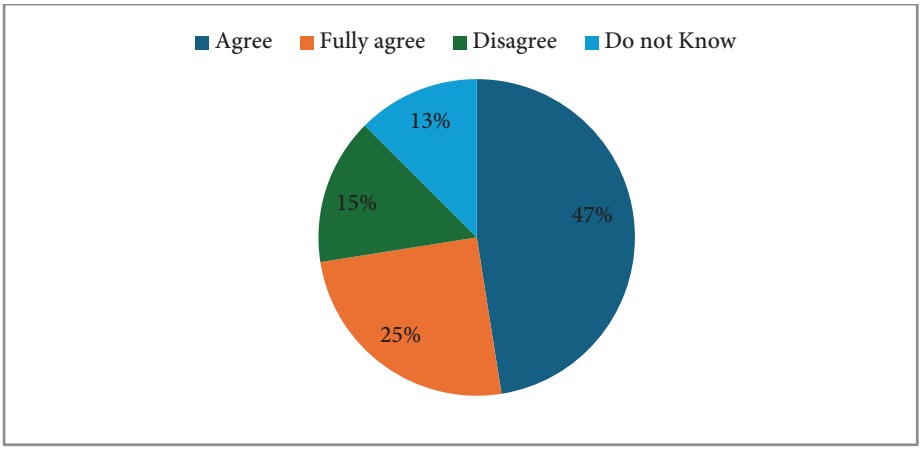
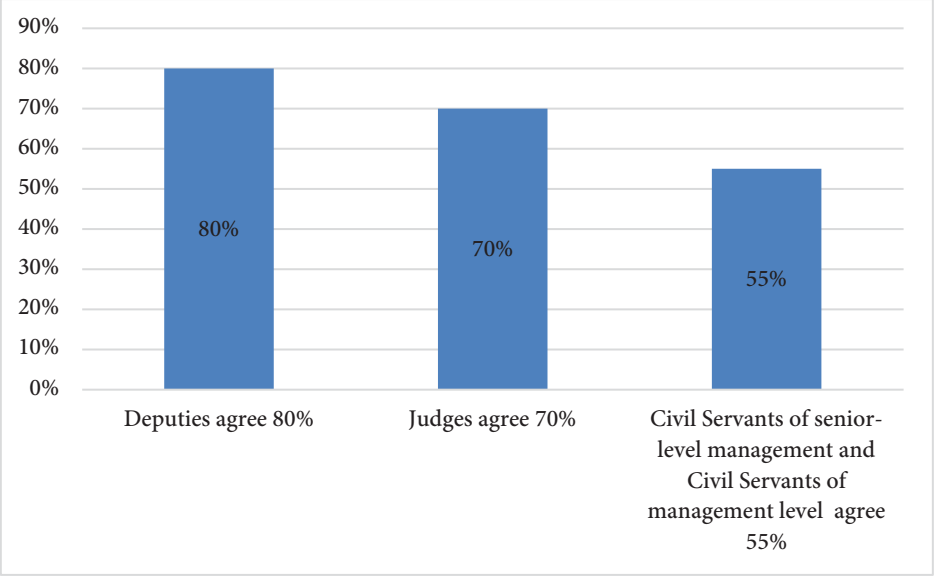


Figure 2. Opinion of Basic Court judges on the establishment of the Administrative Court and the Supreme Administrative Court[81]

80 Source: authors of paper based on research.
81 Source: author of the paper based on research.

The above figure reflects the opinion of the judges participating in this study. Of the judges, 47% agree, 25% fully agree, and 72.0% expressed their support for the establishment of the Administrative Court and the Supreme Administrative Court. Meanwhile, 15% of judges disagreed with the establishment of these courts, and 13% stated that they did not know whether these courts should be established.

According to the former President of the Constitutional Court and the judges at the Basic Court, it is widely accepted that for administrative matters, administrative courts should be established in response to the challenges of functioning of the state administration, and that the existence of only one department at the Basic Court in Pristina is not the right solution. A supreme administrative court (the second instance) should be established in Kosovo as a specialised institution that would exercise judicial control over the legality of the work of the entire public administration. The main drawback in Kosovo lies in the judicial control of legality. If this control were effective, it would establish a certain standard of conduct for the public administration. As the situation stands, there is no clear line that the public administration should follow, which is clearly evident in some cases, given the arbitrary nature of public administration decisions in Kosovo.[82]



Graph 6. Opinion of senior public officials on the establishment of the Administrative Court and the Supreme Administrative Court[83]

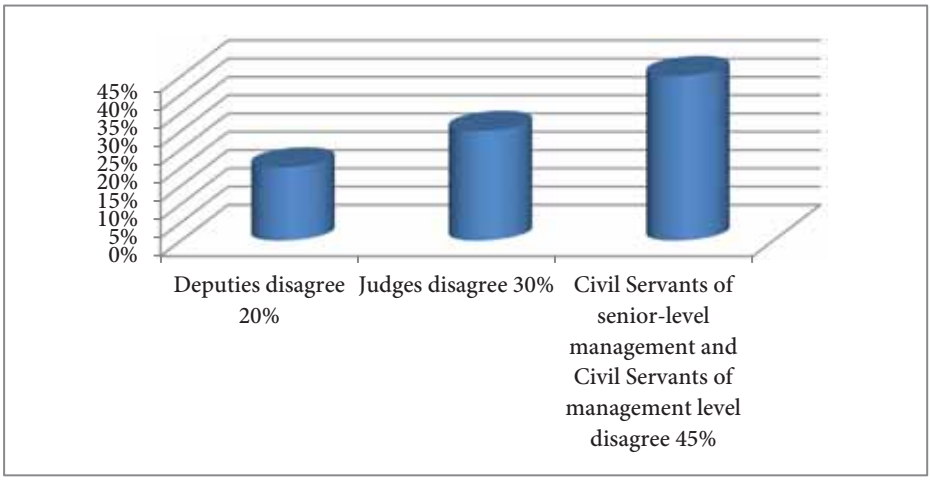
82 Enver Hasani, Former President of the Constitutional Court, University Professor, Interview conducted by the author of the paper on 13 September 2015 (Pristina).

83 Source: author of the paper based on research.

The graph above reflects the opinions of senior public officials involved in the survey: 80% of the Republic of Kosovo's Members of Parliament (MPs), 70% of judges, and 55% of senior-level civil servants and management-level civil servants[84] agree that the establishment of the Administrative Court and the Supreme Administrative Court is necessary.

Based on the research and empirical data results, the hypothesis regarding the necessity of establishing administrative courts in the Republic of Kosovo to resolve administrative issues is substantiated. The Supreme Administrative Court should be established in Kosovo as a specialised institution that would oversee judicial control of the legality of the work of the entire public administration.

However, there are also opinions against establishing the Administrative Court and the Supreme Administrative Court.



Graph 7. Opinion of senior public officials against the establishment of the Administrative Court[85]

84 Law of the Republic of Kosovo no 03/L-149 'On the Civil Service of the Republic of Kosovo' [2010] Official Gazette of the RK 72/12. In the Republic of Kosovo based on Law No. 03/L-149 Article 23 provided that the personnel employed in the Civil Service is divided in four (4) functional categories: 1. Civil Servants of senior-level management; 2. Civil Servants of management level; 3. Civil Servants of professional level; 4. Civil Servants of the technical-administrative level.
Law of the Republic of Kosovo no 08/L-197 'On Public Officials' [2023] Official Gazette of the RK 21/1. This Law of 22 December 2022 repealed Law No. 03/L-149 on the Civil Service of the Republic of Kosovo. According para 2 article 38 of the Law No. 08/L-197 on Public Officials, which provides: positions in the civil service into the following categories: senior-level management category shall include the general secretary, director general in independent and regulatory agencies, executive director, and deputy director of an executive agency, and equivalent positions thereof and mid-level management category shall include the director of department and equivalent positions thereof. Low-level management category shall include the head of division and equivalent positions thereof; The category of specialists shall include the senior professionals in areas that require specific preparation for that area; and the professional category shall include professional officers.

85 Source: author of the paper based on research.

The above graph reflects the opinions of senior public officials who are against establishing the Administrative Court. Of these, 20% of delegates state that there are currently sufficient institutions dealing with administration. They argue that only political will is necessary, and while the necessary institutions exist and there is good legislation, its implementation is lacking.

In addition, 30% of judges argue that there is no need to create another institution to control public administration as such institutions are already in Kosovo. However, they emphasise the need for greater will and more independence, enabling better functioning of the existing institutions.

Some judges further assert that there is no need at all to establish an administrative court or any other institution to oversee public administration in Kosovo. Instead, they propose increasing the number of judges in the Department of Administrative Affairs of the Basic Court in Pristina.[86] While establishing a new court may be straightforward, they note that doing so does not automatically lead to increased professionalism, efficiency, or effectiveness. In some cases, increasing the number of judges in the administrative department has not led to any improvements; on the contrary, it has even resulted in a decline in the court's efficiency.[87]

On the other hand, the Commercial Court serves as the prime example, demonstrating that establishing new courts is not always the solution. While it has been established, it has yet to offer any miracle solutions to the problems it aimed to address. The same dilemma applies to the Administrative Court.[88] In addition, separate administrative departments have been established within both the Basic Court and the Commercial Court, which handle administrative disputes arising from business activities.

This research was conducted over several years, involving interviews, discussions, and questionnaires with senior public officials and civil society representatives. The empirical findings and research results provided insights into Kosovo's need for legal reform. In this regard, the Assembly adopted a new law on administrative disputes to improve the administrative justice framework and protect citizens' rights.[89] Furthermore, the feedback gathered through the interviews and questionnaires influenced senior public officials to initiate legal reforms. Following the submission of the paper to the Journal in 2024, I entered the legislative program for drafting and approving the draft law on the Administrative Court.

86 Shala (n 19) 209-14.

87 Ehat Miftaraj, 'Interview with the Executive Director of the Kosovo Law Institute (KLI)' (*Dukagjini*, 9 June 2023) <https://www.dukagjini.com> accessed 9 June 2023.

88 Naser Shamolli, 'Interview with the Staff in Group for Legal and Political Studies' (*Dukagjini*, 9 June 2023) <https://www.dukagjini.com> accessed 9 June 2023.

89 Law of the Republic of Kosovo no 08/L-182 (n 33). Into forced one (1) year after the publication in the Official Gazette of the Republic of Kosovo.

Moreover, on 5 December 2024, the Assembly of Kosovo adopted the Law on the Administrative Court.[90] However, on 13 December 2024, the opposition party (Democratic Party of Kosovo) challenged the law in the Constitutional Court, citing "procedural violations"[91] and alleging that specific deadlines for approving the draft law had been ignored during the second review.[92] Despite this, adopting the Law on the Administrative Court remains an important step in reforming administrative justice.[93] This law defines that the Administrative Court shall have jurisdiction over the entire territory of the Republic of Kosovo and shall be considered functionalised three (3) months after it enters into force.

Looking ahead, the Administrative Court is expected to be established in 2025, with hopes of improving the professionalism of judges and the efficiency of the court's work.

6 CONCLUSIONS

A comparative analysis of judicial control of public administration in the Republic of Kosovo and in the countries of the region that the Republic of Albania, Northern Macedonia, Montenegro, and Serbia, has led to several key conclusions. Given the limited scope of this study, a selection of findings and recommendations is presented.

With the legal reform, Law No. 06/L-054 on Courts determines that the court system of the Republic of Kosovo comprises of Basic Courts, the Court of Appeals and the Supreme Court.[94] For this reason, administrative disputes are settled within the competence of the Department of Administrative Affairs within the Basic Court in Pristina, which has jurisdiction over the entire territory of Kosovo. Additionally, administrative departments have been established within the Commercial Court to handle administrative disputes initiated by businesses. However, due to the heavy workload, the large number of cases, and the small number of judges dealing with administrative cases, these departments have contributed to an increase in the number of unresolved administrative cases.

90 Republic of Kosovo, *Transcript of the Extraordinary Plenary Session of the Assembly of the Republic of Kosovo held on 5 December 2024* (Assembly of the Republic of Kosovo 2024) 4.

91 Abelard Tahiri, 'Head of the PDK Parliamentary Group at a press conference' (*Telegrafi*, 13 December 2024) <https://telegrafi.com> accessed 13 December 2024.

92 The reason why claims procedural violations. Rules of procedure of the Assembly of the Republic of Kosovo Article 52 defines that the agenda, together with materials, is distributed to the Members of the Parliament (MPs) at least two working days prior the plenary session. Report was distributed the MPs in the day of the holder of the plenary session

93 'The adoption of the Law on the Administrative Court, an important step in the reform of administrative justice' (*Kosovo Judicial Council*, 5 December 2024) <https://www.gjyqesori-rks.org/2024/12/05/miratimi-i-ligjit-per-gjykaten-administrative-nje-hap-i-rendesishem-ne-reformen-e-drejtesise-administrative/> accessed 10 December 2024.

94 Law of the Republic of Kosovo no 06/L-054 (n 29) ch 3.

Based on the results of empirical research, Kosovo must establish the Administrative Court of First Instance, based in Pristina, with branches in six major centers, and the Supreme Administrative Court (second instance).

The Administrative Court will be a guarantor for a regular judicial process and, within a quick and reasonable time, for the legal protection of the constitutional and legal rights, freedoms and interests of the subjects that may be violated as a result of the exercise or not of public functions by public administration bodies. The court would enable judicial control of the legality of the work and activity of public administration, increase the quality of administration and good governance, and increase citizens' trust in institutions.

Establishing the Administrative Court would create a certain standard of conduct for public administration, contributing to the creation of a rule of law, good governance in Kosovo, functioning institutions, democratic societies, and integration into the European Union.

The Assembly of Kosovo adopted the Law on the Administrative Court on 5 December 2024. Subsequently, on 13 December 2024, the opposition party (Democratic Party of Kosovo) submitted the law to the Constitutional Court, claiming procedural violations. Based on the practices of legislative treatment, the Constitutional Court will issue a verdict on the assessment of the constitutionality of the law within the legal timeframe. However, if the Court approves the claim and requests the Assembly to repeat the procedure for a second review of the Draft Law, this will delay the establishment of the Administrative Court, the issuance of sub-legal acts by the Judicial Council, the opening of the competition for the selection and appointment of new judges, and the functionalisation of the court. This delay will result in an increase in cases in the Administrative Departments of the Court.

Although the law of the Administrative Court stipulates that the court shall be considered functionalised three (3) months after the law enters into force, challenges to its functionalisation include the transfer of judges, the recruitment of new judges, training for administrative cases, and the transfer of cases from the Department for Administrative Matters of the Basic Court in Pristina and the Department for Administrative Matters and the Fiscal Department of the Commercial Court to the first instance of the Administrative Court.

Finally, this study will contribute to the legal literature and pave the way for a new research direction. Future researchers should focus more on exploring the challenges of functionalising the Administrative Court and assessing the effects of judicial control by both the Administrative Court and the Supreme Administrative Court.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СТВОРЕННЯ АДМІНІСТРАТИВНОГО СУДУ: НЕОБХІДНІСТЬ ВРЕГУЛЮВАННЯ АДМІНІСТРАТИВНИХ СПОРІВ У РЕСПУБЛІЦІ КОСОВО

Мервете Шала та Джавіт Шала*

АНОТАЦІЯ

Вступ: *Судовий контроль за діяльністю публічної адміністрації відіграє вирішальну роль у підвищенні якості діяльності адміністрації та належного управління. Ця наукова стаття має на меті вивчити наявну ситуацію судового контролю за публічною адміністрацією Республіки Косово та провести порівняльний аналіз правової бази судового контролю за публічною адміністрацією в країнах регіону. Також метою дослідження є відповісти на такі питання: наскільки Суд першої інстанції в Приштині спромігся ухвалити рішення щодо законності актів і дій органів публічної*

адміністрації; чи є необхідним створення Адміністративного суду та Вищого адміністративного суду для розгляду адміністративних справ? Створення адміністративного суду покращить судовий контроль за законністю роботи публічної адміністрації, підвищить якість адміністрування та ефективного управління, збільшить рівень довіри громадян до інституцій.

Методи: *У цьому дослідженні використовувалися різні методології, зокрема якісні, аналітичні, порівняльно-правові, описові та кількісні (статистичні) методи. Метод якісного дослідження аналізує Конституцію, закони, підзаконні акти та інші документи. Порівняльно-правовий метод застосовано для зіставлення положень законодавства про адміністративні спори в країнах регіону. Статистичні методи були використані під час вивчення щорічних звітів Судової ради та судів Косова, а також в емпіричній частині статті.*

Результати та висновки: *За результатами дослідження та аналізу можна зробити висновок про те, що створення адміністративних судів у Республіці Косово є необхідним для вирішення адміністративних питань. З огляду на це, можна зрозуміти, що існування лише одного відділу в Суді першої інстанції в Приштині з «юрисдикцією» для всієї території Республіки Косово не є правильним рішенням. Із цієї причини автори обґрунтовують необхідність створення в Республіці Косово Адміністративного суду для вирішення адміністративних питань. Адміністративний суд першої інстанції розташований у Приштині з відділеннями в шести великих центрах Косова, а Верховний адміністративний суд є другою інстанцією.*

Ключові слова: *адміністративний суд, акти, адміністративні спори, контроль, державне управління, законність.*

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Research Article

INTERNATIONAL LEGAL FRAMEWORKS FOR REGULATING LAND-BASED MARINE POLLUTION: A COMPARATIVE STUDY OF GLOBAL AND REGIONAL APPROACHES, DISPUTES AND SETTLEMENT MECHANISMS

Driss Ed.daran*, Malik Zia-ud-Din, Riad Al Ajlani and Fatima Ezzohra Elhajraoui

ABSTRACT

Background: *Land-based sources are the primary contributors to ocean pollution, posing significant risks to marine ecosystems and human health, as exemplified by Minamata disease caused by mercury contamination. A thriving marine environment is essential for the prosperity of coastal cities. However, despite existing international legal frameworks, stronger regulations remain necessary to effectively control land-based marine pollution. Governments often hesitate to impose strict limits on land-based industries, making legal strategies that constrain state actions crucial for environmental protection. Regional agreements have emerged as potential solutions, offering regulatory approaches tailored to specific economic, social, and political contexts.*

Methods: *This study employs a doctrinal legal research approach to analyse the challenges in implementing global and regional legislative frameworks for land-based marine pollution. A comprehensive literature review of academic works, international legal texts, and landmark judicial cases provides insight into regulatory gaps and potential improvements. Additionally, secondary sources, including reports from civil society organisations, help contextualise the practical implications of these legal frameworks. The study also examines disputes related to land-based marine pollution and the effectiveness of dispute resolution mechanisms at both regional and global levels.*

Results and Conclusions: *The findings emphasise the need to protect marine environments from land-based pollution while balancing economic growth. Regional agreements offer valuable insights into legal strategies and institutional mechanisms that could help achieve this equilibrium. However, weaknesses in how these conventions enhance international law's ability to manage land-based pollution require further analysis. A sustainable legislative framework must reconcile environmental protection with economic, social, and political priorities. Strengthening dispute settlement mechanisms and fostering international cooperation are essential for addressing these challenges. The study underscores the persistent tension between economic growth and environmental preservation in international law and highlights the need for more effective, enforceable legal frameworks to ensure the long-term sustainability of marine ecosystems.*

1 INTRODUCTION

The most significant contributor to ocean pollution comes from land. Since coastal waters are areas of high biological productivity, pollution from land poses a substantial hazard to the marine environment. Contaminations in coastal waters can cause significant dangers to marine ecosystems and human health, as is commonly shown by the case of Minamata, a sickness caused by mercury poisoning via liquid waste from a plant in Japan.[1]

Therefore, it is not an exaggeration to argue that a thriving marine ecosystem is crucial to the well-being of coastal communities. Discharges from land-based sources, which can be municipal, industrial, or agricultural, can enter the marine environment in a few different ways: (i) from the shore, including estuaries that release into the ocean by runoff; (ii) via canals, rivers, or other waterways; (iii) via the atmosphere; iv) sources of pollution-causing activity.[2]

The combination of population overcrowding, industrialisation, and the ocean's limited ability to process pollutants are the root causes of land-based marine pollution. An estimated 60% of the universal population is thought to reside within 100 kilometres of a coastline.[3] As the world's population continues to grow at an alarming rate, land-based pollution may pose an even more significant threat to marine life.

1 SM Sharifuzzaman and others, 'Heavy Metals Accumulation in Coastal Sediments' in Hiroshi Hasegawa, Ismail Md Mofizur Rahman and Mohammad Azizur Rahman (eds), *Environmental Remediation Technologies for Metal-Contaminated Soils* (Springer 2016) 21, doi:10.1007/978-4-431-55759-3_2.

2 Takunda Yeukai Chitaka, Percy Chuks Onianwa and Holly Astrid Nel, 'Marine Litter Sources and Distribution Pathways' in Thomas Maes and Fiona Preston-Whyte (eds), *The African Marine Litter Outlook* (Springer 2023) 35, doi:10.1007/978-3-031-08626-7_2.

3 Christopher Small and Robert J Nicholls, 'A Global Analysis of Human Settlement in Coastal Zones' (2003) 19(3) Journal of Coastal Research 584.

The transboundary character of the issue means that no one nation can solve the problem of pollution entering the ocean from land-based sources. Therefore, international cooperation between States is essential to halting land-based contributions to marine pollution. Additionally, to guarantee fair economic competition on a global scale, it is crucial to adopt international laws in this area. This suggests a pressing need to establish a worldwide legal framework to control marine pollution from land. The optimum way to eliminate marine pollution from land-based sources is not yet agreed upon on a global scale, although there are regional agreements that may assist.[4]

Therefore, the main purpose of this study is to identify the reasons for the continuous development of international regulations of marine pollution from land. Given the reluctance of the government to impose strict regulations on land, protecting the marine environment against pollution from land means only the use of law and limits the scope of the country's work. It is worth noting here that legal ideas and methods for controlling marine pollution from land are increasing, especially in regional meetings. These regional agreements can clarify the laws and institutions that strike a balance between protecting the marine environment from land degradation and promoting economic development. Another issue that needs to be examined is whether regional agreements could help improve international legal regulations on marine pollution from land-based industries.

This study employs a doctrinal legal research approach to examine the challenges in implementing the global and regional legislative framework. This approach allows for identifying gaps in existing knowledge, which are then addressed to generate new insights. The research methodology involves a comprehensive literature review and an analysis of academic articles, books, and legal commentaries to establish a theoretical foundation. Additionally, the study examines the relevant international legal texts, including global and regional laws on the protection of the maritime environment, as well as judicial interpretations of these laws through landmark cases. Secondary sources, such as reports from civil society organisations and international guidelines, are also reviewed to contextualise the findings and provide insights into the practical implications of the legal frameworks.

The research article is structured into four sections. Part 2 builds upon the discussion begun in Part 1, analysing the constraints imposed by the international legal framework on the regulation of land-based pollution. Part 3 explores how regional responses and legal strategies on land-based pollution have evolved through time. Special emphasis is placed on the identification of potentially dangerous compounds, the adoption of a precautionary approach, the implementation of regulatory measures, and the oversight of these processes at the international level. Part 4 provides a comprehensive summary, addressing the most substantial disputes surrounding the protection of the maritime environment from land-based pollution. Furthermore, this section discusses the mechanism of solving these disputes.

4 Daud Hassan, *Protecting the Marine Environment from Land-Based Sources of Pollution: Towards Effective International Cooperation* (Routledge 2017).

2 GLOBAL LAW'S CAPACITY TO CONTROL LAND-SOURCED MARINE POLLUTION

2.1. Analysis of the International Legal System

2.1.1. Internationally Recognised Customary Law and General Legal Principles

The law of the sea has lately embarked on addressing the unique phenomena of regulating marine pollution, mainly marine pollution that originates on land. It is hardly unexpected that there are few laws regarding maritime pollution in customary law, given the lack of State practice in this area.[5] It is generally agreed that no nation may use or permit the use of its territory in any manner that hurts the territory of another nation. The Trail Smelter arbitration *(1938-41)* formally articulated the principle of *sic utere tuo ut alienum non laedas*, which states that one must utilise their property in a way that does not cause harm to the property of others.[6] Though the setting is different, the International Court of Justice *(ICJ)* had already referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" in the 1949 Corfu Channel case.[7] The Stockholm Declaration of 1972 expounded on this guideline in Principle 21. The United Nations Conference on Environment and Development issued the Rio Declaration in 1992, and within it was a reaffirmation of Principle 21.[8]

The *sic utere tuo ut alienum non laedas* norm now reflects customary international law, which is beyond dispute. The common law basis of this norm was confirmed in both the 1997 Gabkovo-Najmaros Project case and the International Court of Justice's advisory decision on the Legality of the Threat or Use of Nuclear Weapons.[9] In international environmental law, *sic utere tuo ut alienum non laedas* is fundamental. However, the subsequent constraints must be considered about the scope and use of this rule.

First, it is widely acknowledged that this rule requires "due diligence" to avoid cross-border harm. If a state has exercised such due diligence, it is exempt from liability for any resulting

5 Owen McIntyre and Thomas Mosedale, 'The precautionary principle as a norm of customary international law' (1997) 9(2) Journal of Environmental Law 221, doi:10.1093/jel/9.2.221.

6 Austen L Parrish, 'Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canada-US Transboundary Water Pollution Disputes' (2005) 85(2) Boston University Law Review 363.

7 Scott J Shackelford, Scott Russell and Andreas Kuehn, 'Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors' (2016) 17(1) Chicago Journal of International Law 1.

8 Rio Declaration on Environment and Development (1992) A/CONF.151/26/Vol.I.

9 Justine Bendel and James Harrison, 'Determining The Legal Nature and Content of EIAs in International Environmental Law: What Does the ICJ Decision in the Joined Costa Rica v Nicaragua/Nicaragua v Costa Rica Cases Tell Us?' (2017) 42 Questions of International Law 13.

damages.[10] Nonetheless, due diligence is a relatively undefined term. Its application may vary on several factors, including the level of available technology and economic resources in a given country and the efficiency of its territorial control.

Moreover, as time progresses in science and technology, what constitutes reasonable due diligence may also shift. The generic term is of little use in this context since it does not specify the actions that each State must take.[11] The notion of "common but differentiated responsibility," which is gaining prominence in international environmental law, may also raise questions about the relationship between due diligence and other concepts of equal importance.[12] Therefore, due diligence requires more explanation in each unique circumstance.

Second, as will be demonstrated, many different substances, sources, and individuals are involved in land-based marine contamination. More than two states in the same area may be responsible for marine contamination. As a result, identifying responsibility for ocean pollution can be a complex and ambiguous process. In such circumstances, the standard requirement of due diligence may face challenges, particularly in establishing clear accountability and enforcement mechanisms.

Third, the rule of *sic utere tuo ut alienum non laedas* demonstrates State culpability after harm has already been done on the other State's territory. In other words, this regulation pertains to the State's legal responsibility for harm already done. However, it may be argued that preventing environmental harm is paramount since its effects are not always easy to reverse.[13]

Finally, it is claimed that strict adherence to this criterion may be quixotic given the frequent occurrence of different transboundary environmental problems. As Oscar Schachter pointed out, no one believes harmful actions can be eradicated via blanket legal decree.[14] Thus, it is proposed that the injury must be substantial before the rule of *sic utere tuo ut alienum non laedas* may be used. Nonetheless, a precise definition of "significant or substantial harm" is difficult, if not impossible, to achieve. Consequently, deciding what constitutes "significant or substantial harm" would be an exercise in judgment. It is clear that the universal rule of *sic utere tuo ut alienum non laedas* is not enough to safeguard the oceans.

10 McIntyre and Mosedale (n 5).

11 Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68(4) International & Comparative Law Quarterly 1041, doi:10.1017/S0020589319000344.

12 Carmen G Gonzalez and Sumudu Atapattu, 'International Environmental Law, Environmental Justice, and the Global South' (2016) 26(2) Transnational Law & Contemporary Problems 229.

13 Angela H Arthington and others, 'The Challenge of Providing Environmental Flow Rules to Sustain River Ecosystems' (2006) 16(4) Ecological Applications 1311, doi:10.1890/1051-0761(2006)016[1311:TCOPEF]2.0.CO;2.

14 Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991).

Land-based marine pollution legislation may also take responsibility for the misuse of rights.[15] When one state uses its privilege to hinder another's ability to enjoy its rights or uses its privilege for an improper purpose, it is engaging in an "abuse of rights" under international law. While the notion of abuse of rights' precise legal status is still up for debate, though it is represented explicitly in the 1982 UN Convention on the Law and Sea, Article 300 states;

"States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right".[16]

In conclusion, it seems that the rule of s*ic utere tuo ut alienum non laedas*, like the notion of exploitation of rights, can put the issues in the limelight about their application due to the abstract character of the rules.[17] It is also worth noting that the guidelines do not mandate that individual states do anything to safeguard the maritime environment or control pollution from any particular source. Therefore, the treaty level has to have more stringent laws regarding land-based marine contamination.

(i) The United Nations Convention on the Law of the Sea (1982)

In force since 1994, the Convention on the Law of the Sea (hereinafter referred to as LOSC) is the first international treaty to impose universal obligations for controlling land-based pollution.[18] Article 194(1) stipulates that States Parties shall adopt measures as may be necessary to prevent, reduce, and control pollution of the marine environment from any source, taking into account characteristic regional features and the state of technical knowledge and its economic feasibility at the time. This clause only applies to contamination that occurs on land.

Furthermore, Article 194 (3) (a) requires that, among other things, "the release of toxic, harmful, or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere, or by dumping" be minimised to the greatest extent possible. It is believed that the 1982 LOSC is a significant improvement against the previous Geneva Conventions that address only restricted causes of marine pollution since it provides such protections.[19]

15 Rehman Akhtar and others, 'An Examination of Evolving Concerns, Obstacles, and Prospects in Relation to Pollution in the Marine Environment' (2023) 3(1) Pakistan Journal of Criminal Justice 66, doi:10.62585/pjcj.v3i1.28.

16 United Nations Convention on the Law and Sea (LOSC) (10 December 1982) [1994] UNTS 1833/3, art 300.

17 Samaa Moustafa, 'The Shortcomings of Rights to Water Doctrines' (Master's thesis, American University in Cairo, School of Global Affairs and Public Policy 2011).

18 LOSC (n 16).

19 Hassan (n 4).

In 1982, the Law of the Sea Convention (LOSC) was opened for signing; it was to the effect that rules should be made and enforced to reduce land-based pollution. Article 207(1) requires governments to adopt laws "consistent with internationally agreed rules and standards and recommended practices and procedures" to prevent, reduce and control pollution of the marine environment from land-based sources.

According to Article 207(3), states should coordinate policies to combat this problem at the regional level. To better address pollution from land-based sources, Article 207(4) calls for the establishment of global and regional institutions and the coordination of regional policy adoption. Article 207 also provides for the enforcement of laws and regulations, while Article 213 provides for the adoption of any additional measures necessary for the implementation of international norms and regulations. Article 207(2) further requires states to adopt "other measures as necessary" to avoid such pollution.[20]

2.1.2. Creation of Non-Binding Measures

The United Nations Environment Programme (UNEP) has been at the forefront of several attempts to manage land-based pollution under a single, worldwide framework. Adopting the Montreal Guidelines for the Protection of the Marine Environment from Pollution by Land-Based Sources in 1985 was one of the first significant events.[21] The guidelines were revolutionary in providing governments with specific advice to "prevent, reduce, and control" land-originating pollution that impacts marine ecosystems, even though they were not legally obligatory. They strongly emphasised preventative actions, including carrying out environmental impact assessments, implementing monitoring systems, promoting information sharing, and providing developing countries financial and technical assistance. The Montreal Guidelines established the foundation for an international standard on marine environmental management by urging nations to implement these measures, highlighting the crucial connection between the preservation of terrestrial and marine ecosystems.

A distinguishing feature of the Montreal Guidelines is their focus on transboundary water management.[22] Recognising that rivers and streams often act as conduits for pollution from inland areas to the sea, the Guidelines call for cooperative measures among states that share waterways. Specifically, the guidelines recommend that if pollution from a shared or bordering watercourse could affect the marine environment, the concerned countries

20 LOSC (n 16).

21 Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources (24 May 1985) <https://digitallibrary.un.org/record/84661?ln=en> accessed 25 November 2024; Bettina Meier-Wehren, 'The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities' (2013) 17 New Zealand Journal of Environmental Law 1.

22 Biliana Cicin-Sain, David Vanderzwaag and Miriam C Balgos (eds), *Routledge Handbook of National and Regional Ocean Policies* (Routledge 2015).

should work together to control it. This approach highlights the need to integrate marine pollution controls and the environmental management of international rivers and waterways, emphasising that marine protection efforts must extend beyond coastlines to address upstream pollution sources. Additionally, the guidelines introduced the concept of protected zones to shield vulnerable ecosystems from pollution, identifying ecologically or culturally significant regions that require special preservation measures.

Agenda 21, a worldwide action plan created at the 1992 United Nations Conference on Environment and Development (UNCED), reaffirmed the need to protect marine habitats from land-based pollution.[23] Chapter 17, devoted to the marine environment, advocates a precautionary and comprehensive strategy for mitigating marine deterioration.[24] It promotes policies including waste reduction, recycling programs, clean production techniques, and the construction of state-of-the-art sewage treatment plants. Furthermore, Chapter 17 emphasises how dangerous materials must be handled carefully to prevent their introduction into maritime systems. To preserve the well-being of the maritime environment, it calls for a coordinated response to pollution of the land, air, and water. Building on the Montreal Guidelines, Agenda 21 advocates the need for stronger international cooperation to promote regional, local, and global collaborations.

The adoption of the Washington Declaration and the Global Programme of Action (GPA) for the Protection of the Marine Environment from Land-Based Activities in 1995[25] kept the impetus for action on land-based pollution management going.[26] The GPA, which was created at an international meeting in Washington, D.C., was a direct result of Agenda 21's marine preservation call and was designed to help states reduce marine pollution from land-based sources. To address the nine main causes of pollution that have been identified, it promotes preventative measures and environmental impact assessments. The GPA represented a major advancement by defining specific steps that governments may take to address these sources at the national, regional, and international levels while including science-based recommendations and the most effective techniques for marine ecosystem protection.

However, managing land-based pollution remains complex, partly due to the nature of the pollution sources. Unlike vessel-source pollution, which primarily involves oil and oily

23 Meier-Wehren (n 21).

24 Louis B Sohn, 'Stockholm Declaration on the Human Environment' (1973) 14(3) The Harvard International Law Journal 423.

25 Washington Declaration on the Protection of the Marine Environment from Land-based Activities (2 November 1995) (1998) 13 Ocean Yearbook 722; UNEP, 'Global Programme of Action (GPA)' <https://www.unep.org/topics/ocean-seas-and-coasts/ecosystem-degradation-pollution/global-programme-action-gpa> accessed 25 November 2024; Meier-Wehren (n 21).

26 David L VanderZwaag and Ann Powers, 'The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance' (2008) 23(3) The International Journal of Marine and Coastal Law 423.

substances, land-based pollution encompasses a broad range of contaminants that vary widely in their chemical composition, sources, and environmental impacts. Pollution from land includes not only continuous sources like factories and agricultural runoff but also episodic events, such as pollutants washed into the ocean during heavy rains. This complexity requires a nuanced regulatory framework that can adapt to diverse pollution types and their fluctuating impact on marine ecosystems. Furthermore, because land-based pollutants are often localised, their effects can vary depending on geographic and oceanographic factors like coastal currents, shallow waters, and semi-enclosed seas, where the consequences of pollution can be more severe.[27]

Moreover, significant disparities between developed and developing nations affect the global approach to managing land-based pollution. Many developing countries lack the financial and technological resources necessary for effective pollution control, making it challenging for them to implement comprehensive marine protection measures. The 1995 Washington Declaration acknowledged that poverty reduction is essential for advancing marine protection, as limited economic resources in impoverished regions can hinder efforts to curb pollution at the source. The Montreal Declaration on the Protection of the Marine Environment 2001[28] further highlighted this, noting that poverty often leads to inadequate sanitation systems that contribute to marine pollution.[29] To address these disparities, international efforts to control land-based pollution should take into account the varying capacities of countries and provide support to those most in need.

In conclusion, while global efforts have led to significant progress in addressing land-based marine pollution, a standardised approach that applies uniformly across all nations is challenging due to the world's diverse economic, geographic, and technological landscape. Instead, regional agreements tailored to specific areas may offer a more practical solution, as they can more effectively accommodate local needs and conditions than broad international treaties. The reliance on regional accords for managing marine pollution highlights the importance of adaptable policies that can address each region's unique environmental and socioeconomic factors. The next step for international law on marine pollution will likely involve further strengthening these regional agreements while fostering collaboration between countries to enhance global marine ecosystem protection.

27 Brenda M Soler-Figueroa and others, 'Characteristics of Global Port Phytoplankton and Implications for Current Ballast Water Regulations' (2020) 155 Marine Pollution Bulletin 111165, doi:10.1016/j.marpolbul.2020.111165.

28 Montreal Declaration on the Protection of Marine Environment (2001) 17 Ocean Yearbook 962.

29 Yoshifumi Tanaka, 'Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Legal Frameworks' (2006) 66 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 535.

3 REGIONAL ACCORDS ON THE CONTROL OF LAND-BASED POLLUTION: AN ANALYTICAL STUDY

3.1. Insights Across the Board

Increasingly, regional agreements are being reached to control marine pollution, including land contamination. In this regard, separate protocols on marine pollution from land-based sources have been established for the Baltic Sea, Black Sea, Mediterranean Sea, Northeast Atlantic, Kuwait Region, Southeast Pacific, and Greater Caribbean.[30] However, it must be stressed that the Northeast Pacific Ocean, Northwest Pacific Ocean, South Asian Sea, Southwest Atlantic, and Arctic Ocean are omitted.

It is also essential to recognise that the customary applicability covers internal waters in relation to these agreements. Measures to control marine pollution from the land would not be successful unless internal waterway contamination were controlled.[31] Given that prior agreements on marine protection did not typically encompass interior waters, managing pollution in internal waterways is a crucial step toward ensuring the success of broader regulatory measures.

Additionally, all preceding documents treat atmospheric pollution as land-based marine pollution—except for the 1982 LOSC, which, under Article 212, distinguishes between airborne and land-based pollution.[32] Among regional conventions dealing with this topic, the following documents are of particular interest for this study:

i. *"The 1980 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based sources (hereafter the Athens Protocol)*[33]

ii. *The 1983 Protocol for the Protection of the South-East Pacific Against Pollution from Land-Based Sources (hereafter the 1983 Quito Protocol)*[34]

iii. *The 1990 Protocol to the Kuwait Regional Convention for the Protection of the Marine Environment Against Pollution from Land-Based Sources (hereafter the 1990 Kuwait Protocol)*[35]

30 Hassan (n 4).

31 Juergen Geist and Stephen J Hawkins, 'Habitat Recovery and Restoration in Aquatic Ecosystems: Current Progress and Future Challenges' (2016) 26(5) Aquatic Conservation Marine and Freshwater Ecosystems 942, doi:10.1002/aqc.2702.

32 LOSC (n 16).

33 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (with annexes) (Athens Protocol, 17 May 1980) [1983] UNTS 1328/120.

34 Protocol for the Protection of the South-East Pacific against Pollution from Land-Based Sources (with annexes) (Quito, 23 July 1983) [2000] UNTS 1648/73.

35 Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources (with annexes) (Kuwait, 21 February 1990) [2006] UNTS 2399/3.

iv. *The 1992 Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-Based Sources (hereafter the 1992 Bucharest Protocol)* [36]
v. *The 1992 Convention on the Protection of the Marine Environment of the Baltic Sea (hereafter the 1992 Helsinki Convention)*[37]
vi. *The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (hereafter the 1992 OSPAR Convention)*[38]
vii. *The 1996 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources and Activities (hereafter the 1996 Syracuse Protocol)"*[39]

3.1.1. From Black Lists to a Common System for Identifying Dangerous Substances

(i) The Issues with the Black/Grey Lists Method

The initial stage in addressing land-based marine pollution is the identification of deleterious substances. Treaties regulating terrestrial pollution have employed black and grey lists. Within this approach, hazardous substances are classified as either acute or chronic. In most instances, parties must eradicate contamination by prohibited substances. Chemical pollution classified as grey-listed must be controlled by states using "reasonable measures." The 1974 Paris Convention, 1974 Helsinki Convention, 1980 Athens Protocol, 1983 Quito Protocol, and 1992 Bucharest Protocol employ a black-and-grey list methodology to mitigate marine pollution originating from terrestrial sources.[40]

This Convention's Contracting Parties' duties vary by hazardous chemical type.[41] Since contamination by Part I of Annex 'A' chemicals required immediate action, the Contracting Parties must remove marine pollution "if necessary by stages" from land-based sources. The Contract Parties must "for the elimination, as a matter of urgency, of pollution of the maritime area from land-based sources by substances listed in Part I of Annex A".[42]

36 Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-Based Sources (Bucharest, 21 April 1992) <http://www.blacksea-commission.org/Official%20Documents/The%20Convention/full%20text> accessed 25 November 2024.

37 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention, 1992) [1994] OJ L 73/20.

38 Convention for the Protection of the Marine Environment of the North-East Atlantic (with annexes, appendices and final declaration) (OSPAR Convention, Paris, 22 September 1992) [2006] UNTS 2354/67.

39 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources [1983] OJ L 67/3; Amendments to the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources [1999] OJ L 322/20.

40 Tullio Treves, 'Regional Approaches to the Protection of the Marine Environment' in Myron H Nordquist, John Norton Moore and Said Mahmoudi (eds), *The Stockholm Declaration and Law of the Marine Environment* (Center for Oceans Law and Policy 7, Brill 2003) 137, doi:10.1163/9789004481589_016.

41 Kristine Sigurjónsson, 'International and Regional Instruments on the Prevention and Elimination of Marine Pollution from Land-based Sources' (Master's thesis, School of Social Sciences 2012).

42 Athens Protocol (n 33).

Contracting Parties must only "strictly limit" maritime chemical contamination by Part II of Annex A. The Contracting Parties must implement programs "for the reduction or, as appropriate, elimination of pollution of the maritime area" by substances in Part II of Annex A under Article 4 (2) (b). However, this provision states that these items cannot be discarded without the consent of the relevant authorities in each contracting state.[43] Thus, Part II compounds can be discharged after authorisation.

The classification and discharge of hazardous chemical substances under international conventions and protocols are complicated, as even "black list" substances can be permitted if admittance limits are respected. For instance, the 1980 Athens Protocol, 1983 Quito Protocol, and 1992 Bucharest Protocol allow limited discharges of some "black list" or "grey list" compounds under joint-party limitations or relevant permits. This flexibility allows blacklist substances to be discharged, making pollution control enforcement difficult and defeating the purpose of strict pollution regulations.

In addition, toxic substance categorisation has shown inconsistencies from convention to convention, meaning similar chemicals needing regulation would receive different treatments. While most protocols list mercury and cadmium as black, the 1974 Helsinki Convention lists them as grey. The 1980 Athens and 1983 Quito Protocols list radioactive materials as blacklisted, but the Helsinki Convention bans them. Despite grey list obligations, the black/grey list system of categorisation and discharge can eliminate marine pollution.[44]

(ii) Creation of a "Uniform Strategy"

In light of the disputes in the classification of hazardous substances, agreements like the 1992 OSPAR Convention have, in recent years, shifted towards a more integrated method of controlling harmful land-based pollutants, irrespective of their differences. As the OSPAR Convention follows the 1974 Paris Convention,[45] specific control measures must be implemented to reduce pollution from land-based sources based on a list of controlled substances and their associated prioritisation criteria. Under Article 14 of Annex I of the OSPAR Commission, any marine point source discharge that may affect the maritime area must be strictly controlled.[46] In this way, community obligations are fulfilled under the supervision of the OSPAR Commission. This movement away from the traditional

43 Iwan Ball, 'Port Waste Reception Facilities in UK Ports Iwan Ball' (1999) 23(4-5) Marine Policy 307, doi:10.1016/S0308-597X(98)00057-8.

44 Judith Schäli, 'The Protection of the Marine Environment from Land-based Sources of Plastic Pollution in International Law' in Judith Schäli, *The Mitigation of Marine Plastic Pollution in International Law* (World Trade Institute Advanced Studies 8, Brill 2022) 107, doi:10.1163/9789004508613.

45 Elizabeth Kirk, 'Science and the International Regulation of Marine Pollution' in Donald Rothwell and others (eds), *The Oxford Research Handbook on the Law of the Sea* (OUP 2015) 516, doi:10.1093/law/9780198715481.003.0023.

46 *OSPAR Convention (n 38)*, opened for signature September 22, 1992, entered into force March 25, 1998.

characteristics of regulation comprising the black and grey list enhances the ability of Members of this Agreement to take effective measures toward protecting the environment in the Northeast Atlantic.

The Helsinki Convention and its 1992 successor also moved towards a more generic method of land-based pollution control without differentiating between the black and grey lists, instead constructing circumstances that make it impossible to pollute the environment anew.[47] Article I of Annex I of the 1992 Helsinki Agreement sought out substances from the 1974 Grey List to be banned to remove all of them.[48] Further control based on a permit enables better management control over emissions and data sharing on the internet.

3.2. The Precautionary Method

3.2.1. The Precautionary Method as Enshrined in Regional Treaties

The precautionary concept or method is another novel strategy in this area. The precautionary approach/principle is increasingly significant in environmental protection and the maritime environment.[49] Different documents may use somewhat different terminology to describe the precautionary approach. However, they all agree on the core idea that insufficient proof of the effect of significant or irreversible dangers should not be used to justify inaction in protecting the environment.[50] Some regional agreements obligate the precautionary approach to managing pollution from land-based sources. For instance, the OSPAR Convention requires its Contracting Parties to implement the following in Article 2 (2) (a):

"the precautionary principle, by which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects."[51]

The OSPAR Convention's negative wording explains that scientific uncertainty should not postpone preventive measures. However, positive language forces governments to adopt

47 Tafsir Johansson and Patrick Donner, *The Shipping Industry, Ocean Governance and Environmental Law in the Paradigm Shift: In Search of a Pragmatic Balance for the Arctic* (Springer 2014).

48 *Helsinki Convention (n 37)* Annex I, opened for signature 9 April 1992, entered into force 17 January 2000.

49 Andrea J Reid and others, 'Emerging Threats and Persistent Conservation Challenges for Freshwater Biodiversity' (2019) 94(3) Biological Reviews 849, doi:10.1111/brv.12480.

50 Klaus Peter Rippe and Ariane Willemsen, 'The Idea of Precaution: Ethical Requirements for the Regulation of New Biotechnologies in the Environmental Field' (2018) 9 Frontiers in Plant Science 1868, doi:10.3389/fpls.2018.01868.

51 *OSPAR Convention* (*n 38*) art 2 (2) (a).

precautionary measures when there is a reasonable concern about dangers.[52] The "precautionary principle" should apply to all forms of pollution, not only in the air or water, since it is a moral imperative.

3.2.2. Constraints on Precautionary Thinking

However, precautionary environmental preservation seems to have little legal impact. Many employ this method since it addresses environmental challenges in international courts and tribunals. Under the "precautionary principle" in 1995, amended in paragraph 63 of a court ruling, New Zealand claimed that France must prove its underground nuclear experiments would not discharge such contaminants into the environment. New Zealand also called for the inclusion of the precautionary principle in environmental policy, requiring governments to establish that potentially dangerous operations would not pollute. The ICJ, however, rejected New Zealand's request, as its 1974 verdict only pertained to atmospheric nuclear tests, and the court had no jurisdiction over underground nuclear tests.[53] The Court did not address whether the precautionary principle applied to this instance.

In 1997, Hungary claimed that the precautionary principle in the Gabkovo-Nagymaros Project had become a standard rule to avert injury. Hungary's "state of ecological necessity" explanation for stopping the 1977 Treaty-mandated operations validated its actions.[54] However, the ICJ held that Hungary could not invoke this defence, as it failed to establish that a "serious" and "imminent" danger existed in 1989 or that its acts were the sole appropriate response.[55] According to the ICJ, "a state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect".[56] Additionally, the Court argued that "imminence" exceeds "possibility" in breadth. The Court found Hungary's warning to be erroneous, asserting that Hungary had other means to address the potential threats. The ICJ's verdict did not directly address precaution. The Court may have ignored the

52 Arie Trouwborst, 'Prevention, Precaution, Logic and Law-The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions' (2009) 2(2) Erasmus Law Review 105.

53 Stephen M Tokarz, 'A Golden Opportunity Dismissed: The New Zealand v France Nuclear Test Case' (1997) 26(4) Denver Journal of International Law & Policy 745.

54 Gabriel Eckstein and Yoram Eckstein, 'International Water Law, Groundwater Resources and the Danube Dam Case' (Gambling with Groundwater: Physical, Chemical and Biological Aspects of Aquifer-stream Relations : Proceedings of the Joint Meeting of the XXVIII Congress of the International Association of Hydrogeologists and the Annual Meeting of the American Institute of Hydrologists, Las Vegas, Nevada, USA, 28 September - 2 October 1998) 892.

55 Boldizsár Nagy, 'The ICJ Judgment in the Gabčíkovo-Nagymaros Project Case and Its Aftermath: Success or Failure?' in Helene Ruiz Fabri and others (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill 2020) 21, doi:10.1163/9789004434950_003.

56 Avidan K Kent and Alexandra R Harrington, 'A State of Necessity: International Legal Obligations in Times of Crises' (2012) 42(1) Canadian Review of American Studies 65, doi:10.3138/cras.42.1.65.

precautionary principle or determined that the environmental threats were so certain they did not need it. The Court's restricted risk reading may suggest that the ICJ was right to take a preventative position.

The International Tribunal for the Law of the Sea (ITLOS) also expressed judicial reluctance. In the 2001 MOX Plants litigation between Ireland and the UK, Ireland argued that the precautionary principle should apply as customary international law, given that emissions from the MOX fuel at Sellafield would always pose a threat to the Irish Sea. Radiation could reach the ocean via air transport and direct discharge. Ireland requested provisional remedies from the ITLOS, but the issue was deemed not urgent enough before the Annex VII arbitral tribunal was formed.[57] The ITLOS required Ireland and the UK to share information on MOX Plant dangers and build mitigation strategies, but the precautionary principle was not mentioned. Some may claim that the judiciary's hesitation is justified.

The first difficulty is identifying major or irreversible risks that require measures. This issue demands a careful approach due to the possible hazards involved. However, some risks are poorly understood or beyond present scientific understanding, making it difficult to assess their severity.[58] Scientific understanding of oceans and marine ecosystems remains incomplete, and ongoing scientific and technological advancement may change estimations of severe harm risk. Additionally, the lack of a mandated dispute resolution system would make international law unstable due to the hazy concept of hazards, as exemplified by the MOX plant dispute.[59]

Second, the cautious approach may cause certain nations to cut economic and industrial activity. Thus, environmental and economic considerations must be balanced. Thus, the precautionary approach must include scientific, economic, social, and political aspects. Efficiency and cost-effectiveness in implementing the cautious approach are crucial. These factors' national security value is best assessed by politicians, lawyers, and scientists. The cautious approach may have been limited by the courts. Thus, the Conference of the Parties or other international bodies should decide whether to utilise the preventative method. Thus, formalising a cautious approach to decision-making may be discounted.

57 Donald R Rothwell, 'The Contribution of ITLOS to Oceans Governance through Environmental Dispute Resolution' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Brill 2007) 1007, doi:10.1163/9789004467668_016.

58 Reid and others (n 49).

59 Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) American Journal of International Law 596, doi:10.2307/2555262.

3.2.3. Using State-of-the-Art Methods and Eco-Friendly Procedures

Regional agreements frequently mandate that contractual parties use "all appropriate measures" to mitigate land-based pollution.[60] To this end, many conventions employ Best Available Techniques (BAT) and Best Environmental Practice (BEP). Article 2(3)(b) of the 1992 OSPAR Convention mandates Contracting Parties to assess BAT and BEP. The utilisation of BAT and BEP is permitted according to Article 6 (1) of the 1992 Helsinki Convention. Consequently, the 1992 Helsinki Convention and the OSPAR Convention delineate BAT and BEP in a comparable manner.[61] Like the OSPAR Convention, the 1992 Helsinki Convention enumerates issues for implementing BAT and BEP. The precautionary principle is used in developing BAT and BEP in the 1992 Helsinki Convention but not in the OSPAR Convention. The 1996 Syracuse Protocol's Article 5(4) requires Parties to consider the BAT when creating and carrying out action plans, programs, and projects.

State parties may possess diminished flexibility to regulate discharges, pollutants, and waste under the BAT and BEP. Establishing a "due diligence" criterion through the BAT and BEP may be feasible.[62] This obligation may improve terrestrial pollution regulations. The use of BAT and BEP presents many challenges. Technological innovation, economic and social obstacles, and scientific knowledge and experience fluctuate, rendering the definition of BAT and BEP unattainable. Occasionally, Contracting Parties possess considerable autonomy, complicating the assessment of BAT and BEP. Owing to the political, economic, ecological, and technical disparities among States and regions, a benchmark may not represent the BAT in another context.[63]

Secondly, reconciling BAT, BEP, and economic interests is a significant concern. The technology's economic viability may be significant in this context. Governments may forgo more costly and efficacious marine pollution mitigation techniques for immediate economic considerations. These criteria may aid governments in reconciling environmental preservation with adopting optimal technology and practices.[64] Thirdly, pollution and environmental degradation may arise even when using BAT. Article 3 (3) of the 1992 Helsinki Convention stipulates that further measures are required if the BAT

60 Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Charting a Course for Future Cooperation* (Legal Aspects of Sustainable Development 18, Martinus Nijhoff 2014) doi:10.1163/9789004266353.

61 *OSPAR Convention (n 38)*.

62 Nikolaos Giannopoulos, 'Global Environmental Regulation of Offshore Energy Production: Searching for Legal Standards in Ocean Governance' (2019) 28(3) Review of European, Comparative & International Environmental Law 289, doi:10.1111/reel.12296.

63 Tiberio Daddi and others, 'Transferring the Integrated Pollution Prevention and Control (IPPC) Approach and Best Available Techniques (BAT) Concepts to Egypt, Tunisia and Morocco' (2013) 5(7) Sustainability 2944, doi:10.3390/su5072944.

64 Stephan Schmidheiny, *Changing Course: A Global Business Perspective on Development and the Environment*, vol 1 (MIT Press 1992).

or BEP does not yield ecologically acceptable outcomes.[65] Annex IV (B) (4) of the 1996 Syracuse Protocol has an identical clause.

Ultimately, the technological disparities between developed and developing nations must be acknowledged. Undeveloped governments have challenges utilising BAT and BEP due to technological constraints. Increased technical and financial assistance is required for developing nations to implement BAT and BEP to combat land-based marine pollution. The 1995 Washington Declaration urged "particularly for developing countries, especially the least developed countries, countries with economies in transition, and small island developing States" ("countries in need of assistance") to formulate and execute national action plans. The Declaration also called on states and the European Commission to assist developing countries in obtaining cleaner technology, knowledge, and skills to mitigate land-based marine pollution.

Article 202 of the 1982 UN Convention on the Law of the Sea mandates that governments promote scientific, educational, technical, and other assistance initiatives for developing countries to safeguard the marine environment and restrict maritime activities. Article 266 (2) of the 1982 LOSC has the same provision. Additionally, Article 10 of the Syracuse Protocol 1996 mandates regional technical assistance for impoverished states. We must evaluate institutional structures that ensure assistance to such regimes.

3.2.4. Evaluation and Tracking of Environmental Effects

The successful implementation of relevant regulations limiting discharges of hazardous substances from land-based sources requires an evaluation of the effects of planned activities on the marine environment and the efficacy of regulatory mechanisms. Environmental Impact Assessments (EIA) are crucial for monitoring in this context. An EIA is explained as "an examination, analysis, and assessment of planned activities to ensure environmentally sound and sustainable development" in the United Nations Environment Programme's (UNEP) "Goals and Principles of Environmental Impact Assessment" established in 1987[66]—Article 206 of the LOSC from 1982 mandates EIA to protect the maritime environment. Article VII (2) of the Protocol Concerning Pollution from Land-Based Sources and Activities (LBS Protocol) 1999, hereinafter referred to as the Aruba Protocol, reflects this approach.[67] The Kuwait Protocol 1990 has a comparable provision in Article VIII (1).

65 *Helsinki Convention (n 37).*

66 UNEP *Goals and Principles of Environmental Impact Assessment: Preliminary Note* (16 January 1987) <https://digitallibrary.un.org/record/42521?ln=en> accessed 25 November 2024.

67 Protocol Concerning Pollution from Land-Based Sources and Activities (LBS Protocol) (1999) <https://www.unep.org/cep/resources/factsheet/protocol-concerning-pollution-land-based-sources-and-activities-lbs-protocol> accessed 25 November 2024.

International collaboration on EIAs is crucial, as marine pollution affects countries distant from its origin. Consequently, the 1992 Helsinki Convention mandates EIAs and collaboration. Article 7 (1) of the Helsinki Convention 1992 mandates EIAs in the Baltic Sea Area. Section 3 further stipulates: "When two or more Contracting Parties share transboundary waters in the Baltic Sea catchment area, these Parties shall collaborate to thoroughly investigate potential impacts on the marine environment of the Baltic Sea Area within the environmental impact assessment mentioned in paragraph 1 of this Article."[68]

Article 6 (a) of the 1992 OSPAR Convention mandates Contracting Parties to "conduct and disseminate periodic joint evaluations of the quality status of the marine environment and its evolution, for the maritime area or its regions or sub-regions." Article 6 (b) delineates the priorities for action and facilitates the evaluation of current and prospective marine environmental protection measures.[69] The OSPAR Commission must assess quality status in collaboration with regional bodies and other knowledgeable international organisations, as stipulated in Annex IV Article 3 (d).

A maritime environment monitoring system is necessary because environmental impact evaluations typically occur during project implementation. Article 204 of the 1982 LOSC mandates comprehensive monitoring of marine pollution and its impacts. Certain regional agreements govern terrestrial marine contamination with analogous stipulations. Agreements can be classified into two groups. Numerous regional agreements require oversight of limits. For instance, the 1980 Athens Protocol mandates Parties to "evaluate, to the extent feasible, the pollution levels along their coastlines, specifically concerning the substances or sources enumerated in Annexes I, and to periodically furnish information regarding this matter" through monitoring. This criterion pertains exclusively to the coastal zone and associated compounds or sources in the appendix. Nonetheless, the coastal dimensions remain ambiguous.

A key question arises: should the monitoring efforts outlined in Article 8(b) encompass the whole Protocol region to assess the impact of actions implemented under this Protocol aimed at mitigating maritime environmental pollution? Certain treaties mandate Contracting Parties to conduct monitoring operations, exemplified by Article VI of the Aruba Protocol, which obligates each Party to establish and execute monitoring programs.[70] These initiatives can evaluate the implementation of the Protocol and monitor alterations in environmental quality within the Convention area.

The obligation to establish monitoring programs extends beyond the coastal zone and acknowledges hazardous chemicals. The 1983 and 1990 Protocols to the Convention on Biological Diversity have similarly comprehensive monitoring obligations in Articles 8 and 7. This concise study indicates that regional agreements limiting land-based marine pollution

68 Helsinki Convention (n 37).

69 *OSPAR Convention* (*n 38*).

70 LBS Protocol *(n 67)*, adopted in Aruba, 1999, under the Cartagena Convention.

progressively integrate EIAs and monitoring mechanisms. If a country's activities result in substantial land-based marine pollution, it may struggle to address uncertainty if the evaluation does not comply with these agreements.[71] This indicates that the EIA may restrict the environmental policy flexibility of States Parties, underscoring the necessity to eliminate pollution at its origin. Understanding the relationship between EIA and precaution is essential. The prudent approach complicates the identification of dangers. This suggests that the EIA, in conjunction with monitoring, may evaluate the probability of hazards necessitating this concept. Consequently, the EIA and other monitoring systems may encourage precautionary measurements.[72]

4 COMPLIANCE WITH APPLICABLE INTERNATIONAL REGULATIONS SUBJECT TO INTERNATIONAL OVERSIGHT

4.1. System for Reporting

International institutions are increasingly overseeing treaty compliance. One definition of international control is the employment of multilateral international institutions to enforce treaty commitments. State-party reporting, verification, decisions, and recommendations are elements of the international control system's approach to treaty compliance. International human rights legislation has established such a framework for oversight. Environmental accords are comparable.[73] International oversight also helps manage land-based marine pollution.

The reporting mechanism might be used to monitor Parties' convention compliance. Reporting is used in several regional conventions on land-based marine pollution. Article 13 (1) of the 1996 Syracuse Protocol requires the Contracting Parties to report on their efforts, results, and, if required, impediments at biannual meetings. It is further highlighted that such reports should include permission granted, monitoring findings, pollutant discharge volumes from their jurisdiction, and Articles 5, 7, and 15 response plans, programs, and activities. Meetings must review Parties' Reports under Article 14 (2) (f). Article 12 (1) of the 1999 Aruba Protocol requires Contracting Parties to report their activities, outcomes, and obstacles during implementation to the organisation. The Meeting of the Contracting Parties decides what data to include, how to collect it, how to present it, and when to provide it, per Article 12 (1). Reporting or exchanging information is required

71 Rebecca Tsosie, 'Indigenous People and Environmental Justice: The Impact of Climate Change' (2007) 78(4) University of Colorado Law Review 1625.

72 Theocharis Tsoutsos, Niki Frantzeskaki and Vassilis Gekas, 'Environmental Impacts from the Solar Energy Technologies' (2005) 33(3) Energy Policy 289, doi:10.1016/S0301-4215(03)00241-6.

73 Louis J Kotzé and Duncan French, 'A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?' (2018) 18(6) International Environmental Agreements: Politics, Law and Economics 811, doi:10.1007/s10784-018-9417-x.

under Articles 13 of the 1980 Athens Protocol, 9 of the 1983 Quito Protocol, 7 of the 1992 Bucharest Protocol, and 12 of the 1990 Kuwait Protocol.

The system's effectiveness depends heavily on the reporting authorities' thoroughness and accuracy, which is difficult because many nations, especially developing ones, do not report or submit the bare minimum to international authorities. Some treaties strengthen the reporting responsibility by requiring Contracting Parties or commissions to provide more detailed information or by setting out the content of such reports. For example, the 1992 Helsinki Convention requires parties to report on their implementation efforts, including their efficacy and problems, under Article 16(1).[74] Report land pollution prevention and cleanup under this provision. Parties must submit emission permits, emission data, and environmental quality data whenever another Party or the Committee asks under Article 16 (2) of the Helsinki Convention. Industrial facility managers must apply to and share information with national authorities under Annex III. Background information, present and prospective activities, alternatives, and environmental, financial, and safety consequences must be included in the application.[75] According to Contracting Party reports, the Baltic Marine Environment Protection Commission must monitor Convention compliance. The relevant Commission will implement these accords. The relevant Commission will implement these accords, aligning with the 1992 OSPAR Convention's Article 22 requirement for periodic reporting by Contracting Parties on specified topics.[76] These comprehensive reporting systems may help States Parties comply with their reporting requirement and provide accurate information to the appropriate international bodies.

4.1.1. The Role of Treaty Commissions in Oversight

The supervision of the treaty-based Commission is crucial, as is the reporting system. The 1992 OSPAR Convention provides a legal framework for the regulation of land-based marine pollution. Article 3 of Annex I mandates OSPAR to formulate (a) a strategy for the reduction and eradication of toxic and persistent pollutants, along with bioaccumulative substances originating from terrestrial sources and (b) initiatives and measures focused on diminishing nutrient inflows from urban municipal, industrial, agricultural, and other sources.

The extent and intricacy of a party's responsibilities regarding the disposal of these substances will be dictated, as anticipated, by the nature of these schemes and the legal documents provided by the Commission.[77] Article 10 of the Convention requires the OSPAR Committee to (a) monitor the implementation of the Convention and (b) assess the

74 Helsinki Convention (n 37).

75 Philippe Sands and others, *Principles of International Environmental Law* (3rd ed, CUP 2012).

76 *OSPAR Convention (n 38).*

77 Javier de Cendra, 'Can Emissions Trading Schemes be Coupled with Border Tax Adjustments? An Analysis vis-à-vis WTO Law' (2006) 15(2) Review of European Community & International Environmental Law 131, doi:10.1111/j.1467-9388.2006.00518.x.

current state of the marine environment, the effectiveness of existing solutions, and the necessity for new or alternative solutions. According to the periodic reports mentioned in Article 22 and any additional reports provided by the Parties, the Committee will (a) assess the compliance of the Parties with the Convention and the decisions and recommendations established under it, and (b) determine and, if necessary, advocate for measures to ensure full compliance and to advance the decisions made under the Convention.

This clause may enhance the Commission's authority to oversee and regulate operations. The expression "to assist a Contracting Party" is found in Article 23, which warrants emphasis. Furthermore, the term "measures" remains undefined, potentially encompassing administrative, technical, and scientific assistance. The OSPAR Commission oversees compliance with the OSPAR Convention and its related regulations, including those addressing land-based marine pollution.[78]

Nonetheless, the OSPAR Commission does not possess implied authority over a Contracting Party for enforcement purposes. Article 13 stipulates that all decisions and recommendations require unanimous approval from all Contracting Parties. The Contracting Party, facing allegations of violating the Convention, is unlikely to endorse a resolution that contradicts its interests. Additionally, decisions or recommendations made by the Committee require a three-quarters majority to be binding on the parties that supported them and did not retract their votes within 200 days of adoption, contingent upon achieving the three-quarters threshold. A Contracting Party that votes against a decision is not obligated to comply. Notwithstanding these limitations, it is important to recognise that international organisations possessing supervisory and regulatory functions have developed in marine environmental preservation, particularly in regulating pollution from terrestrial sources.

4.2. Substantial Disputes regarding Marine Pollution arising from Terrestrial Sources

Several prominent global and regional disputes have arisen over the protection of the maritime environment due to land-based marine pollution. These conflicts often involve transboundary issues, where pollution from one country affects the marine ecosystems of another, leading to diplomatic tensions and legal challenges.

One example is the Sulu-Sulawesi Sea, a biodiversity hotspot shared by the Philippines, Indonesia, and Malaysia, which has faced significant degradation due to land-based marine

78 Meagan Wong and Niccolò Lanzoni, 'Land-Based Sources of Marine Pollution and Dumping at Sea' In Simone Borg, Felicity G Attard and Patricia M Vella de Fremeaux (eds), *Research Handbook on Ocean Governance Law* (Edward Elgar 2023) 109, doi:10.4337/9781839107696.00020.

pollution.[79] Agricultural runoff, industrial waste, and untreated sewage from coastal communities in the Philippines and Indonesia have contributed to the problem. The Philippines has accused Indonesia of inadequate waste management practices, while Indonesia has pointed to the Philippines' rapid industrialisation as a key source of pollution.[80] Despite parties to the United Nations Convention on the Law of the Sea (UNCLOS) and regional agreements like the Coral Triangle Initiative, enforcement and cooperation have been weak, highlighting the need for stronger dispute resolution mechanisms.

Another case involves the Tijuana River, which flows from Mexico into the United States and carries untreated sewage, industrial waste, and urban runoff into the Pacific Ocean, affecting the coastal waters of Southern California.[81] This has led to beach closures, environmental degradation, and public health concerns in the U.S. Both countries are bound by the 1944 U.S.-Mexico Water Treaty and the La Paz Agreement, which address transboundary environmental issues.[82] However, disputes over responsibility and funding for infrastructure improvements have persisted, underscoring the challenges of addressing land-based marine pollution in shared waterways.

The Mekong River, which flows through China, Myanmar, Laos, Thailand, Cambodia, and Vietnam, is a critical waterway for the region's ecosystems and economies.[83] However, upstream dam construction and industrial pollution in China have reduced water flow and increased contamination downstream, affecting fisheries and livelihoods in Southeast Asian countries. While the Mekong River Commission (MRC) provides a platform for cooperation, disputes over China's lack of transparency and accountability in managing the river's resources have strained regional relations.[84]

The issue of transboundary pollution is also evident in the Baltic Sea, shared by nine EU countries and Russia. The sea suffers from severe eutrophication caused by nutrient pollution from agricultural runoff and wastewater discharge. Despite the Helsinki

79 Lyndon DeVantier, Angel Alcala and Clive Wilkinson, 'The Sulu-Sulawesi Sea: Environmental and socioeconomic Status, Future Prognosis and Ameliorative Policy Options' (2004) 33(1) AMBIO: A Journal of the Human Environment 88.

80 Veronica P Migo and others, 'Industrial Water Use and the Associated Pollution and Disposal Problems in the Philippines' in Agnes C Rola, Juan M Pulhin and Rosalie Arcala Hall (eds), *Water Policy in the Philippines: Issues, Initiatives, and Prospects* (2018) 87, doi:10.1007/978-3-319-70969-7_5.

81 Marissa Ann Venn, 'Mitigation of Contaminated Transboundary Flows in the Tijuana River: Public Health Considerations for Remediation Strategies' (Master's thesis, San Diego State University 2021).

82 Peter Smith, 'The Watershed Economy: Legal Challenges Facing the Tijuana River' (2008) 11(2) University of Denver Criminal Law Review 337.

83 Kenneth Ray Olson and Wadslin Frenelus, 'Environmental and Human Impacts of Lancang-Mekong Mainstem and Tributary Dams on China, Laos, Thailand, Myanmar, Cambodia, and Vietnam' (2024) 14(10) Open Journal of Soil Science 555, doi:10.4236/ojss.2024.1410029.

84 Lauren Isabelle Caffe, 'The Mekong River: Regional Planning, Sustainable Development, and Transboundary Cooperation in Southeast Asia' (2023) 16(2) Cornell International Affairs Review 124, doi:10.37513/ciar.v16i2.731.

Convention and the EU's Water Framework Directive, which aims to protect the marine environment, disputes have arisen over the equitable distribution of responsibility and the implementation of measures to reduce pollution.[85] Countries like Poland and Germany have faced criticism for failing to meet reduction targets, leading to regional tensions.

Another region facing significant land-based pollution disputes is the Ganges River, which flows from India into Bangladesh. It is heavily polluted by industrial discharge, agricultural runoff, and untreated sewage. This pollution affects the Bay of Bengal's marine ecosystem and the livelihoods of millions of people in both countries. While the two nations have agreements like the Ganges Water Sharing Treaty, disputes over pollution control and resource management disputes have hindered effective cooperation.[86] Bangladesh has repeatedly raised concerns about India's failure to address upstream pollution, leading to diplomatic friction.

Similarly, Australia has been criticised by Pacific Island nations for its contribution to plastic waste pollution in the Pacific Ocean.[87] Despite regional agreements like the Noumea Convention and global initiatives such as the UN Clean Seas Campaign, Australia's high per capita plastic consumption and inadequate waste management practices have led to significant marine pollution. Pacific Island nations, which rely heavily on healthy marine ecosystems for tourism and fisheries, have called for stronger action and accountability from Australia.

A further example of land-based pollution disputes can be found in the Mediterranean Sea, bordered by 21 countries, which faces severe pollution from land-based sources, including industrial discharge, agricultural runoff, and urban waste. Countries like Italy, Spain, and Egypt have been accused of failing to meet their obligations under the Barcelona Convention, which aims to protect the Mediterranean marine environment.[88] Disputes over enforcement, funding, and the equitable distribution of responsibilities have complicated efforts to address the issue. These disputes highlight the complex challenges of addressing land-based marine pollution in shared maritime environments. They underscore the need for robust global and regional frameworks, effective dispute-resolution mechanisms, and stronger cooperation among nations. By prioritising sustainable practices, equitable responsibility, and collaborative solutions, the international community can better protect marine ecosystems and ensure the long-term health of our oceans.

85 Suvi-Tuuli Puharinen, 'Normative Environmental Quality as a Regulatory Strategy in EU Environmental Law: Legal Implications of Water Status Objectives' (Doctoral thesis, University of Eastern Finland 2024).

86 Sajid Karim, 'Transboundary Water Cooperation Between Bangladesh and India in the Ganges River Basin: Exploring a Benefit-Sharing Approach' (Master's thesis, Department of Earth Sciences, Uppsala University 2020).

87 Margaret Jolly, 'Blue Pacific, Polluted Ocean' (2021) 13(3) International Journal of Society Systems Science 241, doi:10.1504/IJSSS.2021.10041426.

88 Dimitrios Christoloukas, 'International Maritime Law in the Mediterranean Sea; Challenges & Special Cases' (Master's thesis, School of Economics, Business and International Studies 2023).

In such global and regional disputes, a robust dispute settlement mechanism is essential to resolve conflicts and ensure compliance with environmental obligations. An effective mechanism would include clear negotiation, mediation, and arbitration procedures, allowing parties to resolve disputes collaboratively before escalating to formal legal proceedings.[89] Such mechanisms would address immediate conflicts and build trust and cooperation among states, ensuring the long-term protection of shared marine environments. By integrating dispute resolution into global and regional frameworks, states can better balance environmental protection with economic development, promoting sustainable practices and accountability.[90] Considering the above-mentioned disputes, the following is the dispute settlement mechanism to protect the maritime environment.

4.3. Legal Frameworks and Mechanisms for Environmental Dispute Resolution

Dispute resolution within global and regional legal frameworks for environmental protection is a complex process that seeks to balance environmental and economic objectives, which often conflict. At the international level, Multilateral Environmental Agreements (MEAs) such as the Paris Agreement, the Convention on Biological Diversity (CBD), and the Basel Convention provide foundational frameworks for addressing environmental challenges.[91] These agreements often include dispute resolution mechanisms, such as negotiation, mediation, and arbitration, to resolve conflicts between parties. Additionally, many MEAs establish compliance committees or bodies that focus on fostering dialogue and cooperation to address non-compliance issues rather than relying on adversarial proceedings. This collaborative approach helps maintain the integrity of environmental agreements while encouraging states to meet their obligations.

At the regional level, legal frameworks and institutions contribute to environmental dispute resolution. Regional courts, such as the European Court of Justice (ECJ) and the African Court on Human and Peoples' Rights (AfCHPR), adjudicate environmental disputes within their jurisdictions.[92] Regional agreements, like the North American Agreement on Environmental Cooperation (NAAEC) under the USMCA, establish mechanisms for

89 Moustafa Elmetwaly Kandeel, Alaa Abouahmed and Aliaa Zakaria, 'The Premature Expiration of Arbitration Litigation in Investment Disputes' (2023) 5(1) Corporate Law & Governance Review 17, doi:10.22495/clgrv5i1p2.

90 John C Dernbach, 'Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking' (2003) 10(1) Global Legal Studies 247, doi:10.2979/gls.2003.10.1.247.

91 Kati Kulovesi and others, *Multilateral Environmental Agreements Negotiator's Handbook* (3rd edn, CCEEL, UEF Law School, UNEP 2024).

92 Adamantia Rachovitsa, 'On New "Judicial Animals": The Curious Case of an African Court with Material Jurisdiction of a Global Scope' (2019) 19(2) Human Rights Law Review 255, doi:10.1093/hrlr/ngz010; Driss Ed.daran, Fatima Ezzohra Elhajraoui, Riad Al Ajlani and Malik Zia-ud-Din, 'Global responsibility for marine biodiversity: going beyond national jurisdiction' (2024) 8(3) Journal of Wildlife and Biodiversity 419, doi:10.5281/zenodo.12659904.

addressing environmental issues in regional trade.[93] These regional frameworks often complement global efforts by providing tailored solutions to local environmental challenges while fostering cooperation among neighbouring states.

International courts and tribunals also play a significant role in resolving environmental disputes. The International Court of Justice (ICJ) adjudicates disputes between states, though its jurisdiction is limited to cases where states have consented to its authority. Similarly, the International Tribunal for the Law of the Sea (ITLOS) handles disputes related to the United Nations Convention on the Law of the Sea (UNCLOS), including marine environmental protection issues.[94] On the economic front, the World Trade Organisation (WTO) addresses trade-related environmental disputes through its Dispute Settlement Body (DSB), which seeks to balance trade liberalisation with environmental protection.[95] These judicial bodies provide formal avenues for resolving conflicts, but their effectiveness often depends on the willingness of states to comply with their rulings.

Additionally, alternative dispute resolution (ADR) mechanisms, such as mediation, conciliation, and arbitration, are increasingly used to resolve environmental conflicts.[96] Mediation and conciliation involve neutral third parties facilitating mutually acceptable solutions, offering a less adversarial and more collaborative approach than traditional litigation.[97] Arbitration, on the other hand, provides a binding resolution that is often faster and more flexible than court proceedings. These mechanisms are particularly useful in addressing complex environmental disputes, including those involving transboundary issues or investor-state conflicts.

Balancing environmental and economic objectives is a central challenge in dispute resolution. The principle of sustainable development is key to this balance, emphasising the need to meet present needs without compromising the ability of future generations to meet their own. The precautionary principle allows for preventive action in the face of scientific uncertainty to avoid potential environmental harm, even when economic interests are at stake.[98] Similarly, the polluter pays principle ensures that those

93 Elizabeth Trujillo, 'The USMCA and the Environment: Setting Trends for Global and Regional Trade' in David A Gantz and Tony Payan (eds), *The Future of Trade: A North American Perspective* (Edward Elgar 2023) 96, doi:10.4337/9781035315420.00012.

94 John E Noyes, 'The International Tribunal for the Law of the Sea' (1999) 32(1) Cornell International Law Journal 109.

95 Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011).

96 Abdul Haseeb Ansari, Muhamad Hassan Bin Ahmad and Sodiq Omoola, 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes' (2017) 59(1) Journal of the Indian Law Institute 26.

97 Catherine McGuinness, *Alternative Dispute Resolution: Mediation and Conciliation* (Law Reform Commission 2016).

98 David Kriebel and others, 'The Precautionary Principle in Environmental Science' (2001) 109(9) Environmental Health Perspectives 871, doi:10.1289/ehp.01109871.

responsible for pollution bear the costs of managing it, thereby integrating environmental costs into economic decision-making.[99] Together, these principles guide dispute resolution processes, helping to reconcile competing interests and promote long-term environmental and economic well-being.

Public participation and access to justice are critical aspects of environmental dispute resolution. The Aarhus Convention, for example, grants the public rights to access information, participate in decision-making, and seek justice in environmental matters.[100] This empowers individuals and non-governmental organisations (NGOs) to challenge environmental decisions and hold governments and corporations accountable. EIAs further support public participation by including consultation processes that allow stakeholders to voice concerns and influence outcomes.[101] These mechanisms ensure that environmental decision-making is transparent, inclusive, and responsive to the needs of affected communities.

Transboundary environmental issues, such as air or water pollution, require cooperative approaches to dispute resolution. Shared natural resources, like rivers, lakes, and forests, often necessitate joint management frameworks and dispute-resolution mechanisms to ensure equitable and sustainable use.[102] Bilateral agreements and joint commissions are commonly used to address cross-border environmental disputes, fostering collaboration between states to mitigate conflicts and protect shared ecosystems.

Corporate accountability and investor-state disputes are other important dimensions of environmental dispute resolution. Investor-state dispute settlement (ISDS) mechanisms, often included in bilateral investment treaties (BITs) and free trade agreements (FTAs), allow investors to sue states for regulatory changes that affect their investments.[103] This has led to tensions between protecting investor rights and enforcing environmental regulations. At the same time, corporate social responsibility (CSR) initiatives and legal frameworks increasingly hold corporations accountable for their environmental impacts, encouraging sustainable practices and reducing conflicts.

99 Martin O'Connor, 'The Internalisation of Environmental Costs: Implementing the Polluter Pays Principle in the European Union' (1997) 7(4) International Journal of Environment and Pollution 450, doi:10.1504/IJEP.1997.028314.

100 Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (CUP 2019) 116, doi:10.1017/9781108612500.006.

101 Ciaran O'Faircheallaigh, 'Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making' (2010) 30(1) Environmental Impact Assessment Review 19, doi:10.1016/j.eiar.2009.05.001.

102 Simo Kyllönen and others, 'Conflict Management as a Means to the Sustainable Use of Natural Resources' (2006) 40(4) Silva Fennica 323, doi:10.14214/sf.323.

103 Jerry L Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35(2) Emory International Law Review 259.

Scientific and technical expertise is essential in resolving environmental disputes as expert panels and advisory bodies provide the evidence and analysis needed to inform decisions, particularly in cases involving complex scientific issues like climate change or biodiversity loss.[104] Dispute resolution mechanisms must also address scientific uncertainty and risk assessment, ensuring that decisions are based on the best available evidence while accounting for potential environmental threats.[105]

Finally, enforcement and compliance are critical to the success of environmental dispute resolution. Effective enforcement mechanisms, including sanctions and penalties, ensure parties adhere to environmental regulations and decisions. Capacity-building efforts are also vital, particularly for developing countries, to enable their effective participation in international environmental agreements and dispute-resolution processes. By addressing these challenges, global and regional frameworks can better balance environmental and economic objectives, fostering sustainable development and protecting the planet for future generations.

5 CONCLUSION

The study revealed significant challenges and advancements in addressing marine pollution from land-based sources, highlighting a persistent inadequacy in worldwide regulation. Efforts to create a universal legal framework have faced obstacles due to four critical factors: the urgent need for economic growth, the complex array of substances and stakeholders involved, and the widening ecological and economic divide between developed and developing nations. Consequently, regional agreements have emerged as the primary mechanism to control land-based marine pollution, often codifying innovative legal strategies.

Notably, these regional agreements have incorporated progressive approaches, such as replacing black/grey list systems with uniform frameworks, employing BAT alongside BEP, implementing EIAs, and formalising global rules to enhance enforcement. These strategies aim to increase control over land-based marine pollution, emphasising comprehensive management and preventive measures. While the precautionary approach urges states to act preemptively against potential contamination, adopting BAT and BEP provides a blueprint for necessary regulatory actions. Similarly, mandatory EIAs and monitoring systems reduce state discretion in environmental policy, ensuring greater accountability and adherence to treaty obligations.

104 Driss Ed.daran, Riad Al Ajlani, Malik Zia-ud-Din and Fatima Ezzohra Elhajraoui, 'Management of Biodiversity in Pakistan Protected Areas and its Legal Implications' (2023) 7(s) Journal of Wildlife and Biodiversity 1, doi:10.5281/zenodo.14273594.

105 National Research Council (US) Committee on Improving Risk Analysis Approaches Used by the US EPA, *Science and Decisions: Advancing Risk Assessment* (National Academies Press 2009).

However, the study underscores that economic, political, and social factors significantly influence the practical implementation of these legal measures. For instance, the viability of the precautionary approach and the adoption of BAT and BEP depend on a technology's economic feasibility and a state's resources. Moreover, contracting states' thoroughness of reporting is often shaped by their economic and political capacities, suggesting that commitments to controlling marine pollution are not uniformly upheld.

The growth and implementation of regional agreements are inconsistent across different regions. Many areas, such as East Asia, the Red Sea and Gulf of Aden, and the Arctic, lack specific protocols addressing land-based marine pollution. The normative frameworks of existing agreements also vary. Advanced conventions like the 1992 OSPAR Convention, the 1992 Helsinki Convention, and the 1996 Syracuse Protocol adopt harmonised approaches and explicitly support precautionary measures, contrasting with older frameworks like the 1983 Quito Protocol and 1992 Bucharest Protocol, which still rely on black/grey list methods.

The study highlights that a region's economic, social, and political climate significantly influences the normative strength of its agreements. For instance, the OSPAR Convention showcases advanced regulatory methods, partly because its signatories are economically and politically aligned democratic states, many of which are EU members committed to high environmental standards. The European Union's foundational obligation to enhance environmental quality further reinforces this alignment, as evidenced by the political commitment made during the International North Sea Conference (INSC).

Prominent disputes over maritime protection from land-based pollution, such as those in the Sulu-Sulawesi Sea between the Philippines and Indonesia, the Tijuana River conflict between the U.S. and Mexico, and the Mekong River tensions involving China and Southeast Asia, illustrate the urgent need for effective dispute settlement mechanisms. These conflicts often arise from transboundary pollution, where one country's actions significantly impact another's marine environment. In such cases, robust dispute resolution frameworks are essential to mediate conflicts, allocate responsibilities, and enforce compliance with international and regional agreements. Mechanisms like negotiation, mediation, arbitration, and adjudication through international tribunals or regional bodies can provide structured pathways to resolve disputes. For example, the International Tribunal for the Law of the Sea (ITLOS) and regional frameworks like ASEAN's dispute resolution mechanisms could play pivotal roles in addressing these conflicts. Additionally, joint commissions or task forces composed of scientific and legal experts could facilitate evidence-based solutions and foster cooperation among disputing parties.

Ultimately, the findings emphasise the inherent tension between economic growth and environmental preservation in international law governing land-based marine pollution. While regional conventions provide tools to regulate state actions, their effectiveness depends on accommodating each state's unique economic, social, and political

circumstances. Achieving an appropriate and effective legal framework requires a balanced approach that reconciles the demands of environmental protection with the imperatives of economic, social, and political development. Strengthening dispute settlement mechanisms and fostering greater international cooperation will be critical to addressing the complex challenges of land-based marine pollution and ensuring the sustainable protection of our shared maritime environments.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МІЖНАРОДНО-ПРАВОВА БАЗА ДЛЯ РЕГУЛЮВАННЯ ЗАБРУДНЕННЯ МОРСЬКОГО СЕРЕДОВИЩА З СУШІ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ГЛОБАЛЬНИХ ТА РЕГІОНАЛЬНИХ ПІДХОДІВ, СПОРІВ ТА МЕХАНІЗМІВ ВРЕГУЛЮВАННЯ

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АНОТАЦІЯ

Вступ. *Наземні джерела є основними джерелами забруднення океану, які створюють значні ризики для морських екосистем і здоров'я людини, прикладом чого є хвороба Мінамата, спричинена забрудненням ртуттю. Захищене морське середовище має важливе значення для розвитку прибережних міст. Однак, незважаючи на чинну міжнародну правову базу, для ефективного контролю над забрудненням моря з суші все ще потрібні більш жорсткі правила. Уряди часто не наважуються встановлювати суворі обмеження для наземних галузей промисловості, що робить правове регулювання, яке обмежує дії держави, вирішальними щодо захисту довкілля. Регіональні угоди з'явилися як потенційні рішення, пропонуючи регулятивні підходи, адаптовані до конкретних економічних, соціальних і політичних контекстів.*

Методи. *У цій статті використовується підхід доктринального правового дослідження для аналізу проблем із запровадженням глобальних і регіональних законодавчих меж щодо забруднення моря з суші. Комплексний огляд літератури, присвячений науковим роботам, міжнародним правовим текстам і визначним судовим справам, дає змогу зрозуміти нормативні прогалини та покращення, які можуть бути потенційно впроваджені. Крім того, вторинні джерела, зокрема звіти організацій громадянського суспільства, допомагають контекстуалізувати практичні наслідки цих правових заходів. Дослідження також розглядає спори, пов'язані із забрудненням моря з суші, та ефективність механізмів вирішення спорів як на регіональному, так і на глобальному рівнях.*

Результати та висновки. *Результати дослідження підкреслюють необхідність захисту морського середовища від забруднення з суші, що водночас пов'язано зі збалансованим економічним зростанням. Регіональні угоди пропонують цінну інформацію про правові стратегії та інституційні механізми, які можуть допомогти досягти цієї рівноваги. Однак недоліки, що полягають у тому, як ці конвенції підвищуватимуть здатність міжнародного права керувати наземним забрудненням, потребують подальшого аналізу. Стабільна законодавча база повинна узгоджувати захист навколишнього середовища з економічними, соціальними та політичними пріоритетами. Зміцнення механізмів врегулювання спорів і сприяння міжнародній*

співпраці є важливими для вирішення цих проблем. У дослідженні було наголошено на постійному протиріччі в міжнародному праві між економічним зростанням і збереженням довкілля, а також на потребі в більш ефективних правових заходах, щоб забезпечити довгострокову стійкість морських екосистем.

Ключові слова: *міжнародно-правова база, забруднення морського середовища з суші, забруднення, глобальне та регіональне порівняння, механізм вирішення спорів.*

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Research Article

PUBLIC ADMINISTRATION GOVERNANCE: TAX ADMINISTRATION AS A MODEL

Cherif Elhilali

ABSTRACT

Background: *Unlike other public administrations, tax administration interacts with users of public services in a unique context. It does not operate for the benefit of individually identified individuals but rather for the benefit of the community as a whole.*

As a result, taxation is rarely perceived as a pleasant reality, and those responsible for its administration often face difficult relations with taxpayers. Based on this observation, this research seeks to highlight the extent to which a sustained process of governance within tax administration contributes to its overall performance. The tax administration must balance two key imperatives: ensuring revenue for the state and local authorities while also striving for the efficient and equitable application of the tax system.

Methods: *This research is based on a systemic approach, enabling an analysis of the inputs and outputs of tax administration, especially its relations with taxpayers. This includes an examination of techniques, methods, rules, powers, and tax procedures, along with an assessment of their limitations. A comparative aspect is also present in this research, allowing for an evaluation of tax administration governance in developing countries compared to developed countries, particularly in Europe.*

Furthermore, the research opts for an analytical and descriptive approach to examine the realities of tax administration, identify its failures, and develop recommendations aimed at improving its performance and governance.

Results and conclusions: *This article contains results and recommendations, highlighting that although tax administration has seen some improvements in recent years, it still requires greater efficiency, transparency, and overall performance.*

To achieve these objectives, tax administration must be enhanced by improving its performance, guaranteeing quality services, and establishing cooperative—if not partnership-based—relationships with taxpayers.

1 INTRODUCTION

The governance of public administration, particularly tax administration, is a current and ongoing subject[1] due to the specificity of its relations with users (citizens and customers).

Unlike other public administrations, the tax administration operates within a distinct framework in its relationship with taxpayers. Its role is not to intervene for the benefit of individually identified people but rather for the welfare of the community as a whole. This intervention often produces a feeling of dissatisfaction among taxpayers regarding the public services provided.

Taxation is, therefore, seldom perceived as a favourable aspect of governance. Therefore, those responsible for its administration often face challenging interactions with taxpayers.

Based on this observation, it is desirable to initiate a sustained process of governance within the tax administration. As Professor Gabriel Ardant noted, "We have too often forgotten that the best-designed tax system is only as good as administration that sets it up."[2] This statement underscores the essential role of administration in shaping the effectiveness of the tax system.

In this context, the tax administration must strive to reconcile three imperatives: first, provide revenue for the state and local authorities; second, facilitate as much as possible the application of the system tax efficiently and equitably; and third, deliver quality services to users.

To achieve these objectives, the tax administration should be strengthened by improving its performance, guaranteeing quality services, and establishing cooperative and partnership relationships with taxpayers.

2 METHODOLOGY

In addition to the systemic approach and the comparative aspect mentioned above, to understand a solidly standardised and structured institution, the consultation of diversified documentation and the use of interviews with tax administration agents and the taxpayers who supposedly benefit from its services are of capital utility.

1 The Director General of Taxes Administration Mr. Omar Faraj, during the conference organized by the Moroccan Group of the International Fiscal Association (IFA Maroc), on 12 October 2016, in Casablanca, on the theme "Improving the quality of service to taxpayers", underlined the need to meet the expectations of taxpayers in terms of quality of service, fairness and respect for their rights, in return for their tax compliance, a topical theme at a time when the Directorate General of Taxes undertakes structuring projects to modernize and facilitate the use of procedures. See, 'Omar Faraj plaide pour une modernisation de l'administration fiscale' (*Challenge*, 18 octobre 2016) <https://archive.challenge.ma/omar-faraj-plaide-pour-une-modernisation-de-ladministration-fiscale-72533/> accéder 28 octobre 2024.

2 Gabriel Ardant, *Histoire De L'Impot* t 2: Du XVIIIe Siecle Au XXe Siecle (Fayard 1972) 849.

Discussions with tax administration agents are enriching insofar as they provide insight into the practical realities of the system. This qualitative data serves as a basis for the theoretical analysis resulting from the documentation collected, including legal texts, judicial decisions, legal commentaries and treatises). It is reasonable to begin by examining how practitioners describe their practical activity and how taxpayers perceive the services offered to them.

However, the purpose is not to accept these perspectives at face value or validate them without subjecting them to criticism, no matter how moderate. Rather, listening to tax administration agents should help contextualise the institution's role by distinguishing between its codified principles and its actual practices. Likewise, listening to taxpayers should help distinguish their perceptions from the realities of their interactions with the administration.

Given its strategic role in financing the state budget, the tax administration must cultivate its techniques and tools to improve both its internal efficiency and public image with taxpayers.

Ultimately, this study does not aim to forge an archetype of tax administration. Rather, its objective is to present the tools for good governance while first identifying the constraints that hinder the quality of its relationship with taxpayers.

3 IMPROVING THE PERFORMANCE OF THE TAX ADMINISTRATION

Faced with the multiplication and diversification of economic activities on the one hand and the increase in taxable income on the other, the responsibilities of the tax administration are multiplying. This requires improving its performance, which could be achieved both through improvements in human resources and material resources.

3.1. In Terms of Human Resources

Taxpayers are forced to submit their returns to the tax authorities, with some declarations being monthly or quarterly (such as VAT) and others being annual (such as income tax or corporate tax). Tax agents are faced with countless declarations that they must verify, and if there is a gap in the declaration, summon the taxpayers concerned or conduct on-site inspections, particularly in the case of companies.

To effectively manage this work, the tax administration must have sufficient personnel with the necessary training. The objective is to equip auditors with comprehensive knowledge of the legislation in force and the procedures put in place.

However, the tax administration presents a double insufficiency at this level: quantitative and qualitative[3]. This is what negatively influences tax performance and fairness. Therefore, to improve the quality of tax auditing, the tax administration should, on the one hand, increase the number of auditors and, on the other hand, improve their training and strengthen their motivation.

3.1.1. Increase in the Number of Auditors

The quantitative strengthening of the personnel responsible for tax audits remains imperative, given the increase in the number of companies likely to be audited. Indeed, as previously highlighted, there is a disproportion between the continuing rise in the number of companies and the stagnation of the number of agents responsible for control.[4]

This shortage inevitably affects the number of taxpayers who can be audited.[5] Therefore, recruiting new auditors in sufficient numbers and with quality training is recommended to make tax audits more effective. As Professor Ngaosyvanth stated, "Any increase in the number of qualified tax agents, accompanied by a better organisation of services, could increase the collection of tax revenue. These will largely offset the costs incurred."[6]

3.1.2. Improved Training of Auditors

Auditors' competence depends largely on the level of training they undergo. The tax administration needs not only a sufficient number of auditors but also those with the desired qualifications.

As such, it is a question of offering auditors permanent and continuing training tailored to the evolution of endogenous factors (such as tax system reforms) and exogenous factors (broader state governance and economic changes).

To remedy training challenges, especially in developing countries, Professor Ngaosyvathn has proposed four solutions:[7]

1. Sending scholarship holders to developed countries
2. Inviting foreign experts to provide training within developing countries
3. Establishing specialised schools
4. Implementing on-the-job training ("learn by doing" without prior preparation)

3 R Ihsan, 'The Complaint of Tax Agents' *The Economic Life* (Rabat, June 1996) 10.

4 Anas Bensalah Zemrani, *Les Finances de L'état au Maroc*, t 2: L'entreprise face au fisc (L'Harmattan 2001) 8.

5 B Parent, 'La démarche de changement de la DGI et l'efficacité du service public fiscal et foncier' (1996) 54 Revue Française de Finances Publiques 19.

6 Pheuiphanh Ngaosyvathn, *Le rôle de l'impôt dans les pays en voie de développement: appréciation de l'influence exercée par les structures économiques et socio-politiques sur le prélèvement fiscal* (LGDJ 1974) 149.

7 ibid.

Furthermore, to enhance the quality of auditor training, the tax administration should strengthen its openness to its environment, particularly its collaboration with academic institutions. Universities play a crucial role not only in advancing knowledge but also in shaping concepts, projects, and visions of reform. The tax administration must place trust in academics—specifically, public finance and taxation professors—as true trainers in the field.

In this case, establishing collaboration between the tax administration and law faculties, particularly the training and research units specialising in public finance and taxation, would be highly beneficial. This could be done through a formal agreement to train versatile agents (technicians and conceptualisers).

3.1.3. Strengthening the Motivation of Auditors

There is no shortage of economic theories and postulates from administrative science regarding the impact of motivation on improving agent performance. Within the tax administration, motivation depends to a large extent on the remuneration and career advancement of auditors. A reasonable increase in remuneration would have only beneficial effects.

Indeed, when an agent feels valued and treated with greater consideration, they will be motivated to double their efforts in exercising better tax control—an advantageous outcome for the tax administration.

Therefore, the tax administration must encourage and motivate this category of civil servants. As Professor Maurice Laure underlined: "The State must reserve special treatment for the particular category of civil servants who not only engage their moral responsibility in their profession but are also professionally best placed to judge the inequality of conditions."[8]

Moreover, to shield auditors against any temptations of fraud or solicitations from taxpayers while also encouraging them to work harder to secure significant adjustments for the benefit of the public treasury, it is essential to improve their material conditions.

This motivation could also take the form of professional promotion within a structured accountability system. Thus, the tax administration should enable its auditors—and civil servants in general—to build a meaningful career based on their skills and merit. It must ensure their progression within the hierarchy, granting them positions of responsibility while upholding the principle of equal opportunity.

However, the tax administration should also strengthen the forward-looking management of human resources. This approach would allow for better monitoring of job and career development and serve as a basis for more effective staff and skills management

8 Maurice Laure, *Traité de politique fiscale* (Presses Universitaires de France 1957) 407.

3.2. In Terms of Material Resources

The rapid evolution of information technologies is driving a shift from mass computing to online computing. This discussion will successively deal with the computerisation of tax administration services and their technological infrastructure.

3.2.1. Strengthening the Computerisation of Tax Administration Services

It is now widely recognised that IT is a powerful tool that allows the tax administration to increase service performance to the extent that it offers an impressive capacity for storing information and processing it more quickly.

In this sense, Professor Ngaosyvathn highlighted IT's role in expanding the scope of tax administration. According to him, IT facilitates better control of taxpayers, identifies all sources of wealth, and relieves staff from tax assessment and collection tasks.[9]

In addition, IT can "free the tax administration from management tasks where it would have ended up paralysed. It makes it possible to allocate agents to more noble activities in tax control while allowing more informed reflection."[10]

Concerning decentralised services, the reinforcement of IT is of capital importance to the extent that compressing the processing times of tax files is one of the decisive keys to improving tax revenue yield. Regional departments seek seamless interconnection with the central tax administration to enhance efficiency.

Local tax services require a robust computer network to ensure taxpayer files can be done in a context of serenity and precision. For example, IT can support in-depth investigations and controls, providing a reliable framework for detecting irregularities such as double invoicing, falsified invoices, or reconstitution of turnover.

Moreover, in terms of communication of files relating to the taxation procedure, computerisation plays a vital role in facilitating communication between central and decentralised services in taxation procedures. Abandoning the manual processing of declarations is beneficial on two levels for the auditor. First, it allows them to dedicate more time to managing taxable material. Second, paper records will only be needed in the event of searching for proof following a dispute between the taxpayer and the administration.

To consolidate the computerisation system, the tax administration should invest in strengthening personnel capabilities, providing ongoing training, and upgrading IT infrastructure. Additionally, for integrated tax management (base and collection),

9 Ngaosyvathn (n 6) 140.

10 Jean-Claude Martinez et Pierre Di Malta, *Droit fiscal contemporain* (Litec 1985) 261.

computerisation must be implemented in a collaborative environment across all territorial and national entities. These entities should operate within a harmonious framework.

Beyond automation, the value of technology extends beyond replacing manual processes with automatic ones. It also provides automated assistance to agents in carrying out complex work, such as control and recovery. A networked IT system enhances the possibilities of information sharing between agents of the tax administration and, in some cases, between the administration and taxpayers. Key aspects include the use of electronic mail for communication, broad information sharing throughout the state territory regardless of location, optimised group work, and the convergence of all information networks, including internal IT systems, telephone, and the internet.

In tax administrations that have fully embraced digitalisation, online technology has significantly impacted flexibility, responsiveness, and interactivity between different units and processes, leading to more efficient and transparent tax management.

3.2.2. Equipment of Tax Administration Services

The lack of adequate equipment in the tax administration of certain states, especially those in development, is a reality that cannot be ignored. This limitation reduces its capacity for action in terms of control and, consequently, deprives the state of significant tax resources. This is why the widespread adoption of IT "frees the tax administration from management tasks where it would have ended up becoming paralysed. It allows agents to be assigned to more noble activities in terms of tax control while allowing for more enlightened reflection."[11]

This situation necessitates that tax administration officials multiply their efforts to develop equipment to guarantee the best working conditions for tax agents and ensure more efficient and effective tax control. To achieve these and other objectives, the tax administration should implement a real service equipment policy capable of supporting structural reform. This policy should focus on:

- Providing a pleasant environment for taxpayers
- Improving the staff working environment
- Gradually increasing the number of office premises
- Developing internal and external means of information for taxpayers
- Expanding the use of computer equipment

11 ibid 261.

4 THE DEVELOPMENT OF QUALITY SERVICES

The quality of services is a major stakeholder for the tax administration and must be achieved. However, achieving this objective requires that its action be focused on several levels, particularly improving access to tax legislation and information, as well as enhancing tax procedures and techniques.

4.1. Access to Tax Legislation and Information

Ensuring access to tax legislation and information mainly requires guaranteeing its intelligibility and stability, along with significant communication efforts to make tax law more accessible.

4.1.1. Stability of Tax Law

Maintaining stability in the tax system is paramount. There must be a balance between the need to amend tax regulations and the necessity of providing a minimum level of consistency.

For instance, investors must have long-term visibility over a long period and not be thwarted in their projects by perpetual legislative changes. This has been a challenge in certain states, such as Morocco, where tax measures intended to encourage investment have undergone constant modifications.[12]

To address this issue, tax law should be reinforced by defining a framework of tax principles that would be intended to be introduced between major constitutional principles and the technical provisions of each tax system. A key approach would be to regulate the conditions under which tax law can evolve, particularly concerning the instability or retroactive application of its provisions.

Two formal options could be possible. The first is for the government to formally commit to proper conduct. The second, more robust approach would involve enacting a law superior to ordinary law to reinforce this commitment. This approach appears more suited to combating shortcomings in tax governance. For example, an organic law could prohibit the modification of tax incentive provisions before the deadline initially planned in a way that is detrimental to taxpayers.[13]

12 Rachid Lazrak, 'Redonnons à l'impôt son rôle d'outil de croissance' *L'Economiste* (Rabat, 20 décembre 1999).
13 Christophe Heckly, *Rationalité économique et décisions fiscales* (LGDJ 1987) 256.

4.1.2. Simplification and Accessibility to the Tax Law

The codification of tax texts is not sufficient on its own; it should be, on the one hand, simple and intelligible and, on the other hand, accessible to all taxpayers.

The simplification of tax law would contribute to improving governance. However, the objective of simplification should not be misunderstood—tax systems are complex by nature. However, many complications are unnecessary and avoidable. To address this, at least four measures can be taken:

Firstly, the clarification of tax texts, particularly for certain measures such as the taxation of profits. Second, taxes—whether small or large—that incur excessive management costs should be eliminated. Third, reporting obligations for taxpayers, particularly businesses that assume a large part of the administrative costs of taxation on behalf of the state, should be reduced. Finally, the continuation of the modernisation of the tax administration. Indeed, it participates just as much in the management of the tax standard as in the tax decision should continue. Ongoing efforts to establish a single tax contact point for businesses, improve the quality of services provided to taxpayers, and adapt methods of communication around taxation should be continued.

Moreover, administering legislation in a simple, fair, and professional manner helps build public trust. In this sense, and by way of illustration, the French tax administration commits to:[14]

- Submit, each year, proposals for the simplification of tax legislation as well as the clarification of the legal texts in force to achieve the intelligibility of the laws and their proper application.
- Propose measures to simplify the reporting obligations of taxpayers, in particular by reducing the number of their reporting and payment contacts with the tax authorities and by improving the readability and accessibility of printed materials.
- Seek ways to harmonise methods, procedures, and positions to ensure consistency across different sub-departments and prevent discrepancies in handling similar issues.

Ensuring accessibility to tax regulations also involves informing taxpayers of their rights and obligations. As previously pointed out, a lack of information for the taxpayer often leads to misunderstandings between taxpayers and the tax administration, especially given the complexity of tax matters and the proliferation of taxes.

Therefore, this deficiency must be remedied through information and popularisation campaigns and the publication of tax decisions—both from tax commissions and the courts.

14 Projet de Loi n 710 portant habilitation du Gouvernement à prendre par ordonnance des mesures de simplification et de codification du droit (26 mars 2003) <https://www.assemblee-nationale.fr/12/projets/pl0710.asp> accéder 28 Octobre 2024.

It would be more appropriate to establish a taxpayer's charter that defines the principles governing the relationship between the tax administration and the taxpayer and establishes the rights and obligations of both parties in a spirit of collaboration and mutual respect.

Additionally, the internet should be used to disseminate tax legislation more widely, ensuring that taxpayers have better access to information and enabling them to make informed decisions based on reliable tax data.

Moreover, an intranet system can provide tax agents with the current tax regulations, the latest tax documentation according to tax laws, and the most practical tax-related resources.

4.2. Improving Tax Procedures and Techniques

Improving tax procedures and techniques concerns the tax base, assessment, and collection.

4.2.1. At the Level of the Tax Base and Assessment

Good governance of the tax administration is measured through the quality of services offered to taxpayers. Two techniques that can be strengthened in this direction are integrated taxation and electronic declaration.[15]

Implementing the integrated taxation system constitutes an important step in the performance of the information system. This system aimed to gradually move all tax-related services online (e.g., Simpl-VAT, Simpl-Income tax, Simpl-corporate tax, etc.).

The integrated taxation system has two complementary components that equip tax agents with the tools necessary to carry out their tasks more effectively. The first component focuses on the base and the recovery, while the second concerns tax control.[16]

Key objectives of the integrated taxation system include:

- Assigning each taxpayer a unique tax identifier by the federation of information in a tax file and sharing data between the different stakeholders.
- Facilitating the exchange of information between the different services of the tax administration. The data integrated into the taxpayer's file by each department will be available to authorised managers, whether in central or regional services.
- Reducing "reporting" activities by providing summary data already formatted by the hierarchy and central services. This system will also include data transmitted by tax administration partners, enabling relevant cross-checks.
- Developing a quality service. The new applications have many advantages, including quality information available to the authors concerned and, consequently, a reduction in requests for information between services; a proactive system that guides data entry and also avoids errors; cross-checking information concerning the

15 Cherif Elhilali, *Tax Administration and Taxpayers* (Dar Al-Qalam for Printing and Publishing 2021) 189.
16 ibid.

taxpayer and verifying their consistency; the automation of mass processing with low added value and the possibility of reorienting its activity towards control; assistance in identifying declaration or payment failures and payment insufficiencies; the generalisation of dashboards; ease of access to information via the intranet; and greater data security.

Furthermore, the introduction of electronic declarations and electronic payments constitutes a turning point for the tax administration, paving the way for new relationships with taxpayers.

The objective is to transform this administration into a "multi-access administration" so that taxpayers have the choice between direct media (paper) and new channels (the official portal, in particular) for all their tax procedures.

4.2.2. At the Level of the Tax Collection

The adoption of new techniques can significantly improve tax administration management techniques, not only for the tax base but also for its collection. Faced, sometimes, with recovery difficulties, the accumulation of tax arrears, and a relatively moderate rate of tax revenue collection, the tax administration must put in place new techniques and procedures to optimise the collection system.

The tax administration is called upon to consider using dashboards provided by public accountants to identify indicators that serve as decision-making tools. These include, first and foremost, means and workload indicators. This set of information and ratios is intended to highlight the human and material resources available to the tax collector, such as the number, profit, and qualification of agents. These indicators will enable the administration to better distribute resources and target interventions to meet the needs of decentralised public services.

Performance indicators will provide the tax administration with appropriate information on support, recoveries, outstanding recoveries, obstacles to recovery, and to obtain information on recovery rates. These indicators will also help monitor the achievement of objectives assigned to tax collectors, as well as analyse and explain discrepancies between forecasts and achievements.

Management indicators will make it possible to assess the importance, origin, and nature of the outstanding recoveries, ensuring that legal proceedings for the recovery of public debts are initiated against all taxpayers, without exception. They will also help evaluate the performance of recovery efforts and, where necessary, prompt the necessary actions to address dysfunctions and deficiencies observed.

Furthermore, improving the quality of procedures inevitably requires the gradual orientation of accountants responsible for recovery towards procedures with high added value. Thus, the behaviour of the public accountant in matters of recovery is often driven by

the concern for safeguarding and responsibility. Additionally, the mismatch between resources and expenses is a constraint that should not be neglected. However, rational resource use combined with the proper organisation of the collection activity within the collection system could overcome this issue.

Moreover, introducing the notion of integrated management of tax liabilities, particularly for large taxpayers, is a solution to the fragmented management by item, which often leads to the negligence of these taxpayers. Repetitive summons relating to a fraction of the tax liability reduce the deterrent effect of recovery actions and foster the belief that recovery efforts are ineffective.

Tax collection is an activity whose performance depends heavily on the quality of the procedures. Therefore, it is essential to establish a management system in the form of a central observatory, which would establish periodic summaries on the evolution of the collection and clarify, in particular, the procedures to follow. This would allow the public accountant to adopt the most appropriate and effective path for each category of taxpayer.

In light of foreign experiences, optimising the tax collection chain involves outsourcing spontaneous collection and selecting and analysing risk for forced tax collection.

Regarding the outsourcing of spontaneous collection, with the entry into force of online tax declarations and to consolidate the operation, tax authorities could outsource tax collection through the banking network.[17] The taxpayer pays directly (via cheque, bank card, or transfer) from their bank account, and the bank transfers the funds to the treasury account. This system is practised in Spain and many Anglo-Saxon countries. For a commission, banks collect tax on behalf of the Public Treasury.

Regarding selectivity and risk analysis, most modern tax administrations consider that the most effective way to maximise recovery and minimise exposure to the risk of unrecoverability is by aligning available resources with the risk level.[18]

4.3. The Dematerialisation of Tax Administration Services

The dematerialisation of tax administration services is a strategic choice that will certainly contribute to strengthening the implementation of digital administration. It is worth noting that the change in the payment method for certain taxes, such as the car tax, for example, was beneficial for taxpayers. Before this change, they had to spend hours queuing at administration counters, which in turn required the mobilisation of several administration agents dedicated solely to this operation for months leading up to the end of each year.[19]

17 Noureddine Bensouda, 'Le Fisc tenté par l'externalisation du recouvrement' *L'Economiste* (Rabat, 17 Février 2006).

18 Pierre-François Gouiffès et Julien Carmona, *Mission d'analyse comparative des administrations fiscales: rapport de synthèse* (n 98-M-041-11, [France] Inspection générale des finances 1999) 38.

19 Omar Faraj (n 1).

Given its enormous interests, the tax administration should launch a process of complete dematerialisation of all its actions with taxpayers.

Beyond the legal generalisation of electronic declarations and payments in several states (such as France, the UK, and Germany), the tax administration must strengthen online services, such as issuing turnover certificates and tax identification forms for members of the administration's online tax services, and other certificates concerning various taxpayers.

In addition, to further facilitate relations with taxpayers, they should have access to a tax account that provides real-time information about their tax situation, as well as the progress of their reimbursement and restitution requests.

Furthermore, it is important to consider ways to simplify and facilitate reimbursement and restitution requests. This includes generalising the online filing of such requests, modifying the formalities for submitting required documents and their method of verification, and clarifying the rules for rejections, which must be justified and formally notified to the interested parties.[20] For example, the tax administration may receive several complaints annually from different categories of taxpayers. Strengthening the online processing of these complaints will ensure that responses are provided as quickly as possible.[21]

Furthermore, several measures can be taken or strengthened in response to taxpayers' concerns, such as:

- Guaranteeing better supervision of the tax control system
- Reducing the duration of tax administration verification agents' visits to companies
- Rationalising the sanctions regime
- Strengthening the corrective declaration procedure
- Simplifying the appeals before the tax commissions, etc.

The tax administration should implement additional measures to provide taxpayers with high-quality services.

5 THE EFFECTS OF TAX ADMINISTRATION GOVERNANCE ON RELATIONS WITH TAXPAYERS

The governance of the tax administration could have several impacts on relations with taxpayers, which can be summarised in two essential points: the guarantee of tax fairness and the improvement of tax citizenship.[22]

20 ibid.
21 ibid.
22 Elhilali (n 15) 179.

5.1. Guarantee of Tax Fairness

This goal of justice is expressed in particular at two levels: the fight against tax fraud and evasion and the taxation of the informal sector.[23]

5.1.1. The Fight Against Tax Fraud and Evasion

Fraud is an offence against tax legislation and, as such, is subject to administrative or criminal sanctions. Tax fraud is generally distinct from tax evasion, which is not an infraction of the tax law but an abusive use of the legislation to avoid taxation or to minimise it.[24]

The fight against these two phenomena is considered by the tax administration as a determining element in the consolidation of tax justice and the improvement of budgetary resources.[25]

To deal with this, the tax administration must strengthen its collection action for better resource mobilisation. It must also define a responsible control policy and equip itself with effective management resources.

To improve tax control, several measures should be taken:

- Review the control strategy to improve the business climate and establish healthier taxpayer competition. With this in mind, the administration should consider modifying its operating mode by providing for one-off and simplified tax controls.[26]
- Improve control programming based on the risk analysis system.[27]
- Strengthen the organisation and quality of tax audits by relying on experienced auditors trained across all relevant disciplines, sensitive to the values of commitment and ethics, and provided with the necessary logistics to carry out their work effectively.

5.1.2. Taxation of the Informal Sector

The informal sector is a constant concern for public authorities, particularly in tax matters. It is a significant cause of revenue loss for both state and local government budgets, and it contributes to maintaining high tax rates on formal, organised units. This increasingly

23 Cherif Elhilali, 'Covid 19 Pandemic in the Arab Countries: Case of Morocco' (2024) 7(1) Access to Justice in Eastern Europe 307, doi:10.33327/AJEE-18-7.1-a000112.

24 Ahmed Tazi, The fight against tax fraud in Morocco 'Lutte contre la fraude fiscale : le renforcement de la qualité du contrôle fiscal' (2008) 102 Revue Française de Finances Publiques 78.

25 ibid.

26 In this context, it should be emphasised that the Tax Administration must also strengthen the right of observation, which aims to identify invoicing failures, and to exercise it jointly with other administrations such as customs. and the central establishment of State Exchanges.

27 In relation to this point, it is necessary to base ourselves on a list of criteria or a target population and provide tax administration controllers with verification support tools.

widespread phenomenon undermines the economy as a whole and the principle of tax fairness to the extent that it places the total tax burden on a limited number of taxpayers. From this perspective, some experts suggest that only 2% of companies contribute 80% of corporate tax revenue.[28]

Therefore, it becomes important to continue implementing measures that are likely to attract informal units toward the organised economy.[29] The taxation of the informal sector is one of the crucial operations used by the tax administration to strengthen its implementation over the years, aimed at motivating taxpayers to join the formal economy while granting them tax advantages and benefits.

5.2. Improvement of Tax Citizenship (Tax Compliance)

Promoting a culture of tax citizenship is crucial for fostering a tax system based on fairness, transparency, and mutual respect. It stems from the fight against tax fraud and evasion, which is strengthened through communication on the rights and obligations of taxpayers, and their awareness and education on the principles of citizenship.[30]

By way of illustration, to improve tax citizenship through education, tax should be considered, like any other discipline, essential and vital. For instance, the Association of Administrations Tax Authorities of Latin American countries has initiated tax training programs for primary school-age students, resulting in "the teacher will then become the ally of the Tax Authorities."[31]

The promotion of tax citizenship arises from consent to tax, a fundamental principle of taxation that reflects greater support from taxpayers for taxation and state tax policy. In recent years, many countries have seen the emergence of a new concept, that of "voluntary compliance."[32]

In short, for tax citizenship to be truly achieved, several conditions must be met:

- Strengthening the transparency of administration actions to establish trust with taxpayers.
- The simplification of procedures to make tax matters accessible to taxpayers.

28 Abdellatif Zaghnoun, 'Les recettes fiscales potentielles: quels choix possibles et quelles perspectives?' (2011) (spec-Maroc) Revue Française de Finances Publiques 83.

29 This issue concerns several tax administrations (such as the General Tax Directorate, the Customs Directorate, etc.) and the actions to be taken must be coordinated for greater efficiency and performance.

30 Jean Rivoli, *Vive l'impot* (Du Seuil 1965) 121.

31 ibid.

32 For example, in Germany, there is a law which aims to promote tax honesty. The so-called "encouraging tax honesty" law, which came into force on 1 April 2005. See, Bundesgesetz vom 30 Dezember 2003 'Gesetz zur Förderung der Steuerehrlichkeit' [2003] BGBl I 66/2928.

- Strengthening the dematerialisation of tax procedures.
- Widening the competence thresholds of local officials.[33]
- Improving communication and informing citizens about their rights and obligations.

5.3. Establishment of Relationships of Trust and Partnership

Consultation and partnership around taxation are a definite necessity at both operational and institutional levels for making informed decisions and, consequently, providing quality services. Better organisation of taxpayer consultation will prevent certain problems from arising and being dealt with through litigation.

Consultation with business taxpayers is an important practice by tax administrations, particularly when drafting finance laws. Business groups and chambers of commerce and industry are often consulted to gather feedback.[34] These bodies, representing business interests, have generally developed public relations structures that allow them to ensure their voices are heard, particularly if they feel that the administration has not listened to them sufficiently. However, it is acknowledged that tax administration may not always have the time or the mandate to carry out systematic consultations, particularly with regard to specific measures in the finance bill.[35]

For instance, in certain countries like France, consultation with professional taxpayers is not systematic concerning finance law.[36] Instead, taxpayer consultation may take place a posteriori[37] in the form of public exchanges of letters between taxpayers and the Ministry of Finance (tax administration).

Moreover, many tax administrations recognise that providing taxpayers with information promotes voluntary compliance with tax obligations. As a result, several states have adopted more openness to the environment. A notable example is the National Meetings on Taxation organised by the Moroccan Ministry of Economy and Finance in Skhrirate in April 2013. This event brought together parliamentarians, economic operators, national and

33 As an illustration in terms of VAT reimbursement, restitution and processing of tax disputes to strengthen local tax management.

34 Noureddine Bensouda, 'La Modernisation de L'administration Fiscale' (*Université Mohammed V*, 21 mai 2003) <https://www.tgr.gov.ma/wps/wcm/connect/e07bd876-4887-4ae3-bfee-8199ae81d7a6/universite_med5_modernisation.pdf?MOD=AJPERES&CACHEID=e07bd876-4887-4ae3-bfee-8199ae81d7a6> accéder 28 octobre 2024.

35 ibid.

36 Le Conseil d'État, 'Rapport Public 2002' (*Le Conseil d'État*, 30 novembre 2002) <https://www.conseil-etat.fr/publications-colloques/rapports-d-activite/rapport-public-2002> accéder 28 octobre 2024.

37 For example, in France the instruction of December 28, 2001 modifying the system of dividend distributions giving right to tax credit undoubtedly constitutes the most striking recent counter-example: due to the late nature of the text, added to this is the problem of its economic retroactivity, and its practical application difficulties.

international experts, academics, and the tax administration. These meetings served as a platform for open discussion and mutual respect, leading to the development of a roadmap to modernise the country's tax system and administration.[38]

In addition to these national meetings on taxation, economic operators in other states are invited each year, through their respective organisations, to participate in the development and enrichment of draft finance law. They are also invited to give their opinion on the draft circular notes before publication. The frequency and permanence of these meetings with professional orders and chambers of commerce and industry will certainly promote the institutionalisation of consultation.[39]

6 CONCLUSIONS

To conclude, the governance of the tax administration, no matter how efficient, cannot succeed without establishing trust and partnership with taxpayers. It is crucial to overcome the state of mistrust and sometimes hostility that can arise between taxpayers and the administration from time to time. Good governance is grounded in multiple principles, such as participation, efficiency, and equity.[40] In tax matters and the rule of law, it is not enough for tax policy to rest on legal foundations. It is equally important that citizens understand the law, participate in its elaboration, and judge the accuracy of taxation that they are subjected to. Additionally, they must be assured of their rights and guarantees in the event of an audit (control) or tax dispute.

In short, what taxpayers seek is not fine speeches or vague promises but a concretely effective administration—one that is respectful of tax law, open and humane. Such an administration should not lose sight of the fact that the taxpayer is its very reason for being. It must strike a balance between management efficiency (administrative and financial, in particular, the collection of public resources) and the quality of services provided to taxpayers. While these may appear as opposing forces, they are complementary, and a tax administration that can balance both is ideal. This is the kind of administration that can drive change and meet the challenges of the modern tax landscape.

38 'Les 2èmes Assises Nationales sur la Fiscalité à Skhirate' (*Royaume du Maroc*, 29-30 Avril 2013) <https://www.maroc.ma/fr/actualites/les-2%C3%A8mes-assises-nationales-sur-la-fiscalit%C3%A9-%C3%A0-skhirate> accéder 28 octobre 2024; 'Synthese Des Propositions Issues Des Assises Nationales Sur La Fiscalite Tenues le 29 et 30 Avril 2013 à Skhrirate' (2013) <https://www.lavieeco.com/wp-content/uploads/2018/12/la-synth%C3%A8se-des-propositions-1.pdf> accéder 28 octobre 2024.

39 Noureddine Bensouda, 'Groupes de Pression et Prise de Décision Fiscale au Maroc' (2006) 94 Revue Française de Finances Publiques 140.

40 Cherif Elhilali, 'The General Budget in the Kingdom of Saudi Arabia: Between Governance Requirements and Financial Sustainability' (2023) 6(spec) Access to Justice in Eastern Europe 59, doi:10.33327/AJEE-18-6S006.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДЕРЖАВНЕ УПРАВЛІННЯ: АДМІНІСТРУВАННЯ ПОДАТКІВ ЯК МОДЕЛЬ

Шеріф Ельгілалі

АНОТАЦІЯ

Вступ. *На відміну від інших видів державного управління, під час адміністрування податків відбувається взаємодія з користувачами державних послуг в унікальному контексті. Воно діє не в інтересах окремих осіб, а радше на користь суспільства в цілому.*

Як наслідок, оподаткування рідко сприймається як приємна реальність, а особи, відповідальні за його адміністрування, часто стикаються зі складними відносинами з платниками податків. З огляду на це спостереження, дослідження має на меті висвітлити, якою мірою сталий процес адміністрування податків сприяє загальній ефективності у цій сфері. Адміністрування податків повинне балансувати між двома ключовими імперативами: забезпеченням надходжень до державного та місцевих

бюджетів, а також прагненням до ефективного та справедливого застосування податкової системи.

Методи. *Це дослідження ґрунтується на системному підході, що дозволяє проаналізувати вхідні та вихідні дані адміністрування податків, особливо взаємодію з платниками податків. Це передбачає вивчення методів, способів, правил, повноважень, що стосуються податкових процедур, а також оцінку їхніх недоліків. Порівняльний аспект також було застосовано у цьому дослідженні, що дозволяє оцінити ефективність адміністрування податків у країнах, що розвиваються, порівняно з розвиненими країнами, зокрема в Європі.*

Крім того, у дослідженні обрано аналітичний та описовий підхід для вивчення реалій адміністрування податків, виявлення недоліків та розробки рекомендацій, спрямованих на покращення його ефективності та управління.

Результати та висновки. *Ця стаття містить результати та рекомендації, які підкреслюють, що, хоча за останні роки адміністрування податків зазнало певних покращень, воно все ще потребує більшої прозорості та загальної результативності.*

Щоб досягти цих цілей, адміністрування податків має бути вдосконалене в результаті підвищення його ефективності, гарантування якісних послуг та налагодження відносин із платниками податків на основі співробітництва, якщо не партнерства.

Ключові слова: *управління, адміністрування податків, платники податків, ефективність державного управління, якісні послуги, справедливість податків.*

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CRIMINAL LIABILITY FOR THE USE OF PERFORMANCE-ENHANCING DRUGS IN SPORTS: A COMPARATIVE AND ANALYTICAL STUDY UNDER INTERNATIONAL AND MIDDLE EASTERN CRIMINAL LAW

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ABSTRACT

Background: *This research aims to examine the phenomenon of widespread use of performance-enhancing drugs (PEDs) in sports and the methods for combating it on both international and national levels. Internationally, this entails the efforts of organisations and agencies dedicated to sports, while at the national level, it involves the implementation of legislation, enforcement of penalties, and the translation of international recommendations, warnings, and jurisdictional matters to resolve disputes effectively. The study addresses the adequacy of traditional criminal provisions to curb the misuse of PEDs in sports competitions and the legal characterisations of such activities.*

Methods: *The research employs several scientific methodologies: the descriptive method to define the phenomenon, its nature, and various aspects, highlighting its adverse dimensions and health risks to athletes; the analytical method to review legal opinions and international and national laws criminalising the use of PEDs, including judicial rulings; and the comparative method to analyse the approaches of Arab and foreign laws in addressing this issue and their alignment with international recommendations and general legal frameworks.*

Results and Conclusions: *The research concludes with findings and recommendations emphasising the need to combat this phenomenon and limit its effects. It found that the lack of specific laws addressing doping, especially among minor athletes, contributes to its proliferation and blurs the lines between doping and the use of narcotic substances. The research further recommends enhancing penalties for those involved in the production, administration, and prescription of doping substances, alongside establishing clear legal provisions to ensure accountability and effective deterrence.*

1 INTRODUCTION

Sports are significant on psychological, mental, and physical levels. Since ancient times, they have been integral to human societies, serving as a means to maintain health and enhance the efficiency of the human body's systems. Recognised as vital contributors to society, sports also play a crucial role in fostering peace among nations across continents. The significance of this topic stems from the central role sports play in human society, functioning both as a material and moral pillar of the social system. In today's world, it is nearly impossible to envision a human society without a sports entity representing it in various athletic activities. Sports also bolster the political system, acting as a soft power to strengthen relationships between countries. They support intellectual and cultural exchange by serving as a tool for communication and acquaintance among nations. Additionally, they play a crucial role in promoting cultural awareness by enabling exposure to different cultures through tournaments held across the globe. Furthermore, sports are a cornerstone of the economic system, as they have become a source of income for both nations and individuals.

Performance-enhancing drugs (PEDs) differ from recreational drugs and alcohol in their specific psychological, mental, and physical effects; though they share some chemical and addictive properties.[1] Performance-enhancing drugs are divided into pharmaceutical stimulants and synthetic stimulants.

Stimulants, such as amphetamines, enhance physical and mental performance by targeting the central nervous system. However, their use is associated with severe side effects such as fatigue and cardiovascular damage. Sedatives and narcotics, such as morphine and oxycodone, reduce pain and induce relaxation, making them popular in combat sports, but they pose significant risks, such as respiratory depression and addiction. Synthetic stimulants like blood and diuretics offer alternative approaches to improve athletic performance. Blood stimulants raise the body's oxygen capacity by re-pumping stored blood. At the same time, diuretics are used for fast weight loss or to mitigate the effects of banned substances in drug tests. While these stimulants may offer short-term performance benefits, their widespread use undermines fair competition and poses significant health risks.

With the advent of professional sports[2] and intensified competition, the use of performance-enhancing drugs has become prevalent. While this phenomenon has historical roots,[3] it has evolved with the internet serving as a platform for distributing these substances. This issue

1 Abdullah Dhiyan Al-Anzi, *Sports Doping: Between Permissibility and Criminalization* (Dar Al-Jami'a Al-Jadida 2014) 99.

2 Mohammed Labban, 'Combating Sports Doping in Algerian Law' (2024) 9(1) Algerian Journal of Law and Political Science 110.

3 Nidal Yassin Al-Abadi, *Sports Doping: From the Criminal Permissibility Rule to the Law of Sports Crimes: An Analytical Study* (Dar Al-Kutub Al-Qanuniyya 2012) 45.

is not limited to developed nations but also affects developing countries due to the severe health and life risks[4] associated with performance-enhancing drugs (PEDs).

The widespread prevalence of this phenomenon can be attributed to several factors, primarily the belief held by many athletes in various sports that the use of performance-enhancing drugs rapidly and effectively improves their athletic performance and secures victory in sports competitions. This, in turn, provides them with substantial financial returns and numerous temptations that may be difficult to resist.

It is incontestable that this has driven many athletes worldwide, across all sports disciplines, to pursue their desire for immense financial gains by achieving victories in competitions or championships. To that end, they resort to performance-enhancing drugs to increase their physical and psychological strength and fitness. However, this behaviour deviates from the ultimate purpose of engaging in sports and the honour of fair competition.

The research problem lies in the efforts to curb the use of PEDs in sports through a multi-level approach and diverse legal instruments. Many countries have implemented punitive legislation to address this issue at local, regional, and international levels, aiming to determine criminal responsibility for PED use among athletes. Therefore, the study seeks to answer the following questions: Are existing legal provisions sufficient to criminalise and penalise PED users in sports? What preventive measures are necessary to limit their spread?

This paper aims to evaluate the adequacy of comparative criminal laws in addressing PED-related activities in sports and the mechanisms of sports arbitration in these cases. It also aims to clarify the differences in national legal frameworks regarding their alignment with international recommendations.

To achieve this, the research employs the descriptive method to explore the phenomenon and its legal nature, the analytical method to examine its negative impacts and the international efforts to combat it, and the comparative method to study legal models from Egypt, the UAE, Kuwait, Algeria, and European countries such as France and Belgium that have tackled this issue through diverse approaches.

Based on the adopted methodology, the research is divided into several sections, each dedicated to a specific aspect of the study:

i. Defines performance-enhancing drugs (PEDs)
ii. Explores the International legal mechanisms dedicated to combating doping
iii. Examines the Criminalization of Doping and Athletes' Responsibility
iv. Discusses the scope of criminal liability and dispute resolution mechanisms.

4 Ahmad Saad Ahmad (Al-Dafraw), *Criminal Liability for the Use of Performance-Enhancing Drugs in Sports and Their Impacts in Jordanian and Iraqi Law: A Comparative Study* (Dar Amman 2015) 51.

2 METHODOLOGIES

This paper employs multiple methodologies to examine the use of performance-enhancing drugs (PEDs) in sports, their legal implications, and national and international efforts to combat their use.

The descriptive method involves defining the phenomenon of PED use in sports, outlining its nature and various aspects, describing the negative dimensions and health risks associated with PEDs, providing a comprehensive overview of the phenomenon, and shedding light on its complexity.

The analytical method includes analysing various judicial rulings and the effectiveness of existing legal frameworks in preventing the misuse of PEDs. It also involves evaluating the consistency of these frameworks with international standards and identifying any gaps or inconsistencies. To review legal opinions and international and national laws criminalising the use of PEDs, the study examines the historical evolution of these laws and their practical application in different jurisdictions.

The comparative method compares the legal frameworks of various countries, including Egypt, the UAE, Kuwait, Algeria, and European nations such as France and Belgium, to understand the differences in legal mechanisms and their effectiveness in combating PED use in sports. By selecting countries participating in international anti-doping mechanisms, such as the International Convention against Doping in Sport, the study assesses the extent to which national laws are consistent with global anti-doping standards. In addition, the analysis incorporates early anti-doping laws in France alongside more recent regulatory frameworks in Kuwait and the UAE, providing a comprehensive overview of the progress of anti-doping legislation.

The study comprehensively analyses the subject matter using a range of primary and secondary resources, including legal texts, judicial rulings, international conventions, and academic literature.

3 THE NATURE OF PERFORMANCE-ENHANCING DRUGS IN SPORTS

To understand the concept of performance-enhancing drugs (PED) use, it is necessary to first define PEDs within the context of sports. Historically, the term "Dop" was used in ancient societies to describe a stimulant-containing drink or liquid.[5] The word "doping" first appeared in the English lexicon in 1889[6] and gained widespread prominence by 1933, in general and specialised dictionaries, including sports dictionaries like the *Beckmann Sports*

5 Al-Abadi (n 3) 13.

6 Ahmed Abdel-Lah Al-Maraghi, *Sports Criminal Law* (Center for Arab Studies 2020) 89.

Dictionary, which defined it as the use of substances that enhance performance, thereby giving athletes an unfair advantage.[7]

The first official definition of doping emerged in 1963 when the European Committee Council described it as the administration or intake of foreign substances or unnatural quantities of natural substances to unnaturally enhance physical fitness or capacity. This definition also encompassed psychological influences such as hypnosis to control an athlete as if they were a robot.[8]

Institutional definitions of doping have evolved, most notably from the World Anti-Doping Agency (WADA). As a global regulatory authority, WADA coordinates efforts to prevent doping through universal anti-doping regulations. According to Article 1 of its Code, doping involves substances that enhance athletic performance, constituting a violation of its rules.[9] Article 2 of the Olympic Movement Anti-Doping Code outlines two primary legal definitions of doping:

1. Abstract Definition: Using a means that could harm athletes' health or enhance performance.
2. Pragmatic Definition: The presence of a prohibited substance in an athlete's body or evidence of its use.[10]

France was among the first countries to legislate against doping in sports since the issuance of Law No. 17-99-233 on the protection of the health of athletes and the fight against doping, which was repealed by Order No. 2000-548 of 15 June 2000, defining doping as substances used to enhance performance.[11] Since the Decree of 2 February 2000, the French legislature regularly updates its list of prohibited substances, aligning with global anti-doping codes.[12] Key legislative milestones include Decree No. 405-2006 and Law No. 650-2008, which established the French Anti-Doping Agency and addressed

7 Khamis Al-Mahiri and Zayed Al-Ghawari, 'The Legality of Using Sports Doping in International and National Arenas' (2023) 20(1) *University of Sharjah Journal for Legal Sciences* 559, doi:10.36394/jls.v20.i1.19.

8 Al-Abadi (n 3) 14; Robert Alexandru Vlad and others, 'Doping in Sports, a Never-Ending Story?' (2018) 8(4) *Advanced Pharmaceutical Bulletin* 529, doi:10.15171/apb.2018.062.

9 *World Anti-Doping Code 2021* (*World Anti-Doping Agency*, 1 January 2021) <https://www.wada-ama.org/en/resources/world-anti-doping-code-and-international-standards/world-anti-doping-code> accessed 28 January 2025.

10 Klaus Vieweg and Christian Paul, 'The Definition of Doping and the Proof of a Doping Offence' (2002) 1 International Sports Law Journal 2

11 Loi de la République Française n 99-223 du 23 mars 1999 'Relative à la protection de la santé des sportifs et à la lutte contre le dopage' [1999] JORF 70/4399; Ordonnance du Ministère de l'emploi et de la solidarité n 2000-548 du 15 juin 2000 'Relative à la partie Législative du code de la santé publique' [2000] JORF 143/9340.

12 Arrêté du Ministère de la jeunesse et des sports du 2 février 2000 'Relatif aux substances et aux procédés mentionnés à l'article 17 de la Loi no 99-223 du 23 mars 1999 relative à la protection de la santé des sportifs et à la lutte contre le dopage' [2000] JORF n°56/3561.

doping-related trafficking.[13] Updates continue, such as Decree No. 1426 of 2012, ensuring current regulations remain robust.[14]

In Egypt, the legislature designated the Egyptian Anti-Doping Agency as the entity responsible for combating doping in all sports, in accordance with Article 12 of Decision No. 1125 of 2017 regarding the adoption of the Statute of the Egyptian Anti-Doping Organization.[15] The definition of doping was referred to Article 2 of the World Anti-Doping Code, which includes a list of prohibited substances or methods divided into categories from 1 to 11.[16] This list is updated annually by the World Anti-Doping Agency and the Egyptian Anti-Doping Agency.[17] Similarly, Kuwaiti Law No. 82 of 2018 established its national anti-doping agency, incorporating a list of prohibitions in Article 1.[18]

The UAE follows a similar framework to the one outlined in its 2021 National Anti-Doping Regulations. Article 1 defines doping as any violation of anti-doping rules detailed in Articles 2/1–11, while Article 2 specifies the purpose and prohibited list, supplemented with explanatory notes for each prohibited substance.[19]

Globally, legislations have converged on adopting the World Anti-Doping Agency's (WADA) definitions. These definitions are intentionally broad, allowing for the inclusion of substances not yet identified but potentially usable as doping agents in the future. This flexibility addresses the rapid evolution of doping techniques and substances. Awareness of the risks of doping emerged in the early 20th century, prompting international sports agencies to establish strict definitions and regulations. These legal and methodological definitions of the importance of prohibition and penalties ensure fair competition and safeguard athletes' health during sports events.

13 Loi de la République Française n 2006-405 du 5 avril 2006 'Relative à la lutte contre le dopage et à la protection de la santé des sportifs' [2006] JORF 82/5193; Loi de la République Française n 2008-650 du 3 juillet 2008 'Relative à la lutte contre le trafic de produits dopants' [2008] JORF 155/10715.

14 Décret du Ministère des affaires étrangères n 2012-1426 du 19 décembre 2012 'Portant publication de l'amendement à l'annexe de la convention contre le dopage, adopté à Paris le 13 novembre 2012, et à l'annexe 1 de la Convention internationale contre le dopage dans le sport, adopté à Paris le 12 novembre 2012' [2012] JORF 297/20177.

15 Decision no 1125 of 23 March 2017 'Adoption of the Statute of the Egyptian Anti-Doping Organization' <https://manshurat.org/node/28016> accessed 12 February 2025.

16 World Anti-Doping Code (n 9) art 2.

17 *Egyptian Anti-Doping Organization* (*EGY-NADO*, 2025) <https://egy-nado.com/ar/> accessed 15 January 2025.

18 *Kuwait Anti-Doping Agency* (*KADA*, 2025) <https://kada.gov.kw/> accessed 15 January 2025.

19 *United Arab Emirates Anti-Doping Rules 2021* (UAE NADA 2021) <https://www.uaenada.ae/writable/uploads/code/document/1632721190_143aa5e0a3132b52d5a8.pdf> accessed 15 January 2025.

4 INTERNATIONAL LEGAL MECHANISMS DEDICATED TO COMBATING DOPING

The rise of PEDs in sports has been driven by athletes' desire for glory and wealth, alongside increasing competition among companies producing such substances. Their widespread use has led to severe health consequences, including injuries and deaths among athletes. This section examines international mechanisms to combat doping in sports.

4.1. International Efforts to Combat Doping in Sports

With the widespread use of performance-enhancing drugs (PEDs) in international competitions, it became necessary to establish a global legal framework to address this issue and coordinate efforts among nations and international organisations. Early steps included numerous meetings and conferences to identify the root causes of PED usage and propose practical solutions to preserve the ethical and humanistic goals of sports.

The 20th General Conference of UNESCO, held in Paris on 21 November 1978, marked a pivotal moment. The conference led to the adoption of the International Charter of Physical Education and Sport, which established physical education and sport as a basic right for all individuals. In 2015, UNESCO revised and adopted the International Charter of Physical Education, Physical Activity, and Sport during its 38th General Conference to modernise its principles.[20]

In 1989, the Council of Europe formulated the Anti-Doping Convention to harmonise anti-doping regulations and promote athletes' ethical and physical development. Article 4(1) of the Convention required member states to implement laws or administrative measures to restrict the availability and usage of prohibited substances and doping methods, particularly anabolic steroids.[21]

While the Convention did not impose specific penalties for PED use in sports, it encouraged member states to enact appropriate laws, including criminal and civil penalties, to achieve effective deterrence. The Convention also established a Monitoring Group to oversee its implementation, consult with stakeholders, and recommend improvements.[22]

The doping scandal during the 1998 Olympic Games in France prompted the International Olympic Committee (IOC) to convene a global conference in Lausanne in February 1999. Delegates concluded that an independent body was essential to combat PED use. This led

20 *International Charter of Physical Education, Physical Activity and Sport* (UNESCO 2015) <https://unesdoc.unesco.org/ark:/48223/pf0000235409> 15 accessed January 2025.

21 *Anti-Doping Convention of the Council of Europe* (16 November 1989) ETS 135 <https://rm.coe.int/> accessed 15 January 2025.

22 'The Monitoring Group of the Anti-Doping Convention (T-DO)' (*Council of Europe: Sport*, 2025) <https://www.coe.int/en/web/sport/t-do> accessed 15 January 2025.

to the establishment of the World Anti-Doping Agency (WADA) on 10 November 1999, initially headquartered in Lausanne before relocating to Montreal in 2002. In 2003, WADA introduced the World Anti-Doping Code (WADC), standardising anti-doping regulations across all sports and nations.[23] The code came into effect in 2004.

In 2005, the IOC partnered with UNESCO to draft the International Convention Against Doping in Sport, which came into force in 2007. The Convention included 43 articles addressing the use of PEDs during competitions and training and establishing guidelines for testing protocols to detect doping. It required all national Olympic committees to incorporate its provisions into domestic legislation.[24] The Convention has become one of UNESCO's most successful agreements, with 191 signatory states as of 2024.

The Convention provided the necessary legal and regulatory framework to address the spread of doping and performance-enhancing substances in sports, regulate dietary supplements, and develop and coordinate education and scientific research programs. It also clarified that doping is not a phenomenon limited to elite athletes but also occurs within broader sports communities. Given the complexity of combating doping in sports activities, the Convention highlighted that challenges extend beyond distribution, manufacturing, and testing systems, and that no single country can tackle these issues independently. As a result, it emphasised the necessity of unifying international cooperation efforts among all relevant stakeholders and establishing regulatory frameworks under the jurisdiction of governments of the state parties.[25]

This convention and the principles it reinforced have become a unified global legal framework for states, significantly influencing national laws. This influence is rooted in the commitments outlined in Article 5 of the Convention, which states: "Each State Party undertakes to adopt appropriate measures to fulfil its obligations under this convention. These measures may include legislation, regulations, policies, or administrative practices."[26] Furthermore, Article 8 stipulates that state parties must take measures to restrict the availability of prohibited substances and methods in sports unless they are used for approved therapeutic purposes. Such measures include combating the trafficking of these substances and monitoring their production, importation, distribution, and sale while ensuring the availability of substances for legitimate purposes.[27]

23 World Anti-Doping Code (n 9).

24 *International Convention Against Doping in Sport* (*UNESCO*, 19 October 2005) <https://www.unesco.org/en/legal-affairs/> accessed 28 January 2025; Paul Marriott-Lloyd, '*International Convention Against Doping in Sport*' (SHS/2010/PI/H/2, UNESCO 2010).

25 UNESCO, *Evaluation of UNESCO's International Convention against Doping in Sport* (IOS/EVS/PI/161 REV.2, IOS Evaluation Office 2017) 19.

26 International Convention Against Doping in Sport (n 24) art 5.

27 ibid, art 8.

Notably, the International Convention against Doping in Sport was incorporated into French law through Law No. 129-2007, dated 31 January 2007.[28] Since that date, France has undertaken various measures in the field of anti-doping aimed at preventing doping among athletes and penalising its use, promoting clean sports in line with sporting ethics, and protecting athletes who are victims of doping without ostracising them. Article 3(a) of the Convention obligated states to adopt necessary measures to combat doping.[29] Article 5 further stated: "In compliance with the obligations under this Convention, each State Party undertakes to adopt appropriate measures, which may include legislation, regulations, policies, or administrative practices."[30]

Accordingly, the Convention urged states to enact laws and necessary measures, including the potential for imposing criminal and civil penalties on those violating these regulations. However, despite urging parties to adopt measures to combat doping, the practical form and mechanism for implementing such measures remain unclear. This has led stakeholders to believe that its implementation by state parties faces challenges, such as difficulty integrating the Convention's objectives into local frameworks, a lack of awareness regarding which entities should be involved in anti-doping efforts, and insufficient resources and capabilities to support these entities.

In a practical example, in December 2019, the Russian Anti-Doping Agency (RUSADA) was declared non-compliant following a visit by the Council of Europe's delegation to the Moscow Anti-Doping Laboratory due to allegations of state-sponsored doping. After it was revealed that the state had manipulated laboratory doping data, the World Anti-Doping Agency (WADA) imposed a four-year set of sanctions on Russia, later reduced to two years following an appeal by RUSADA to the Court of Arbitration for Sport (CAS). Under these sanctions, Russia was prohibited from hosting or being granted the right to organise major events during the suspension period. Eventually, the Council of Europe's monitoring group concluded that Russia had complied with its anti-doping convention but issued several recommendations, including increasing penalties on coaches, doctors, and support staff violating doping rules and restoring the accredited laboratory.[31]

Additionally, the case of *United States Anti-Doping Agency v. Lance Armstrong*—commonly referred to as the Lance Armstrong doping case—served as another high-profile example of doping violations. In August 2012, the United States Anti-Doping Agency (USADA) imposed a lifetime ban on professional cyclist Lance Armstrong, resulting in the annulment of all his competitive results since August 1998 and the stripping of seven consecutive titles and an Olympic medal. USADA then issued its reasoned report on the ban, including

28 Loi de la République Française n 2007-129 du 31 janvier 2007 'Autorisant la ratification de la convention internationale contre le dopage dans le sport' [2007] JORF 27/1943.

29 International Convention Against Doping in Sport (n 24) art 3(a).

30 ibid, art 5.

31 Geoff Berkeley, 'Russia Compliant with Council of Europe's Anti-Doping Convention, Report Rules' (*Inside the Games*, 20 January 2022) <https://www.insidethegames.biz/articles/1118041/russia-compliant-council-of-europe> accessed 15 January 2025.

thousands of pages of evidence against Armstrong and his US Postal Service team teammates.[32] USADA described these actions as:

> "The most sophisticated, professionalised, and successful doping program … and more extensive than any previously revealed in professional sports history."[33]

On 22 October 2012, the Union Cycliste Internationale (UCI) accepted USADA's findings and officially stripped Lance Armstrong of his seven Tour de France titles.[34]

In another case, on 2 April 2024, the Court of Arbitration for Sport (CAS) dismissed the appeal filed by the International Boxing Association (IBA) against the decision made by the International Olympic Committee (IOC) on 22 June 2023, to withdraw its recognition of the IBA. In its final ruling, the CAS panel stated that as of the date of the challenged decision, the IBA had not complied with the conditions set by the IOC for recognition. These conditions included increasing financial transparency, amending referee-related procedures to ensure integrity, and implementing the measures proposed by the Governance Reform Group established by the IOC, including cultural changes. The CAS panel concluded that the IOC's decision was based on sufficient and lawful grounds.[35]

Recently, the Court of Justice of the European Union (CJEU) issued significant rulings regarding the governance of sports at the European level. The court established the criteria and conditions that sports governing bodies (SGBs) must adhere to. It affirmed that these authorities could establish the necessary rules for obtaining competition licenses and impose sanctions in cases of violations to promote competition based on merit and equal opportunities. The court emphasised that these bodies must comply with standards of transparency, objectivity, and non-discrimination to ensure fair and equitable competition.[36]

As a result, it is imperative for national anti-doping agencies to follow the standards set by the World Anti-Doping Agency (WADA) and coordinate with it to ensure the implementation of both local and international anti-doping policies without interference from states. Governmental manipulation of anti-doping policies contradicts international standards, exposing national agencies to the risk of losing WADA recognition and potentially leading to international sanctions against the state or the national agency.

32 Peter Bell, Charlotte Ten Have and Mark Lauch, 'A Case Study Analysis of a Sophisticated Sports Doping Network: Lance Armstrong and the USPS Team' (2016) 46 International Journal of Law, Crime and Justice 57, doi:10.1016/j.ijlcj.2016.03.001.

33 *Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility Claimant v Lance Armstrong* (USADA, 2012) 5 <https://www.usada.org/pdf> accessed 15 January 2025.

34 David Mottram, 'The Lance Armstrong Case: The Evidence Behind the Headlines' (2013) 2(1) Aspetar: Sports Medicine Journal 57.

35 CAS 2023/A/9757 *International Boxing Association v International Olympic Committee* (CAS, 2024) para 457 <https://www.tas-cas.org/pdf> accessed 15 January 2025.

36 Stephen Weatherill, 'The Impact of the Rulings of 21 December 2023 on the Structure of EU Sports Law' (2023) 23 The International Sports Law Journal 409, doi:10.1007/s40318-024-00265-w.

4.2. Forms of Violations of the Anti-Doping Rules in the World Anti-Doping Code

The World Anti-Doping Code has established specific rules to combat doping, categorising any violation as using performance-enhancing substances. Article 1 of the Code defines doping as "the occurrence of one or more violations of anti-doping rules set forth in Articles 1-2 to 2-11 of the Code."[37] This article clarifies that doping is based on the concept of usage, and such usage constitutes a violation of the Code's rules.

Article 2 of the Code specifies that "the purpose of Article 2 is to define the circumstances and behaviours that constitute violations of the anti-doping rules. Hearings on doping cases are conducted based on establishing that one or more of these specified rules have been breached. Athletes or other persons are responsible for being aware of acts that constitute violations of anti-doping rules, as well as substances and methods included in the list of prohibited substances and methods."[38] Violations can be identified as follows:

- The presence of a prohibited substance, its metabolites, or its markers in an athlete's sample.
- The use or attempted use of a prohibited substance or method by an athlete.
- Evading, refusing, or failing to provide a sample by an athlete.
- Failure to provide whereabouts information.
- Tampering or attempting to tamper with any part of the doping control process.
- Possession of a prohibited substance or method by an athlete or their support personnel.
- Trafficking or attempted trafficking of any prohibited substance or method by an athlete or another person.
- Administering or attempting to administer a prohibited substance or method to an athlete in competition or providing such substances or methods to an athlete outside competition.
- Complicity or attempted complicity by an athlete or another person.
- Prohibited association by an athlete or another person.
- Actions by an athlete or another person aimed at obstructing or retaliating against whistleblowing to the authorities.

37 World Anti-Doping Code (n 9) art 1.
38 ibid, art 2.

These violations conflict with the fundamental principles established by international charters governing sports competitions since their inception. These principles include:[39]

- Ethical Principle: The use of doping in sports contravenes the values and ethics governing sports, involving deceit and manipulation that undermine fairness and integrity in competitions.
- Sporting Principle: Sports competitions aim to create a fair environment where athletes compete to their utmost ability without external interference that grants an unfair advantage. Doping disrupts this balance and compromises fair competition.
- Health Principle: Many doping substances are harmful to athletes' health and can lead to severe health issues. Prohibiting doping protects athletes' health and ensures a fair opportunity to compete without exposure to health risks.

5 CRIMINALIZATION OF DOPING AND ATHLETES' RESPONSIBILITY

There is a global consensus that doping violates principles relevant international agreements uphold. However, countries differ in their approaches to criminalising doping. This section examines the stance of criminal legislation on doping, first discussing laws that explicitly criminalise doping and then those that apply traditional laws.

5.1. Laws Specifically Criminalising Doping

Some legislators have criminalised illegal doping activities by going beyond the administrative penalties imposed by the International Olympic Committees and sports federations—such as disqualification, annulment of results, or temporary suspension. Notably, most European criminal laws have adopted this approach.

In Belgium, doping and its possession were criminalised alongside administrative penalties. However, with the introduction of the Reform Act in August 1980, the Belgian legislature removed the criminal characterisation of these acts.[40]

Similarly, the French legislature criminalised doping in 1965 through the President of Youth and Sports Maurice HERZOG,[41] which was later repealed and replaced by Law No. 432-89 in June 1989. Subsequently, on 23 March 1999, Law No. 223-99 concerning the protection

39 Mohsen Qadeer Al-Muhtaram and Najm Abdel Adhab, 'The Crime of Using Prohibited Doping Substances in International and National Competitions: (excerpt from a PhD thesis "Sports Crimes from the Perspective of International and National Law")' (2023) 64(3) Iraqi University Journal (Faculty of Law) 582.

40 Gauthier Ervyn, *Les Fédérations Sportives Face au Dopage* (*Resolved*, novembre 2005) 3 <https://resolved.law/wp-content/pdf> accessed 28 January 2025.

41 Tristan Chemin, 'La loi antidopage de 1965 dans le milieu du sport: contexte, mise en place, acteurs et réception (1950–1975)' (Mémoire de Master, Université Paris 1 Panthéon-Sorbonne, Ecole d'Histoire de la Sorbonne 2024) dumas-04627017 <https://dumas.ccsd.cnrs.fr/> accessed 28 January 2025.

of athletes and combating doping was issued, including doping within crimes enumerated in the 1999 French Sports Law.[42]

On 5 April 2006, Law No. 405-2006 was enacted to combat doping and protect athletes' health, aligning with UNESCO's Anti-Doping Convention.[43] This law included administrative penalties and granted extensive powers to the National Agency, particularly in monitoring, analysis, and imposing administrative sanctions. Finally, on 3 July 2008, Law No. 650-2008 addressing the trade in doping substances was enacted.[44] A 2012 amendment to the Sports Law ensured its compliance with the principles of the World Anti-Doping Code.

In French law, a chapter titled "Combating Doping" is dedicated to the Sports Code,[45] with Section 6 specifying criminal provisions in Articles L232-25 through L232-31. According to these articles, an athlete found guilty of prescribing, providing, inciting, or using substances or methods related to doping in connection with competitions or preparation for them or evading testing and sampling faces up to five years of imprisonment and a fine of €75,000. The same penalty applies to the manufacturing, importing, exporting, transporting, storing, or purchasing of prohibited substances (doping substances) by an athlete for non-medical reasons (without a prescription).[46]

It is worth noting that the French legislature increased the penalties for these crimes to up to seven years of imprisonment and fines of up to €150,000 if committed by an organised group, against minors, or by a person in a position of responsibility in the field of sports.[47] Additionally, in Law No. 432-89 issued in 1989, the French legislature criminalised the use of such substances for animals participating in sports like horse racing, a provision repealed in Law No. 405-2006.[48] Furthermore, Article 232-9 of the Sports Code places the responsibility on athletes to ensure that no prohibited substances enter their bodies.

In the Arab criminal stance, Algeria is considered one of the pioneering countries in criminalising doping in sports. Several laws governing the sports sector have been

42 Zubaida Jassim Al-Mazmi, 'Criminal Liability for the Use of Performance-Enhancing Drugs in Sports' (2024) 20(2) The Legal Journal (Cairo University Khartoum Branch) 705, doi:10.21608/jlaw.2024.354409.

43 Loi de la République Française n 2006-405 (n 13).

44 Loi de la République Française n 2008-650 (n 13).

45 Code du sport (2004) titre 3, ch 2 Lutte contre le dopage (arts L232-1 à L232-31) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071318/2025-02-24/> accessed 16 January 2025; Romain Soiron and Aude Binichou, 'The Sports Law Review – Edition 6 – France' (*Joffe & Associés*, 18 décembre 2020) <https://www.joffeassocies.com/the-sports-law-review> accessed 15 January 2025.

46 Code du sport (n 45) titre 3, ch 2, s 6, arts L232-25 à L232-31.

47 ibid.

48 Doaa Mohsen Othman, 'The Criminal Protection of Sports Competitions' (2023) 1 *Sports and Law* 288.

established;[49] however, the criminalisation was explicitly stated in Law No. 13-05 of 2013 concerning regulating physical and sports activities.[50] It can be said that the Algerian legislature aligned with the French legislature, as Article 225 penalises any athlete participating in an organised or authorised sports competition or event for possessing prohibited substances or methods listed in Article 189 without medical justification, obstructing monitoring measures by agents referred to in Article 221 or failing to respect disciplinary decisions issued by the National Anti-Doping Agency.

Moreover, Article 223 criminalises those who facilitate doping use, imposing imprisonment from six months to two years and fines ranging from 500,000 to 1,000,000 Algerian dinars (€3,546 to €7,093), provided this constitutes a violation of Article 192 or obstruction of monitoring measures by agents mentioned in Article 221.[51]

Both French and Algerian legislators have translated the international desire to preserve principles ingrained in the sports doctrine. They have made a clear distinction between doping and the use of narcotic substances, in contrast to the laws discussed in the second section. Furthermore, both legal systems permit the use of these doping substances when prescribed or justified for medical treatment. A question that arises in this context is: What happens if the substances used are listed as narcotics or psychotropic drugs?

The straightforward answer is that using such substances is distinct from doping, primarily due to the differing purposes and the requirement of being an athlete. Therefore, if it is determined that an athlete has used narcotic or psychotropic substances, the applicable laws are Law No. 31 of 1970 on combating narcotics and Law No. 05-23 of 2004 and its amendments.

5.2. Laws Without Specific Criminalization of Doping

It is evident that while Arab legislations, such as those in Egypt, the UAE, Kuwait, and others, have enacted specific laws to combat doping in sports, focusing on the definition of doping substances, the necessity of combating them, and addressing violations under Article 2 of their sports doping provisions—they have not specifically criminalised these acts as French and Algerian legislators have done. This means, in comparative law, that the applicable law for cases involving athletes consuming and criminalising doping substances would be the law governing narcotics and psychotropic substances.

49 Ali Bin Moussa, 'Fighting Against Doping in Algerian Legislation' (2021) 58(4) *Algerian Journal of Legal and Political Sciences* 29; Rashid Al-Balushi, 'Criminal Laibility for the Use of Doping in the Sports Field: a Comparative Study' (2019) 16(1) University of Sharjah Journal of Law Science 327, doi:10.36394/jls.v16.i1.12.

50 Law of the People's Democratic Republic of Algeria no 13-05 of 23 July 2013 'Relating to the Fight Against Doping in Sport' [2013] Official Journal of Algeria 39.

51 Karimash Wahiba, "The Crime of Doping and Ways to Deter It Nationally and Internationally' (2021) 6(2) Journal of Excellence in Physical and Sports Activities Sciences and Technologies 326, doi:10.36394/jls.v16.i1.12.

Comparative laws agree on including a table or multiple tables identifying substances prohibited in any activity, whether narcotics or psychotropics, and have defined them as substances banned for use outside of medical treatment. In Egypt, the legislature criminalised narcotic use under Law No. 182 of 1960 and its amendments. Article 39 stipulates imprisonment for one year and a fine ranging from 1,000 to 3,000 (€19 to €57) Egyptian pounds for narcotics consumption. If the offender is apprehended in a location designated for drug use with their knowledge and intent, the penalty doubles to two years if cocaine or heroin is involved. Penalties are determined based on the quantity, type, and nature of the narcotic substance.[52]

Additionally, Article 37 of the law outlines behaviours intended for consumption, stating: "Temporary hard labour and a fine not less than 10,000 pounds and not more than 50,000 pounds (€190 to €954) shall be imposed on anyone who possesses, acquires, buys, produces, extracts, separates, or manufactures narcotic substances... with the intention of personal use or consumption outside the legally authorised conditions."[53]

Similarly, Kuwaiti law subjects the consumption of narcotics and psychotropic substances to Law No. 74 of 1983 on combating drugs, regulating their use, and their trade, as well as its amendments.[54] Kuwaiti legislators do not differ from the Egyptian and Emirati approaches in criminalising consumption. Article 38 stipulates imprisonment of up to two years and a fine of no more than 2,000 Kuwaiti dinars (€6,215), or one of these penalties, for anyone caught consuming such substances knowingly. Additionally, Article 43 prescribes imprisonment of up to five years and a fine of no more than 5,000 dinars (€15,538) for behaviours including consumption outside the legal authorised conditions.[55]

In the UAE, several forms of narcotics usage are criminalised under Articles 41 to 44 of Federal Decree-Law No. 30 of 2021 on Combating Narcotics and Psychotropic Substances. Article 12 provides an exception for medical treatment, stating: "It is prohibited to consume narcotics or psychotropic substances in any form or use them personally except for treatment and under a prescription from the treating physician issued under Article 40 of this decree-law. This prohibition applies to any substance or plant other than narcotics or psychotropic substances listed in the schedules attached to this decree-law, which causes intoxication or any other adverse mental effect when consumed for the purpose of

52 Decree-Law of the Arab Republic of Egypt no 182 of 1960 'On Control of Narcotic Drugs and Regulation of their Utilization and Trade in them', art 39 <https://manshurat.org/node/325> accessed 16 January 2025. <https://manshurat.org/node/325> accessed January 16, 2025.

53 ibid, art 37.

54 Al-Anzi (n 1) 160.

55 Law of the State of Kuwait no 74/1983 of 18 April 1983 'On Combating Drugs and the Regulation of Their Use and Trafficking' <https://www.lexismiddleeast.com/law/Kuwait/Law_74_1983> accessed 16 January 2025.

intoxication or mental harm." This broad provision under Article 12 can be applied to anyone who consumes such substances in any form for recreational or other purposes.[56]

The Emirati legislature stands out by criminalising the use of performance-enhancing drugs under Federal Law No. 7 of 2015 on combating prohibited substances in horse racing and equestrian sports. Articles 3 and 7 prohibit and criminalise such behaviours, with penalties stipulated under Article 10.[57]

In light of the above, we find that comparative laws do not distinguish between doping substances and narcotics or psychotropic substances. This could result in individuals evading punishment if they consume substances not listed as narcotics or included in doping lists, even if they intend to intoxicate or affect mental faculties. In other words, these laws can be applied to individuals using narcotics in sports generally and in competitions specifically, provided the substance is listed in the attached schedules.

Anti-doping laws also require the consumption of substances during sports competitions, meaning that consumption outside these times would not fall under the scope of these provisions. Legislators should address this gap to prevent athletes from evading punishment, particularly when the doping substance is not listed in the narcotics and psychotropic substance schedules, potentially allowing misuse for this reason.

Despite the similarities in effects—both types of substances lead to addiction—the differences lie in the consumer's profile and the legislature's intent behind enacting these laws. Applying narcotics laws to doping substances should adhere to the principle of legality. If no provision criminalises a specific substance under anti-doping laws, and the athlete's intent was for performance enhancement, the general provisions may not suffice. Moreover, doping laws impose lighter penalties than those in laws combating narcotics and psychotropic substances.

6 SCOPE OF CRIMINAL LIABILITY AND DISPUTE RESOLUTION MECHANISMS

While the general rule is to attribute criminal responsibility to athletes if they knowingly consume such substances, exceptions exist in specific cases. This section discusses the legal framework of these exceptions, examines the extent of contributors' criminal liability for violating anti-doping regulations, and discusses the jurisdiction of arbitration in these matters.

56 Federal Decree-Law no 30 of 2021 'On Combating Narcotics and Psychotropic Substances' [2021] Official Gazette of UAE 712 <https://uaelegislation.gov.ae/en/legislations/1540> accessed 16 January 2025.

57 Federal Law no 7 of 2015 'On Combating Prohibited Substances in Horse Racing and Equestrian Sports' [2015] Official Gazette of UAE 577 <https://uaelegislation.gov.ae/en/legislations/1217> accessed 16 January 2025; Othman (n 48) 290.

6.1. Exclusion of Criminal Responsibility for Athletes

Athletes are not criminally liable if they were unaware of the nature of the substance they consumed based on the instructions of their coach or others in the administrative or technical staff, as explained later. The cases in which an athlete's responsibility is excluded can be summarised as follows:

- The athlete adhered to the rules governing their sport.
- The consumption occurred as part of the game and within its legal framework.
- The game is recognised and sanctioned by law.[58]

Criminal responsibility may also be excluded if the athlete consumed performance-enhancing substances for medical treatment of specific conditions, provided these were prescribed by a physician. Comparative legal provisions consider this exception under the principle of exemption. French law addresses this matter in Article L232-2 of the Sports Law, stating that athletes participating in or preparing for the events specified in Paragraph 1 of Article L230-3, whose health conditions necessitate the use of prohibited substances or methods, may apply for therapeutic use exemptions to the French Anti-Doping Agency (AFLD).[59]

Article L.232-2 of the Sports Law clarifies that the presence, use, possession, or attempted use of prohibited substances by athletes does not result in disciplinary or criminal penalties, provided these substances are part of a prescribed treatment authorised by a therapeutic use exemption from the AFLD, a recognised foreign license issued by a national organisation or international federation, or a declaration from the World Anti-Doping Agency (WADA).

The questions that arise in this context are: What if an assault on a competitor occurs due to the use of performance-enhancing drugs? Would this constitute an unintentional crime or a crime of transferred intent?

The use of performance-enhancing drugs by an athlete constitutes an unlawful and unethical method of overcoming opponents, in violation of legal provisions and sports ethics. In this context, the principles of criminal responsibility apply, and the justification for the act is negated. Resorting to doping constitutes fraud, directly undermining the principles of fair competition.[60]

Moreover, the use of performance-enhancing drugs nullifies another condition required for the absence of criminal responsibility: the victim's consent. Such consent must be valid, free of defects, and based on full awareness of all circumstances and risks arising from using

58 Wahab Hamza, 'Criminal Liability for Using Doping Substances in Sports Competitions' (2017) 10(3) Journal of law and Humanities Sciences 86.

59 Code du sport (n 45) titre 3: Santé des sportifs et lutte contre le dopage (arts L230-1 à L232-31).

60 Hamza (n 58) 78.

these substances, including potential harm. If the victim had complete knowledge of these consequences, they would not have agreed to participate, rendering their consent flawed.[61]

To hold an athlete accountable for crimes such as assault, injury, or homicide, it is necessary to prove their connection to doping and determine criminal responsibility based on intent or negligence in accordance with the Penal Code.

6.2. Responsibility of Contributors

The violation of doping regulations may not be limited to the athlete alone but can also involve those around them or their collaborators, such as coaches, pharmacists, doctors, and others. For example, a doctor might administer or inject a narcotic substance into the athlete or convince them of its legitimacy under the guise of medical advice. If such actions fall outside the scope of medical treatment intended to cure illnesses, they fail to meet the conditions of medical exemption and constitute an assault on the athlete's bodily integrity.

The International Convention Against Doping in Sport has addressed this issue explicitly in Article 9, stating, "State Parties shall adopt measures or encourage sports organisations and anti-doping organisations to adopt measures that impose penalties or sanctions targeting members of athletes' support personnel who violate any anti-doping rule or commit any doping-related offence in sport."[62] The question is: To what extent can collaborators be held criminally liable?

Concerning doctors, legal theory and jurisprudence agree that certain conditions must be met for a medical act to be exempt from liability. If any condition is absent, the justification is void. These conditions include the act's medical nature, its treatment purpose, and the patient's consent. Otherwise, the doctor may be held criminally liable for the act.[63]

Similarly, pharmacists licensed to prepare and dispense narcotic substances may incite or assist athletes in unlawfully consuming such substances, rendering them liable under legal provisions combating the illegal use of narcotics.

In France, Article L232-10-3 of the French Sports Code (2021) prohibits anyone from being an accomplice, instigator, or participant in violating anti-doping regulations.[64] Article L232-25 stipulates disciplinary penalties, including imprisonment and a fine of €7,500, for individuals convicted of violating anti-doping rules, including accomplices and instigators. Furthermore, Article L232-26/2 defines criminal penalties for individuals who facilitate or encourage doping, explicitly targeting those actively involved in the administration of

61 ibid.

62 International Convention Against Doping in Sport (n 24) art 9.

63 M Hollyhock, 'The Application of Drugs to Modify Human Performance' (1969) 4 British Journal of Sports Medicine 119.

64 Code du sport (n 45) titre 3, ch 2, s 6, art L232-10-3.

doping substances, such as doctors prescribing prohibited substances without medical justification and coaches or others directly managing doping substances. These penalties include up to five years of imprisonment and a fine of €75,000.

The Egyptian legislature stated in Article 34(b) of the Anti-Narcotics and Regulation of Usage and Trafficking Law No. 122 of 1989 that: "The penalty of death or life imprisonment and a fine of no less than one hundred thousand pounds and not exceeding five hundred thousand pounds shall be imposed on anyone licensed to possess narcotic substances for a specific purpose and disposes of them in any way for purposes other than that specific purpose."[65] Based on this provision, it is evident that anyone licensed to possess narcotic drugs, such as doctors, and who permits their use for purposes other than treatment—particularly by athletes—bears criminal responsibility accordingly. Additionally, Article 35(b) prescribes life imprisonment and a fine for anyone who facilitates or provides narcotic drugs without compensation and without legal justification.[66]

Notably, Article 33 of the Egyptian Sports Law No. 71 of 2017 prohibits athletes from consuming performance-enhancing substances. It also prohibits coaches, accredited doctors, and others working in the sports field from administering or encouraging the consumption of such substances in violation of the rules of the International Anti-Doping Organization. Regarding penalties for violators of this provision, the Youth and Sports Committee of the House of Representatives proposed an amendment to the Sports Law that includes adding Article 91 bis 1, which stipulates: "A penalty of imprisonment and a fine of no less than ten thousand pounds and no more than one hundred thousand pounds(€190.87 to €19,087), or either of these penalties, shall be imposed on anyone who traffics, distributes, consumes, or incites the consumption of doping substances and dietary supplements listed in the schedule referred to in Article 33 of this law."

In Algerian legislation, Article 192 of Law No. 13-05 of 2013 on the regulation of physical and sports activities prohibits prescribing, selling, or administering prohibited drugs to athletes participating in competitions or preparing for participation. Article 223 stipulates a penalty of six months to two years of imprisonment and a fine ranging from 500,000 DZD to 1,000,000 DZD (€3,546 to €7,093), for anyone who violates the provisions of Article 192. The term "anyone" includes doctors, pharmacists, and any assistant who plays a role in facilitating the consumption of prohibited substances by athletes. Notably, Algerian legislation imposes harsher penalties on contributors to doping than on the athletes themselves, as it criminalises the actions of contributors with imprisonment, whereas the primary offender (the athlete) is merely deemed to have committed an infraction under the law.[67]

65 Law of the Arab Republic of Egypt no 122 of 1989 'Amending Certain Provisions of Decree-Law no 182 of 1960 concerning the Control of Narcotic Drugs and Regulation of their Utilization and Trade in them', art 34(b) <https://sherloc.unodc.org> accessed 16 January 2025.

66 ibid, art 35(b).

67 Hamza (n 58) 87.

The UAE legislature, under Federal Decree-Law No. 30 of 2021 on combating narcotic drugs and psychotropic substances, states in Article 48: "A penalty of imprisonment for no less than five years and a fine of no less than fifty thousand dirhams(€13,040) shall be imposed on anyone who invites or incites another person to commit any of the crimes stipulated in Articles (41), (42), (43), and (44) or facilitates their commission in any way. The penalty shall be more severe if the crime of incitement, facilitation, or encouragement occurs in public gathering places, educational institutions, or their facilities, or cultural or sports institutions."[68] Article 34 of the same law specifies: "A pharmacy may only dispense narcotic or psychotropic substances based on a prescription from a licensed medical practitioner"[69] and prohibits dispensing such substances if the prescription exceeds the quantities listed in Schedule No. 9 attached to the decree-law. If a patient's condition necessitates exceeding the specified quantity, administrative approval is required. These provisions allow for the accountability of medical staff and pharmacies that assist athletes in consuming unauthorised narcotic drugs during competitions or preparation periods.

In contrast, Kuwaiti Law No. 122 of 1989 does not include specific provisions regarding the responsibility of contributors, doctors, or pharmacists, referring instead to Penal Code No. 16 of 1960, which regulates criminal participation in Articles 47 through 54.

The above discussion demonstrates the expanded scope of liability to include not only athletes but also their entourage, such as coaches, doctors, and pharmacists, who may facilitate or promote the use of doping substances. The mentioned legislations impose strict penalties on such contributors, reflecting lawmakers' increasing awareness of these individuals' significant role in influencing athletes' behaviours. This expansion of accountability highlights national efforts to ensure a healthy and fair sports environment. The prescribed penalties vary, ranging from disciplinary and criminal penalties for contributors in France to severe sanctions such as lengthy imprisonment or even capital punishment under Egyptian and Algerian laws.

6.3. Jurisdiction to Consider Doping Cases in Sports

It must first be recognised that sports arbitration is one of the legal issues that international sports federations worldwide have agreed upon. As a result, the resolution of disputes in general, and doping cases in particular, follows a distinct and specialised approach, independent of others in the field of arbitration.

At the international level, the International Court of Arbitration for Sports (CAS) has exclusive jurisdiction in considering doping cases during sports. Athletes can appeal CAS decisions to an appeals court for further review. However, its jurisdiction does not extend

68 Federal Decree-Law no 30 of 2021 (n 56) art 48.

69 ibid, art 34.

to criminal cases; in such cases, CAS either proceeds without considering the criminal aspect or halts proceedings until a final judgment is issued.[70]

At the national level and in alignment with international standards, doping cases are handled by national authorities. These laws designate these bodies as the competent authorities responsible for establishing disciplinary committees to adjudicate doping cases in sports and address violations of anti-doping regulations. The decisions of these committees may be appealed before a specialised appeals committee unless the case was referred to the International Court of Arbitration for Sport (CAS), as it is the competent international tribunal for such matters. This mechanism is taken without reaching the criminal courts unless sports doping is classified as involving drugs or psychotropic substances, which is what led to the recommendation in the study to distinguish between the aforementioned concepts.

In France, however, legal action can be taken in criminal courts, as certain sports violations are recognised criminal offences. Among the laws compared, most allow appeal decisions to be brought before national courts, except in the UAE, where rulings by the Disciplinary Committee of the Emirates Arbitration Centre are deemed final and not subject to appeal—a procedure that some argue may be unconstitutional. Other jurisdictions, however, permit appeals before a competent appeals committee.

A ruling issued by the Administrative Court in Egypt reveals the special nature of decisions issued by sport-related bodies. In a lawsuit demanding the suspension and cancellation of the decision of the Egyptian Appeals Committee for Doping Cases in the Egyptian Organization, the court ruled that it lacked jurisdiction, reasoning that such decisions issued by these bodies are not considered administrative decisions.[71]

Finally, the use of artificial intelligence in automated arbitration for sport doping cases could enhance the efficiency of dispute resolution on an international scale. Nevertheless, it is essential to address challenges related to neutrality and equality between the parties to ensure a fair and transparent process.[72]

70 *Court of Arbitration for Sport* (*TAS / CAS*, 2025) <https://www.tas-cas.org/en/general-information/index/> accessed 28 January 2025.

71 Ahmed Abdel Hady, 'The Administrative Court Rules That It Has No Jurisdiction Over Sports Doping Cases' *Youm7* (Giza, Egypt, 26 November 2017) <https://www.youm7.com/> accessed 12 February 2025.

72 Abdelrahman Gehad Shalaby, Gehad Mohamed Abdelaziz and Moustafa Elmetwaly Kandeel, 'Using Artificial Intelligence to Resolve Disputes through Online Arbitration' (2022 Ninth International Conference on Social Networks Analysis, Management and Security (SNAMS), 29 November - 1 December 2022) doi:10.1109/snams58071.2022.10062524.

7 CONCLUSIONS

The widespread use of doping among athletes internationally has attracted significant attention from the global community, prompting countermeasures through international mechanisms such as conferences, international conventions, and the establishment of specialised global anti-doping agencies, alongside national mechanisms such as sports-specific laws and the creation of national anti-doping organisations.

This study revealed that the national legislators of Algeria and France, unlike their counterparts in Kuwait, Egypt, and the UAE, have responded to international recommendations by incorporating criminal and civil penalties to sanction violations of international anti-doping regulations.

It has become evident that doping constitutes a form of sports fraud or cheating, as it involves engaging in unethical practices to gain an unfair and illegal competitive advantage. It was also found that the absence of specific laws to combat sports doping leads to its proliferation. Additionally, the lack of designated offenses and penalties in laws addressing sports doping can blur the distinction between doping and the use of narcotic or psychotropic substances. Furthermore, while the international convention on combating sports doping does not address its use by minor athletes, the French legislature regulated this issue under Article 232. Doping substances may be permitted in exceptional circumstances under conditions defined by national laws in alignment with international conventions, particularly when doping is for competitive purposes rather than other reasons. It has also become evident that special disciplinary committees, except for the UAE, have jurisdiction over doping issues. Their decisions may be appealed before dedicated appeals committees.

The study concluded with several key recommendations. There is a need for international and national efforts to coordinate and align actions between countries and organisations to achieve optimal compliance with legal standards for combating sports doping. Monitoring and follow-up mechanisms should be developed through mutual cooperation and the transparent dissemination of all information related to doping in sports. The study also recommends intensifying penalties for violators of sports laws, especially those responsible for producing, administering, and prescribing doping substances, such as doctors and pharmacists, to achieve effective prevention and necessary deterrence. Finally, it calls for the inclusion of specific provisions in sports laws addressing contributors, doctors, and pharmacists, as reliance on general legal principles alone is insufficient. Appropriate penalties must be established to prevent escape from liability.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ВЖИВАННЯ ДОПІНГОВИХ ЗАСОБІВ У СПОРТІ: ПОРІВНЯЛЬНО-АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ МІЖНАРОДНОГО ТА БЛИЗЬКОСХІДНОГО КРИМІНАЛЬНОГО ПРАВА

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АНОТАЦІЯ

Вступ. *Це дослідження спрямоване на вивчення явища широкого використання допінгових засобів (PEDs) у спорті та методів боротьби з ними як на міжнародному, так і на національному рівнях. На міжнародному рівні це вимагає зусиль організацій і агенцій, які займаються спортом, тоді як на національному рівні це передбачає імплементацію законодавства, застосування покарань і переклад міжнародних рекомендацій, попереджень і питань, що забезпечать юрисдикцію для ефективного вирішення спорів. У дослідженні розглядається відповідність традиційних кримінальних положень для обмеження неправомірного використання PED під час спортивних змагань та юридична характеристика такої діяльності.*

Методи. *У статті було використано декілька наукових методів: описовий метод для визначення явища, його природи та різних аспектів, підкреслюючи його несприятливі характеристики та ризики для здоров'я спортсменів; аналітичний метод для перегляду юридичних висновків міжнародних і національних законів, що криміналізують використання PED, зокрема судових рішень; і порівняльний метод для аналізу підходів арабського та іноземного законодавства до вирішення цього питання та їх узгодження з міжнародними рекомендаціями та загальною правовою базою.*

Результати та висновки. *Дослідження завершується висновками та рекомендаціями, які підкреслюють необхідність боротьби з цим явищем та обмеження його наслідків. Було виявлено, що відсутність спеціальних законів щодо допінгу, особливо серед неповнолітніх спортсменів, сприяє його поширенню та стирає межі між допінгом і вживанням наркотичних речовин. У статті також було рекомендовано посилити покарання для тих, хто бере участь у виробництві, застосуванні та призначенні допінгових речовин, разом із встановленням чітких правових положень для забезпечення відповідальності та ефективного стримування.*

Ключові слова: *допінгові препарати, спортивна злочинність, кримінальна відповідальність, змагання, правові положення, спортивний арбітраж, ВАДА, CAS.*

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Review Article

CRIMINAL LIABILITY FOR PAID DISINFORMATION IN THE DIGITAL WORLD: A COMPARATIVE STUDY BETWEEN UAE LAW AND THE EUROPEAN DIGITAL SERVICES ACT (DSA)

Mohammad Amin Alkrisheh* and Fatiha Mohammed Gourari

ABSTRACT

Background*: With the rapid digital transformation and the extensive use of social media platforms, disseminating various forms of harmful digital content—including illegal content and false or misleading information, particularly when financially incentivised—has become a pressing global challenge. These practices threaten digital trust and pose significant risks to societal stability. Despite the growing legal efforts to address these crimes, a unified and comprehensive legal framework remains lacking. This study examines the criminal liability associated with paid disinformation in the digital world, comparing the legal approach under UAE law with the European Digital Services Act (DSA). While the UAE has enacted specific provisions targeting the monetisation of disinformation, the European framework primarily focuses on the responsibilities of digital platforms without explicitly addressing individual actors involved in such activities.*

Methods: *This study employs a comparative legal analysis, focusing on relevant legislative provisions in both jurisdictions. The research applies an analytical and comparative approach, examining Article 55 of the UAE's Anti-Rumours and Cybercrime Law, which explicitly criminalises financial incentives for disseminating illegal content. In contrast, the study assesses the European DSA, which primarily regulates platform accountability but lacks direct provisions on individual criminal liability for paid disinformation. The analysis also incorporates doctrinal legal research and case studies to highlight the effectiveness and limitations of each legal system in combating this issue.*

Results and Conclusions: *The study finds that UAE law provides a more structured and detailed legal framework for addressing paid disinformation, offering clear criminal sanctions for individuals engaged in such acts. Conversely, the European DSA adopts a broader regulatory approach, focusing on institutional oversight without directly addressing the criminal liability of individuals involved in monetised disinformation. The research recommends that European legislation adopt a more specific model to combat these crimes, integrating direct criminal accountability alongside platform regulation. Additionally, the study emphasises the need for enhanced international cooperation and regulatory harmonisation to strengthen digital transparency and mitigate the risks posed by financially motivated disinformation.*

1 INTRODUCTION

The digital world has undergone rapid and transformative developments in exchanging and disseminating information. Social media platforms and other digital tools now play a pivotal role in shaping public opinion and influencing various political, social, and economic aspects of life. Alongside these advancements, serious legal and ethical challenges have emerged—particularly concerning false and misleading information. The phenomenon of "paid disinformation" is of growing concern, where such content is intentionally spread in exchange for financial or moral incentives, posing threats to societal stability and undermining public trust in the digital environment. Studies have shown that emerging technologies such as deepfake videos and generative artificial intelligence significantly amplify the scale and credibility of such disinformation, making legal regulation increasingly complex.[1]

This research focuses on criminal liability for paid disinformation in the digital world. It analyses the approach taken by UAE law, which establishes a comprehensive legal framework to combat this phenomenon under the UAE Anti-Rumours and Cybercrime Law. It also compares this to the European Digital Services Act (DSA), which primarily regulates the responsibilities of digital platforms. At the same time, criminal liability for individuals remains under the jurisdiction of member states' national legislation. This distinction has raised concerns among legal scholars about potential gaps in accountability.[2]

1. Achhardeep Kaur and others, 'Deepfake Video Detection: Challenges and Opportunities' (2024) 57(6) Artificial Intelligence Review 159, doi:10.1007/s10462-024-10810-6; Raghu Raman and others, 'Fake News Research Trends, Linkages to Generative Artificial Intelligence and Sustainable Development Goals' (2024) 10(3) Heliyon e24727, doi:10.1016/j.heliyon.2024.e24727.
2. Marc Tiernan and Goran Sluiter, 'The European Union's Digital Services Act and Secondary Criminal Liability for Online Platform Providers: A Missed Opportunity for Fair Criminal Accountability?' (*SSRN*, 18 March 2024) doi:10.2139/ssrn.4731220 <https://ssrn.com/abstract=4731220> accessed 25 February 2025.

Given the global exploitation of social media to influence public opinion and shape narratives, the need to protect the digital environment from the risks associated with paid disinformation has become increasingly urgent. Recent studies have shown that artificial intelligence technologies, particularly deepfakes and generative AI models, have significantly increased the sophistication and reach of disinformation, complicating legal responses to such content.[3] This study is significant because it examines how UAE law addresses crimes related to paid disinformation in the digital world. It highlights the legal mechanisms established by the Emirati legislative framework to criminalise individual behaviours associated with these offences. It also sheds light on the regulatory aspects of the European Digital Services Act (DSA), particularly its platform-focused approach. While the DSA aims to regulate systemic risks, legal scholars have noted its lack of direct criminal provisions for individual accountability, raising questions about the effectiveness of its enforcement model.[4]

The research problem centres on legislators' legal challenges in combating paid disinformation in the digital world, which poses significant threats to societal stability and digital information security. This study explores the extent to which the **UAE legislator** has succeeded in establishing a comprehensive legal response to such crimes and contrasts this with the European Digital Services Act (DSA), which provides a regulatory framework focusing primarily on digital platforms' responsibilities while leaving criminal liability for individuals to the discretion of national laws in EU member states. The research further examines the limitations and strengths of both systems and proposes legal mechanisms that could enhance the effectiveness of efforts to combat paid disinformation in the digital environment.

2 RESEARCH METHODOLOGY

This study adopts an analytical approach to legal texts, focusing on the relevant legislative provisions governing paid disinformation in the United Arab Emirates (UAE) and the European Union (EU). The research examines Federal Decree-Law No. 34 of 2021 on Combating Rumours and Cybercrimes in the UAE, particularly Article 55, which explicitly criminalises the acceptance of financial incentives for disseminating illegal content. Additionally, it analyses the European Digital Services Act (DSA), which establishes a regulatory framework for online platforms but does not contain explicit provisions criminalising individuals engaged in the monetisation of disinformation.

A comparative legal method is employed to identify similarities and differences between the UAE and EU legal frameworks, exploring the legislative approaches adopted in both jurisdictions and the extent to which they address the criminal liability of individuals involved in paid disinformation. The study analyses the definitions of key legal concepts,

3. Kaur and others (n 1) 159; Raman and others (n 1) 3.
4. Tiernan and Sluiter (n 2) 14.

including "illegal content" and "false or misleading information," as interpreted within each legal system. Furthermore, relevant jurisprudence and doctrinal legal interpretations are analysed to clarify the scope of criminal liability associated with these offences. The study also scrutinises the constitutive elements of the offence of accepting financial incentives to spread false or illegal content and assesses the penalties prescribed under both legal frameworks.

By highlighting legislative gaps within the European framework, the research demonstrates that while the UAE legal system provides a more direct and explicit criminalisation of paid disinformation, the European DSA primarily focuses on the regulatory responsibilities of digital platforms rather than imposing individual criminal liability. The analysis further examines how criminal conduct is defined and liability is assigned under each legal system, offering insights into the effectiveness of existing legal mechanisms in addressing this phenomenon. The study concludes by synthesising the key findings and proposes recommendations to strengthen legal responses to disinformation monetisation, enhance regulatory coherence, and promote digital transparency.

3 MISLEADING INFORMATION AS A FORM OF ILLEGAL CONTENT

To understand the dimensions of criminal liability for paid disinformation in the digital world, it is essential first to define the concepts of "illegal content," "false information," and "paid disinformation," as these constitute the foundational elements of the crime of receiving an incentive to disseminate unlawful or misleading material.

False or misleading information is considered illegal when it violates legal standards, especially when its publication harms public order, national security or the spread of baseless rumours. Illegal content broadly refers to any material or expression contravening the law, including hate speech, terrorism-related content, or harmful falsehoods. In this context, paid disinformation describes publishing or republishing such content in exchange for financial or moral benefits. Clarifying these definitions is crucial for understanding the legal treatment of such acts under UAE law and the European Digital Services Act (DSA).

3.1. The Concept of Illegal Content

Illegal content is one of the most ambiguous legal notions, as its definition and standards vary across different countries' legal, cultural, and political systems. Due to the international nature of the Internet, this term exhibits significant divergence in interpretation among nations, creating a substantial challenge in unifying the standards for addressing such content.[5]

5 Majid Yar, 'A Failure to Regulate? The Demands and Dilemmas of Tackling Illegal Content and Behaviour on Social Media' (2018) 1(1) International Journal of Cybersecurity Intelligence & Cybercrime 5, doi:10.52306/01010318RVZE9940.

Defining illegal content is a fundamental step in understanding the scope of digital crimes, especially in the context of paid disinformation or the dissemination of false information. This concept is significant due to the global nature of the Internet and the divergence in legal systems across countries. While legislators aim to establish clear definitions, challenges persist due to the dynamic nature of digital content.[6]

The UAE legislator has explicitly defined the concept of illegal content in Article 1 of Federal Decree-Law No. 34 of 2021 on Combating Rumours and Cybercrimes.[7] Unlawful content is described as: "Content that constitutes the subject of a punishable crime under the law, or whose publication, circulation, or re-circulation within the state may harm the state's security, sovereignty, or any of its interests; public health; public order; friendly relations with other states; or influence the results of elections for the Federal National Council or advisory councils in the emirates. It may also incite hostility or hatred between different groups of people, lower public confidence in the performance of any duty or task, or affect the exercise of authority by state entities or any of its institutions."

This definition highlights the comprehensive scope of illegal content under UAE law, addressing various dimensions of harm that could arise in the digital environment.

In addition, Article 3 (h) of the European Digital Services Act (DSA) defines illegal content as: "Information that, in itself or about an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State that complies with Union law, irrespective of the precise subject matter or nature of that law."[8]

This definition emphasises content alignment with national and European laws, assigning digital platforms the responsibility to monitor and remove non-compliant content. It exhibits flexibility by allowing the specific details of illegal content to be determined by the national laws of each Member State. Examples of illicit content under the DSA include:

- Hate speech and incitement to violence.
- Promotion of terrorism or related materials.
- Exploitation of children and unlawful sexual content.
- Violations of intellectual property rights.
- Dissemination of disinformation that undermines public order or societal safety.

6 Khawlah M AL-Tkhayneh, Abdulrasheed Olowoselu and Mohammad Amin Alkrisheh, 'The Crime in Metaverse (The Future Scenarios for Crime Patterns and the Prospective Legal Challenges)' (2023 Tenth International Conference on Social Networks Analysis, Management and Security (SNAMS), Abu Dhabi, UAE, November 2023) doi:10.1109/SNAMS60348.2023.10375402.

7 Federal Decree-Law no (34) of 2021 'On Combating Rumours and Cybercrimes' [2021] Official Gazette of UAE 712.

8 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 'On a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)' [2022] OJ L 277/1.

The phenomenon of paid disinformation is not limited to political or social manipulation; it also extends into the commercial domain, where individuals or entities intentionally publish misleading content for financial gain. One typical example is deceptive online advertising, which shares core characteristics with criminally relevant disinformation—namely, the intent to mislead and the presence of economic incentives.[9]

In this context, some legal commentators distinguish between illegal and unsafe content. Illegal content explicitly violates statutory provisions—for example, inciting violence, disseminating hate speech, or publishing false information that threatens public order. By contrast, unsafe content refers to materials that may not breach legal thresholds but still pose risks to platform integrity, public confidence, or brand reputation. This differentiation underscores the broader regulatory and ethical considerations that digital platforms and legislators must address in maintaining a safe, reliable, and lawful digital environment.

Some legal scholars argue that illegal content should be defined based on its nature and impact. They describe it as the opposite of legitimate, purposeful, and lawful content – inappropriate for publication and offensive to public taste and morals. This includes disseminating irresponsible words, images, or comedic videos that lack awareness, often descending into triviality and violating societal norms and traditions. It has also been defined as:

- "Any act or behaviour related to creating and disseminating content that disrupts public morals or offends public taste."[10]
- "The production of short video materials that spread online and include songs, acting, comedic content, and satirical commentary, some of which contain obscene language accompanied by physical gestures or dancing, as well as addressing controversial social topics such as gender relations and family issues in a predominantly conservative environment."[11]

These definitions highlight the broader cultural and societal considerations in determining illegal or inappropriate content, reflecting the influence of prevailing social values and traditions in shaping legal and ethical standards for digital content.

9 Tariq Abdel Rahman Kameel, Moustafa Elmetwaly Kandeel and Mohammad Amin Alkrisheh, 'Consumer Protection from Misleading Online Advertisements "An Analytical Study in UAE Law"' (2022 International Arab Conference on Information Technology (ACIT), Abu Dhabi, UAE, November 2022) doi:10.1109/ACIT57182.2022.9994108.

10 Ashour Abdel Rahman Ahmed Mohamed, 'Civil Responsibility For Providers Of Illicit Content Circulating On The Internet (A Comparative Study Between French Law And Egyptian Law)' (2020) 35(3) Journal of the Faculty of Sharia and Law, Tanta University 1098, doi:10.21608/mksq.2020.111506.

11 Mahmoud Mohammed Abu Farwa, 'Social Media Platforms and Their Legal Liability for Illegal Content' (2022) 39 Kuwait International Law School Journal 175.

It has also been defined as content that includes information in any form—images, videos, writing, or gestures—that is violent, incites violence, is sensitive or inappropriate, or encourages any criminal activity or promotes unsafe behaviour.

The principle of public order plays a significant role in determining the legality of content disseminated through social media. Content that violates public order in all its aspects—economic, political, social, religious, and public morals—is considered illegal content. Consequently, harmful content is indistinguishable from unlawful content, as both undermine societal stability and contravene established norms and standards.[12]

Some scholars believe that defining illegal content depends on identifying actions that exceed the boundaries of freedom of expression and negatively impact public order, such as incitement to violence,[13] hate speech and media manipulation. The lack of international consensus on this term presents a significant challenge in combating its spread across digital platforms.[14]

This perspective highlights the delicate balance between protecting freedom of expression and maintaining societal stability, emphasising the need for a unified approach to address the complexities of illegal content in a globally interconnected digital environment.

The rulings issued by the European Court of Justice (ECJ) demonstrate that European jurisprudence has not provided a comprehensive and precise definition of illegal content. Instead, it has addressed specific manifestations of such content in applying European legislation. For instance, in the *Right to Be Forgotten* case (2019),[15] the Court discussed individuals' rights to request the removal of irrelevant or excessive content. Still, it did not establish a universal definition for illegal content. Similarly, other cases, such as the *YouTube* Case (2020),[16] which focused on data protection, and the *Planet49* Case (2019),[17] which dealt with cookie consent and privacy violations, emphasised specific legal issues

12 Amhamed Al-Mansouri, 'Publishing and Promoting Fake News between the Criminal Law and the Press and Publishing Law' (2024) 13 Electronic Journal of Legal Research 258 <https://revues.imist.ma/index.php/RERJ/article/view/47387> accessed 25 February 2025.

13 Mohammad Amin Alkrisheh, Saif Obaid Al-Katbi and Khawlah M Al-Tkhayneh, 'The Criminal Confrontation for Crimes of Discrimination and Hate Speech: A Comparative Study' (2024) 7(2) Access to Justice in Eastern Europe 138, doi:10.33327/AJEE-18-7.2-a000210; Hassan Mohamed Ahmed Hassan, 'Media Publication Crimes: A Comparative Jurisprudential Study with Positive Law – The Crime of Incitement as a Model' (2024) 47 Journal of Jurisprudential and Legal Research 487.

14 Yar (n 5).

15 *Google LLC, successor in law to Google Inc v Commission nationale de l'informatique et des libertés (CNIL)* Case C-507/17 (CJEU, 24 September 2019) <https://curia.europa.eu/juris/liste.jsf?num=C-507/17> accessed 25 February 2025.

16 *Constantin Film Verleih GmbH v YouTube LLC and Google Inc* Case C-264/19 (CJEU, 9 July 2020) <https://curia.europa.eu/juris/liste.jsf?num=C-264/19> accessed 25 February 2025.

17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Planet49 GmbH* Case C-673/17 (CJEU, 1 October 2019) <https://curia.europa.eu/juris/liste.jsf?num=C-673/17> accessed 25 February 2025.

like privacy and intellectual property rights without directly addressing the broader concept of illegal content.

This approach reflects the European courts' reliance on regulations such as the Digital Services Act (DSA) and the General Data Protection Regulation (GDPR) to define the legal framework for illegal content. These regulations delineate the scope of unlawful content based on violating national or European laws. Thus, the role of the ECJ primarily involves interpreting and applying these laws rather than formulating a comprehensive legal definition of illegal content.

It is important to note that addressing illegal content in the context of media disinformation requires precise and well-defined terminology, given the cross-border nature of this phenomenon. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression emphasised this necessity in their 2021 report to the Human Rights Council. The report underscored the importance of developing clear definitions of illegal content to tackle the challenges posed by media disinformation.[18]

3.2. The Concept of False Information

False or misleading information has sparked widespread debate in the digital age due to its significant social, political, and economic impacts. This study uses the term to reflect entirely fabricated content and information that may be partially true but presented in a deceptive or manipulated context. Definitions of false information vary across legal, cultural, and social systems. Describing a piece of news or information as "false" is often complex, as it depends heavily on subjective and artistic standards, making it challenging to establish a comprehensive and precise definition.

False information frequently intersects with misleading news or content that aims to mislead the public, blurring the lines between intentional deception and unintended inaccuracies.[19] This ambiguity underscores the difficulties in setting universal criteria for identifying and addressing false information across different jurisdictions.

The UAE law defines false information in Article 1 of Federal Decree-Law No. 34 of 2021 on Combating Rumours and Cybercrimes as: "Rumours and false or misleading statements, whether wholly or partially false, and whether by themselves or in the context in which they appear."[20]

18 Irene Khan, 'Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (UN 2021) <https://digitallibrary.un.org/record/3925306?ln=en> accessed 25 February 2025.

19 Raman and others (n 1); Anja Hoffmann and Alessandro Gasparotti, *Liability for Illegal Content Online: Weaknesses of the EU Legal Framework and Possible Plans of the EU Commission to Address them in a "Digital Services Act"* (CEP 2020).

20 Federal Decree-Law no (34) of 2021 (n 7) art 1.

This definition highlights the emphasis placed by UAE legislators on the intent to mislead, whether the information is entirely false or merely misleading within its context or framing. It highlights that both the content and the manner in which it is presented are relevant in determining legality.

False information can take various forms, depending on the deceptive intent behind its production, including:[21]

1. Fabricated Content: Entirely false content, significantly diverging from the truth.
2. Impersonated Content: Involves identity theft of genuine sources.
3. Misleading Content: Information presented in a way that falsely accuses or misdirects against individuals, entities, or issues.
4. Manipulated Content: Edited or doctored materials, such as cut-and-paste modifications, designed to create a false impression.
5. False Context: Accurate information placed within a false framework or context, leading to public deception.
6. False Association: Using unrelated headlines or images to misrepresent the actual content.
7. Satire or Parody: Although not directly harmful, these can indirectly mislead audiences or propagate false information subtly.
8. Deepfakes: Content created using artificial intelligence to produce compelling but entirely fabricated material.[22]

Conversely, the European Digital Services Act (DSA) does not provide a specific definition of false information as a standalone phenomenon. However, it addresses the dissemination of illegal content, which may include false information if its spread causes societal harm or violates European or national laws. The DSA primarily focuses on the responsibility of digital platforms, rather than individual accountability.

False information is also addressed more broadly under the European Union's strategies for combating media disinformation. Examples under the DSA include:[23]

- Fake News: Deliberately false information aimed at influencing public opinion.

21 Ahmed Gamal Hassan Mohammed, 'Mechanisms of the Egyptian Public in Verifying Fake News and its Relationship their Interactive Patterns on Social Networking Sites' (2021) 59(2) Journal of Media Research 1008, doi:10.21608/jsb.2021.199620; Mohammed Salem Alneyadi and others, 'The Crime of Electronic Blackmail in the Emirati Law' (2022 International Arab Conference on Information Technology (ACIT), Abu Dhabi, UAE, November 2022) doi:10.1109/ACIT57182.2022.9994165.

22 Kaur and others (n 1) 159.

23 EU, 'A Europe that Protects: The EU Steps up Action against Disinformation: Press release' (*European Commission*, 5 December 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6647> accessed 25 February 2025; EU, 'The Strengthened Code of Practice on Disinformation 2022' (*European Commission*, 16 June 2022) <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> accessed 25 February 2025.

- Misleading Context: Accurate information presented within deceptive or manipulated contexts.
- Deepfakes: Content created using artificial intelligence to produce compelling but entirely fabricated material.

The European Media Disinformation Centre defines false information as: "Any content intentionally designed to mislead or manipulate public opinion through technical means such as deepfake technology."[24]

From the above, it is evident that UAE law provides a clear and precise definition of illegal content and false information, treating it as a standalone offence. In contrast, European law adopts a less detailed approach, offering a general definition of unlawful content and leaving the specific legal nuances to be applied by individual Member States under their national laws. The European framework emphasises the regulation of internet platforms rather than the content itself.

To enhance the effectiveness of the Digital Services Act (DSA), it is suggested that the regulation adopt an explicit and comprehensive definition of illegal content and false information. This should focus on the criminal liability of individuals who produce or disseminate such content or data with the intent to mislead. Such measures would strengthen the protection of European society from the negative impacts of illegal content and false information, ensuring a more robust and harmonised legal framework.

4 THE CRIME OF RECEIVING INCENTIVES TO PUBLISH ILLEGAL CONTENT OR FALSE INFORMATION

Receiving incentives to publish illegal content or false information is a serious offence punishable under national and international laws. In the United Arab Emirates, this crime is regarded as a grave violation of public order and regulations related to combating fraud and defamation, as stipulated in the UAE Anti-Rumours and Cybercrime Law. The increasing use of AI-generated content, including deepfakes and misleading narratives, has further complicated enforcing such laws, especially when financial or ideological motives incentivise such content.[25]

24 European Digital Media Observatory, *Information Disorder and Disinformation Management in Europe: Policy and Practice Overview* (EDMO 2020) < https://edmo.eu/> accessed 25 February 2025.

25 Katarina Kertysova, 'Artificial Intelligence and Disinformation: How AI Changes the Way Disinformation is Produced, Disseminated, and Can Be Countered' (2018) 29(1-4) Security and Human Rights 55, doi:10.1163/18750230-02901005; Giuseppe Vecchietti, Gajendra Liyanaarachchi and Giampaolo Viglia, 'Managing Deepfakes with Artificial Intelligence: Introducing the Business Privacy Calculus' (2025) 186 Journal of Business Research 115010, doi:10.1016/j.jbusres.2024.115010.

Similarly, the European Union addresses this issue through the Digital Services Act (DSA) and the Code of Practice on Disinformation, focusing on combating false information and illegal content by imposing strict penalties and regulating the responsibilities of digital publishing platforms. However, legal scholars have pointed to the DSA's limited treatment of individual criminal liability, emphasising the need for more robust frameworks to address incentivised disinformation at the individual level.[26]

To thoroughly analyse this crime, this section will explore its elements and the penalties prescribed, comparing the legal framework in the UAE with the provisions of the DSA. This comparison will highlight the similarities and differences between the two systems, shedding light on their respective approaches to addressing this offence.

4.1. The Material Element (Actus Reus)

The material element of the crime of receiving incentives to publish illegal content or false information requires a specific action by the perpetrator. According to Article 55 of the UAE Anti-Rumours and Cybercrime Law, this includes any individual who:

- Requests, accepts or takes any form of benefit.
- Manages or oversees the operation of an abusive account or website.
- Rents or purchases advertising space on such a platform.

This criminal activity involves any benefit obtained by the perpetrator, whether material or non-material or even a promise thereof, in exchange for publishing or republishing illegal content or false information within the UAE using any form of information technology.

The UAE legislator clearly defines the scope of this criminal activity, ensuring that it encompasses all benefits of disseminating harmful or misleading content. Thus, the legislator protects public order and ensures accountability in the digital space.

4.1.1. Forms of Criminal Activity

The first form of criminal activity under examination is the request for illegal content dissemination in exchange for financial incentives**.** This practice involves individuals or entities soliciting the publication of false or unlawful information for monetary gain, thereby contributing to digital misinformation.

The act of requesting involves an individual who owns, manages, or oversees the operation of an electronic account or website initiating a demand for compensation in exchange for publishing or republishing illegal content or false information within the state using information technology. In this scenario, the individual effectively offers the act of

26 Tiernan and Sluiter (n 2).

publication or republication for sale, seeking a promise of compensation without any prior offer from the interested party.

The crime is considered complete upon the request, regardless of whether the request is accepted or rejected by the interested party. Receiving the promised compensation is irrelevant to establishing the crime; the act of requesting alone constitutes a complete offence under the law.[27]

For the crime to materialise, the request must be made by the individual who owns, manages, or supervises the operation of an electronic account or website or through an intermediary. However, in cases involving intermediaries, the request must originate personally from the perpetrator and be conveyed to the interested party through the intermediary.[28]

The request can be made in writing or orally, with no distinction as to the form of communication, as long as the intent and demand are clear.[29]

Another significant form of criminal activity is accepting financial incentives to spread illegal content. In such cases, individuals knowingly agree to distribute false or unlawful information, often leveraging digital platforms to amplify their reach. This behaviour undermines public trust and poses severe legal and ethical implications.

Acceptance occurs when the interested party offers compensation to an individual who owns, manages, or oversees the operation of an electronic account or website to publish or republish illegal content or false information. The crime is considered complete once acceptance occurs, as the meeting of wills between the parties—offer and acceptance—establishes the offence. Significantly, the crime does not depend on the actual implementation of the promised compensation by the interested party; the act of acceptance alone constitutes the offence.[30]

Acceptance does not require a specific form of expression and can be either oral or written, explicit or implicit. Implicit acceptance refers to a legally valid intention where the act of acceptance is inferred from actions that align with the offer. For instance, when the publisher, after becoming aware of the offer, proceeds to publish or republish illegal content in line with the interested party's request, this constitutes implicit acceptance. Determining whether acceptance occurred is a matter for the court of fact, which evaluates the specific circumstances of each case.

27 UAE Cassation Ruling no 354 of 2008 [2009] 1 Collection of Judgments and Legal Principles Issued by the Court of Cassation, Criminal Division, Judicial Year Three, 2009, January 1 to June 30, 114; Vecchietti, Liyanaarachchi and Viglia (n 25).

28 Walid Saad El-Din Mohamed Saeed, 'The Role of Regulatory Bodies and Legislative Measures in Combating Corruption Crimes' (2024) 20(4) The Legal Journal 1489, doi:10.21608/jlaw.2024.354476.

29 Kaur and others (n 1).

30 Osama Hussein Abdel Aal, 'The Crime of Bribery: An Analytical Study' (2017) 59(1) Journal of Legal and Economic Sciences, Ain Shams University 915.

For the crime to be established, acceptance must be serious and genuine. The seriousness of the acceptance reflects the perpetrator's intent and culpability, which are essential elements for imposing criminal liability. If the perpetrator merely pretends to accept the offer to assist authorities in apprehending the interested party in the act, such feigned acceptance negates the offence.[31] Similarly, if the perpetrator lacks a genuine intention to agree with the offer but instead acts to expose the interested party's wrongdoing, the crime of acceptance is not considered established.

The offer from the interested party must also appear serious. Even if the offer lacks genuine intent, its apparent seriousness is sufficient to establish the crime. However, if the offer is blatantly non-serious—such as promising all one's possessions in exchange for publishing illegal content—the crime does not occur. In such cases, any acceptance by the perpetrator does not lead to the establishment of the crime, as the offer lacks the necessary clarity and intent to form a legal agreement.

In this context, a further category of criminal conduct is facilitating monetised disinformation through digital platforms. This occurs when platforms or intermediaries enable the circulation of false information while benefiting financially, whether directly or indirectly. By allowing or failing to regulate such content, these entities play a crucial role in sustaining the economic viability of disinformation campaigns.

This act occurs when the perpetrator receives or benefits from the incentive that constitutes the subject of the crime. This material element is characterised by directly involving the receipt of the incentive, regardless of whether a promise preceded it. Taking is considered the most serious manifestation of the criminal behaviour associated with this offence, as it signifies that the perpetrator has accepted compensation in exchange for publishing or republishing illegal content.[32]

When the perpetrator takes the incentive, the receipt method is irrelevant—it could be physical or symbolic, as long as the act constitutes acceptance of the benefit or advantage related to the crime. Moreover, "taking" includes any form of enjoyment or use of the advantage or benefit provided as part of the offence. This demonstrates the critical nature of this aspect of the crime, as it involves tangible acknowledgement and execution of the illicit agreement.

1.1.1. Forms of Benefits Received by the Perpetrator

The criminal activity in the offence of receiving incentives to publish illegal content or false information—whether through request, acceptance, or taking—must centre around a benefit, incentive, or promise thereof. A benefit or incentive includes anything the

31 Mahmoud Naguib Hosni, *Explanation of the Penal Code: Special Section According to the Latest Legislative Amendments* (6th edn, University Publications House 2019) 321.

32 Al-Anoud Mishaal Al-Ghubayshan Al-Azmi, 'The Crime of Bribery with Case Studies from Reality' (2022) 2(1) Middle East Journal of Legal and Jurisprudential Studies 215.

perpetrator receives, assigns to another, or knowingly agrees to, regardless of its name or type and whether it is material or non-material.

An incentive is anything that fulfils a personal need, no matter how significant or minor that need may be. The most common form of an incentive is money, but it may also be financial documents, securities, jewellery, clothing, food, or any other valuable item. On the other hand, a promise is considered a deferred incentive, carrying the same legal weight as an immediate one.[33]

Incentives can also take the form of services the interested party provides to the publisher or benefits such as facilitating a promotion for an employee, transferring them, lending them an apartment, or granting access to a vehicle for use.[34] Whether the money or benefit comes from a legitimate or illegitimate source is irrelevant.

The incentive itself can also be inherently illegal, such as drugs, stolen property, a bounced check, or a sexual favour in exchange for publishing prohibited content or false information.[35]

The crime is established whether the incentive—in exchange for publishing illegal content or false information—is explicitly apparent or implicitly concealed. For instance, it could involve a formal agreement between the interested party and the publisher, where the latter receives a hidden advantage, such as selling goods at a very low price or purchasing items at an excessively high price.[36]

The law does not require the incentive or benefit to be of substantial value for the crime to be established. The benefit may be large or small, as there is no legal requirement for a proportional relationship between the incentive and the illegal action for which it was offered. The crime is considered complete in either case, as long as the incentive is linked to achieving the purpose of the crime.

However, the crime is not established if the benefit or incentive lacks the intended criminal purpose—such as being a gesture of goodwill, a culturally customary practice, or trivial in value. For example, if the publisher acted out of courtesy or accepted an insignificant and culturally accepted token, the crime does not occur.

33 Abdel Aal (n 30).

34 Saeed (n 28).

35 Nagham Hamad Ali and Ziad Aboud Manajid, 'The Crime of Sexual Bribery' (2022) 33(2) Journal of Al-Maaref University College 93, doi:10.51345/.v33i2.496.g269.

36 Saeed Abdulla Al Nuaimi, Mohammad Amin Alkrisheh and Khawlah M Al-Tkhayneh, 'The Crime of Sexual Harassment: A Comparative Study Between UAE & French Law' (2023) 13(3) Journal of Educational and Social Research 241, doi:10.36941/jesr-2023-0073.

4.1.2. Purpose of the Criminal Act

The purpose of the criminal act in this offence is to publish or republish illegal content or false information within the state using information technology. The crime is contingent upon this specific intent, even if the publisher does not execute the action.

Publishing refers to uploading or sharing content (such as texts, images, videos, or links) on a social media platform or website, making it accessible to others. Publishing can be public (available to all users) or targeted (restricted to specific groups, such as friends or followers). Republishing, however, involves sharing previously published content by another user. For instance, this includes retweeting on X (formerly Twitter), sharing on Facebook, or reposting on other platforms. Republishing often references the source but extends the content's reach to a new audience.

Republishing is legally considered an independent act if it intends to promote or support the original content, especially when it is illegal. Republishing may imply tacit endorsement of the original material unless proven otherwise. It carries the same legal liability as the original publication if the individual republishing the content is aware of its illegality.

From the above, it is clear that UAE law, as outlined in Article 55 of the UAE Anti-Rumours and Cybercrime Law, comprehensively addresses criminal behaviour, including acts of requesting, accepting, and taking incentives. By contrast, European law, as embodied in the Digital Services Act (DSA), does not provide similar provisions criminalising these specific actions, such as requesting, accepting, or taking incentives in exchange for publishing illegal content or false information. Instead, the DSA emphasises the responsibility of digital platforms to manage and remove illegal content when reported.

European law focuses on ensuring compliance with legal obligations related to content moderation and oversight rather than addressing individual motivations behind criminal behaviour.[37] In this framework, the publication or republication of illegal content is deemed a violation if it contravenes transparency and supervision standards. The DSA imposes fines of up to 6% of the platform's global annual revenue for failing to meet obligations related to illegal content. However, it does not extend criminal liability to individuals who receive or accept incentives for publishing such content.[38]

Under the DSA, platforms are required to monitor accounts or sites operating in violation of the law, but direct penalties for individuals managing such accounts in exchange for incentives are absent. This creates a legal loophole concerning criminalising individual actions related to such offences.[39]

37 Regulation (EU) 2022/2065 (n 8) art 3(h).

38 ibid, arts 19, 26, 52.

39 Gail E Crawford and others, *The Digital Services Act: Practical Implications for Online Services and Platforms* (*Latham & Watkins LLP*, 14 March 2023) <https://www.latham.london/2023/03/digital-services-act-practical-implications-for-online-services-and-platforms/> accessed 25 February 2025.

To address this gap, European legislation should incorporate provisions that criminalise the acts of requesting, accepting, or taking incentives for publishing illegal content. Such measures would strengthen European efforts to combat the spread of false information and illicit content by holding individuals accountable for their actions, not just the platforms hosting the content. This approach would bridge the gap in the current regulatory framework, ensuring a more comprehensive and effective legal response to this issue.

4.2. The Mental Element (Mens Rea)

The crime of receiving incentives to publish illegal content or false information is an intentional offence that requires the mental element of criminal intent (*mens rea*). This crime cannot be established through negligence or unintentional acts, as these are not punishable in this context. The perpetrator must possess criminal intent to prove the crime, which comprises two essential elements: knowledge and will.

4.2.1. Knowledge

The perpetrator must be aware of all the legal elements necessary for the crime of receiving incentives to publish illegal content or false information. Specifically, they must know they are requesting, accepting, or taking a benefit in exchange for publishing or republishing illegal content or false information within the state using information technology.

If the perpetrator is unaware that the incentive received is in exchange for publishing or republishing illegal content—such as believing it to be payment for a debt or a gift from a friend on a family occasion unrelated to publication—the criminal intent is absent, and the crime is not established.[40]

Additionally, knowledge of the exchange must exist when receiving the benefit, whether during acceptance or request. Subsequent awareness arising after the act does not constitute the required criminal intent, as post-facto awareness holds no legal relevance in establishing the offence.

4.2.2. Will

The perpetrator's will must be directed toward requesting, accepting, or taking the incentive. The crime is complete even if the perpetrator does not ultimately execute the agreement. For example, the crime occurs if the perpetrator accepts a gift or incentive in exchange for publishing illegal content but later returns the gift or fails to fulfil the agreed-upon act.

40 Chergui Khadija, 'Mechanisms for Monitoring the Crime of Bribery and the Penalties Prescribed for It in Algerian Legislation' (2021) 3(2) Journal of Law and Local Development 58.

The criminal intent required for this crime is classified as general intent, as it only necessitates the perpetrator's intent to fulfil the elements of the crime. There is no requirement for additional intent beyond the act itself.

The burden of proving intent lies with the prosecution, which must establish it through general evidentiary rules. Intent can be demonstrated through any means of evidence. If the perpetrator does not explicitly express their intent in writing or speech, the court may infer it from the circumstances and context of the case.

In contrast, under the Digital Services Act (DSA),[41] UAE law does not address the mental element in detail. The DSA does not explicitly criminalise requesting or accepting incentives in exchange for publishing illegal content or false information. Instead, the European framework focuses on the responsibility of digital platforms to manage and remove illegal content upon being notified.

The DSA prioritises platforms' regulatory obligations over determining individuals' intent or motivations. It emphasises platforms' negligence or failure to monitor or remove illegal content, constituting a regulatory violation. As a result, material actions related to content management, such as reporting and removal, are the primary focus rather than the criminal intent of individual users.[42]

To address this gap, it is recommended that European legislation incorporate provisions that explicitly criminalise the intent and actions of individuals requesting, accepting, or receiving incentives for publishing illegal content. Such an approach would complement existing regulations by ensuring that individuals are held accountable for their actions, strengthening efforts to combat false information and illegal content within the digital ecosystem.

4.3. The Penalty for the Crime

According to Article 55 of the UAE Anti-Rumours and Cybercrime Law,[43] the perpetrator of this crime is punishable by temporary imprisonment and a fine not exceeding AED 2,000,000. The same penalty applies to anyone who manages or supervises the operation of an abusive account or website or rents or purchases advertising space on such platforms. An electronic account or website is considered abusive if it repeatedly publishes false data or content that violates the law.

The UAE legislator has also prescribed two mandatory complementary penalties: proportional fines and confiscation. Article 55 states that "the court shall order the confiscation of the incentive or material benefit obtained, or impose a fine equivalent to its value if it cannot be confiscated." Consequently, the penalty includes temporary

41 Regulation (EU) 2022/2065 (n 8).

42 Crawford and others (n 39); Hoffmann and Gasparotti (n 19).

43 Federal Decree-Law no (34) of 2021 (n 7).

imprisonment ranging from three to fifteen years and a fine between AED 1,000 and AED 2,000,000.[44] The court also orders the confiscation of the incentive accepted by the perpetrator or offered to them. Confiscation applies exclusively to items physically obtained, regardless of whether they are monetary or non-monetary.

Confiscation, a material penalty, is mandatory and cannot be imposed if the criminal act stops at the mere request or acceptance of a promise. In such cases, judges cannot estimate the promise's value or request to impose confiscation. Furthermore, confiscation cannot be applied if the benefit has already been consumed or is non-material.

In cases where the incentive or material benefit cannot be confiscated, the court must impose a fine equal to its value. This proportional fine is mandatory, and the judge cannot waive it. The fine, as specified in the law, is determined according to the specific value of the benefit in each case.

In contrast, European law's Digital Services Act (DSA) does not include explicit provisions criminalising the request, acceptance, or receipt of incentives in exchange for publishing or republishing illegal content or false information. Instead, the DSA focuses on the responsibilities of digital platforms to manage and remove illegal content upon being notified of its presence.

The DSA imposes significant penalties on platforms for non-compliance with their obligations, including fines of up to 6% of their global annual revenue and, in severe cases, suspension or complete prohibition of their services.[45] European legislation indirectly addresses illegal content dissemination by penalising platforms for failing to act rather than focusing on the financial or moral motives of individuals involved in such activities.

While the DSA ensures platform accountability, it does not explicitly address individual behaviours related to incentivised dissemination of illegal content. By contrast, as embodied in Article 55, UAE law explicitly criminalises requesting, accepting, or receiving either material or non-material incentives in exchange for publishing or republishing illegal content. This detailed legislative approach ensures comprehensive coverage of various aspects of the crime and effectively targets its root causes.

To enhance the effectiveness of European efforts in combating the dissemination of false information and illegal content, it is recommended that European legislation adopt a framework similar to UAE law. This should include explicit provisions criminalising the request, acceptance, or receipt of incentives for publishing or republishing illegal content, thereby addressing individual accountability and platform responsibility.

44 As of March 16, 2025, AED 1 equals €0.2501. Therefore, the fines range from approximately €250 (for AED 1,000) to €500,200 (for AED 2,000,000).

45 Crawford and others (n 39); Regulation (EU) 2022/2065 (n 8) art 52.

5 CONCLUSIONS

This study highlights the significance of Federal Decree-Law No. 34 of 2021 on Combating Rumours and Cybercrimes, which provides a comprehensive framework for addressing paid disinformation in the digital world. The UAE legislature has explicitly criminalised various individual behaviours associated with this phenomenon, including requesting, accepting, or receiving incentives in exchange for disseminating illegal content or false information. The law prescribes stringent penalties, including imprisonment, fines, and confiscation, underscoring the state's commitment to maintaining digital and societal security. Beyond criminalising the publication or republication of illegal content, the UAE legal framework also extends to managing and supervising abusive electronic accounts and using advertising spaces for deceptive purposes, further strengthening regulatory oversight.

In contrast, the European Digital Services Act (DSA) primarily focuses on regulating digital platforms and combating illegal content through supervision and removal mechanisms. However, it does not explicitly criminalise individual behaviours related to paid disinformation, leaving a gap in addressing these offences comprehensively. The absence of direct provisions penalising those who request or accept incentives to spread misleading content highlights a significant difference between the UAE and European legal approaches.

Given these findings, several key recommendations emerge. First, the UAE legislature should introduce legal provisions requiring digital platforms to cooperate promptly with legal authorities, ensuring strict enforcement through penalties such as temporary bans or substantial fines for non-compliance. In the European context, the DSA would benefit from explicit legal provisions addressing individual liability for paid disinformation, bridging the existing legal gap and enhancing accountability.

Beyond national legislation, enhancing international cooperation is essential to establishing a unified legal framework for combating paid disinformation crimes. A globally coordinated effort would facilitate consistent definitions and penalties across jurisdictions, strengthening enforcement mechanisms. Additionally, specialised training programs for judges and public prosecutors on the technical and legal aspects of paid disinformation crimes are crucial for ensuring informed judicial and prosecutorial decision-making.

Finally, raising public awareness through national and international education campaigns is necessary to combat the spread of paid disinformation. Encouraging digital responsibility and promoting information verification will play a fundamental role in mitigating the harmful effects of false and misleading content. A multi-faceted approach that combines legal, institutional, and public engagement strategies is essential to addressing the growing challenges posed by paid disinformation in the digital world.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ОПЛАЧЕНУ ДЕЗІНФОРМАЦІЮ У ЦИФРОВОМУ СВІТІ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ЗАКОНОДАВСТВА ОАЕ ТА ЗАКОНУ ЄС ПРО ЦИФРОВІ ПОСЛУГИ (DSA)

Могаммад Амін Алкрішег* і Фатіха Могаммед Ґурарі

АНОТАЦІЯ

Вступ. *Завдяки швидкій цифровій трансформації та широкому використанню платформ соціальних медіа розповсюдження різних форм шкідливого цифрового контенту, включно з незаконним контентом і неправдивою чи оманливою інформацією, особливо коли це фінансово стимулюється, стало актуальною глобальною проблемою. Такі практики загрожують цифровій довірі та створюють значні ризики для суспільної стабільності. Незважаючи на посилення правових зусиль щодо боротьби з цими злочинами, єдиної та*

комплексної законодавчої бази все ще бракує. У цьому дослідженні розглядається кримінальна відповідальність, пов'язана з оплаченою дезінформацією в цифровому світі, здійснено порівняння правового підходу, що передбачений законодавством ОАЕ та Законом ЄС про цифрові послуги (DSA). У той час як ОАЕ прийняли спеціальні положення, спрямовані на монетизацію дезінформації, європейське законодавство зосереджене насамперед на обов'язках цифрових платформ без прямого звернення до окремих учасників, залучених до такої діяльності.

Методи. *У статті використовується порівняльно-правовий аналіз, увагу зосереджено на відповідних законодавчих положеннях в обох юрисдикціях. У дослідженні застосовано аналітичний і порівняльний підхід для вивчення статті 55 Закону ОАЕ про боротьбу з плітками та кіберзлочинністю, яка чітко криміналізує фінансові стимули для поширення незаконного контенту. Також було здійснено оцінку Європейського DSA, який в основному регулює підзвітність платформи, але не містить прямих положень про індивідуальну кримінальну відповідальність за оплачену дезінформацію. Аналіз охоплює доктринальні юридичні та тематичні дослідження, щоб підкреслити ефективність і обмеження кожної правової системи в боротьбі з цією проблемою.*

Результати та висновки. *Дослідження виявило, що законодавство ОАЕ забезпечує більш структуровану та детальну правову базу для боротьби з платною дезінформацією, пропонуючи чіткі кримінальні санкції для осіб, причетних до таких дій. Європейський DSA, навпаки, використовує ширший регуляторний підхід, зосереджуючись на інституційному нагляді, не розглядаючи безпосередньо кримінальну відповідальність осіб, причетних до монетизованої дезінформації. У дослідженні рекомендується, щоб європейське законодавство прийняло більш конкретну модель боротьби з цими злочинами, інтегрувавши пряму кримінальну відповідальність поряд із регулюванням платформ. Крім того, у статті наголошено на необхідності посилення міжнародного співробітництва та гармонізації регулювання для того, щоб посилити цифрову прозорість та зменшити ризики, пов'язані із фінансово мотивованою дезінформацією.*

Ключові слова: *оплачена дезінформація, неправдива інформація, кримінальна відповідальність, кіберзлочини, законодавство ОАЕ, Закон ЄС про цифрові послуги (DSA), цифрові платформи, діпфейк, AI, плітки.*

CASE STUDY

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Case Study

THE SPECIFICITY OF EXECUTION IN PERSONAL STATUS MATTERS: A STUDY ON THE ENFORCEMENT OF NATIONAL AND FOREIGN JUDGMENTS BEFORE THE EXECUTION JUDGE

Najlaa Flayyih*, Ahmad Fadli, Zeana Abdijabar, Abdulaziz Alhassan and Pierre Mallet

ABSTRACT

Background: *The enforcement of personal status judgments poses unique legal and procedural challenges, particularly in jurisdictions where family law is deeply intertwined with religious and cultural principles. The United Arab Emirates (UAE) has introduced a specialised execution judge for personal status matters to enhance procedural efficiency and safeguard family stability. This reform represents a significant departure from traditional execution mechanisms, granting the judge discretionary powers to modify enforcement conditions while addressing the sensitivities of family-related disputes. However, questions arise regarding the scope of judicial intervention, the adequacy of procedural safeguards, and the compatibility of this system with established legal principles, particularly in cases involving foreign judgments. This study critically evaluates these aspects and conducts a comparative analysis of the French legal system to explore best practices.*

Methods: *This research employs a doctrinal legal methodology, analysing statutory frameworks, judicial precedents, and legislative intent behind introducing the personal status execution judge in the UAE. A comparative legal analysis is conducted with the French legal system to examine procedural safeguards, jurisdictional limitations, and the role of judicial discretion in enforcing family law judgments. Special focus is given to the legal implications of modifying visitation rights, travel restrictions, and enforcement conditions, particularly in cross-border cases.*

Results and Conclusions: *The findings reveal that the appointment of a specialised execution judge for personal status matters offers notable advantages, including expedited enforcement, enhanced confidentiality, and tailored procedural mechanisms aligned with the unique nature of family disputes. However, the discretionary authority granted to the execution judge—particularly in modifying visitation schedules and prohibiting travel—raises concerns regarding the stability of judicial decisions and acquired rights. Additionally, the research highlights challenges in enforcing foreign personal status judgments, emphasising the need for clearer legislative provisions to address conflicts of laws. The comparative analysis with the French legal system underscores the importance of judicial expertise in family affairs and the necessity of integrating procedural safeguards to uphold fairness and legal certainty. The study recommends refining the scope of the execution judge's powers, strengthening procedural protections, and reconsidering specific legislative terminologies to ensure a balanced approach between judicial efficiency and fundamental legal principles.*

1 INTRODUCTION

In an unprecedented move not found in other Arab legal systems, the Emirati legislator introduced the position of a judge specialised in personal status execution, granting them additional powers alongside the traditional jurisdiction of execution judges. These powers were tailored to meet the needs of Emirati society and to ensure consistency with legal provisions derived from Islamic jurisprudence regulating marital relations.

Special consideration was given to the sensitivity of family relationships by making execution sessions in personal status matters non-public and dispensing with the need for formal sessions unless otherwise determined by the judge of personal status execution. Additionally, the legislator included provisions such as prohibiting the travel of a child under custody and modifying the times and location of visitation or accompaniment. These interventions are permitted even when they conflict with the terms stated in the execution document or the reconciliation minutes ratified between the parties, thereby granting the judge discretion to override prior agreements or judicial decisions in the interests of justice and child welfare.

To assess the effectiveness of this unique legal development, the research incorporates a comparative analysis of the French legal system. The study examines how the enforcement of personal status judgments is regulated in France, where execution procedures are rooted in a civil law tradition with distinct mechanisms for safeguarding the rights of all parties involved. By comparing both systems, the research aims to highlight best practices and potential areas for reform within the Emirati model while considering the specific cultural and religious considerations that shape UAE family law.

The research revolves around the extent to which the provisions related to the jurisdiction of the judge of personal status execution affect the validity of judgments, the rights of the wards, and the principle of legal stability. It also examines the adequacy of the provisions within the jurisdiction of the judge of personal status execution to facilitate the efficient and speedy implementation of those judgments without compromising family interests. The research aims to determine whether these provisions require modification, development, or enhancements to strengthen their effectiveness.

The objectives focus on defining the jurisdiction of the execution judge and evaluating it by balancing the rights of the parties involved in the execution process and assessing their compatibility with procedural safeguards. The research also compares the Emirati approach with the French system to identify possible legal improvements and procedural refinements.

The research is significant because it explores a topic that no specialised study has addressed extensively, apart from general references in prescribed textbooks for execution law courses. Additionally, it represents the first evaluative study of this innovative system. By introducing a comparative dimension with French law, the study provides a broader perspective on how personal status enforcement mechanisms function in different legal traditions, offering valuable insights for potential legislative enhancements in the UAE.

2 THE ADVANTAGES OF ASSIGNING A JUDGE FOR THE EXECUTION OF PERSONAL STATUS

Lawsuits related to personal status have unique characteristics that differ from debt-related lawsuits. This is because both parties involved in the execution process usually belong to the same family, and conflicts typically do not revolve around financial matters except incidentally. The essence of the dispute is often related to living arrangements and conflicts arising within the family and society.

Therefore, assigning a judge dedicated to executing judgments related to personal status is considered a positive step.[1] This initiative acknowledges the unique nature of family-related disputes and their connection to the family, taking into account the traditions and customs of Emirati society[2] and the provisions of Islamic law related to personal status matters[3].

1 Federal Decree-Law no (42) of 2022 'Promulgating the Civil Procedure Code' [2022] Official Gazette of UAE 737. Art. 226 states: "Exceptionally from Article 207 of this Law, judgments and decisions related to personal status matters shall be executed under the supervision of a specialized judge appointed at the headquarters of each court."

2 ibid. Art. 227 states that "The judge for the execution of personal status matters alone, without others, is responsible for executing executive documents and decisions related to personal status matters ... taking into account customs and prevailing traditions in the country."

3 Islamic law is a source of legislation in the UAE and many other Arab countries, especially in personal status matters such as marriage, divorce, custody, maintenance, lineage, and others. See: Sahib Ubaid Al-Fatlawi, *The Easy Explanation of Civil Law*, vol 1 (Wael Publishing House 2011) 51.

Additionally, this approach will expedite the execution process by reducing the timeframes for personal status matters compared to regular debts.[4] Furthermore, it provides specialised executive procedures and mechanisms that complement and enhance the traditional jurisdiction of the execution judge.[5]

Moreover, the legislator has granted the execution judge a proactive role in proposing reconciliation to the parties involved—an intervention that represents the last opportunity to address family conflicts and prevent the family's dissolution.

However, this otherwise progressive approach could be more effective if one of the conditions for appointing judges assigned to handle personal status matters required expertise in social psychology and family affairs.[6] While the law mandates the presence of assistants such as social workers, it does not specify that these professionals must be specialised in social psychology or have experience in family therapy.[7] Given the evolution of social psychology into an independent specialisation in the field of sociology, there is a clear need to reinforce practical experience with such specialised knowledge, especially considering that the legislator has already endorsed this approach in the regulatory regulations issued by Cabinet Resolution No. 75 of 2018. The UAE legislator has retained this regulation in the new Civil Procedures Law under Decree No. 42 of 2022, effective 2 January 2023.[8]

As part of this experiment, the UAE legislator has considered the sensitivity of family disputes by requiring that execution proceedings be conducted privately, without the need for formal sessions.[9] This principle is endorsed in comparative legislation when courts are

4 Federal Decree-Law no (42) of 2022 (n 1). Art. 231 states that "Executive documents and decisions related to personal status matters shall be executed after 7 days from the date of announcement in the document." Furthermore, Art. 233, para. 3, specifies that the period for the debtor's compliance shall be within 7 days. Appeals against judgments issued under the Personal Status Law must be filed within 15 days from the date of issuance of the judgment (Art. 232, para. 1).

5 The traditional jurisdiction and functions of the execution judge are discussed in various legal texts, such as those mentioned in the following references: Mondher Abdul Karim Al-Qadi, *Explanation of the New Civil Procedures Law for the United Arab Emirates* (Dar Al-Badeel Publishing 2024) 228; Mustafa Al-Matouli Qandil, *Concise Guide to Compulsory Execution According to the Civil Procedure Law of the United Arab Emirates* (Brighter Horizon Publishers 2014) 36; Mahmoud Al-Kilani, *Rules of Evidence and Execution Provisions* (Dar Al-Thaqafa for Publishing and Distribution 2010) 184; Bakr Abdel Fattah Al-Sarhan, *Compulsory Execution under the UAE Civil Procedures Law* (University Library, Sharjah 2013) 33.

6 This position is based on the fact that the law has given a positive role to the execution judge in personal status matters, through which rifts can be reconciled and failures in dispute resolution during the trial can be addressed. This may indicate that the disputes are entrenched and require deep expertise in the field of family problem-solving to provide a final and serious opportunity for reconciliation.

7 The importance of family therapy is discussed on the website: *Middle East Academy for Training and Development* <www.meatddwarat.com> accessed 25 February 2025.

8 Federal Decree-Law no (42) of 2022 (n 1).

9 ibid, art 230.

empowered to privately conduct trials involving events or matters affecting families and other issues with their sensitivities.[10]

These benefits undoubtedly also apply to the enforcement of foreign judgments and decisions related to personal status matters. The UAE legislator did not distinguish between foreign and national judgments when appointing an execution judge for personal status matters.

3 VALIDITY OF JUDGMENTS IN THE IMPLEMENTATION OF PERSONAL STATUS MATTERS

In the new regulation of the system of the personal status judge, some indications suggest a potential impact on the principles of the validity of judgments and acquired rights in two respects.

First, the law grants the personal status judge[11] the authority to offer reconciliation to the parties involved in the execution process. The judge is also empowered to approve settlement agreements reached between the parties regarding the execution of the enforcement document, even if such agreements contradict the enforcement document or the decree executed under it, provided that they do not compromise the interests of the wards.[12]

This apparent encroachment on the enforcement document or the decree—by allowing parties to agree on matters contrary to its provisions—seems superficial. This is because the lawsuit and the judgment remain the property of the litigants, allowing the party in whose favour the judgment was issued to waive the rights awarded to them if they so wish. Moreover, both parties have the right to agree to depart from the terms of the judgment and

10 Ivy Daure et Souad Yadini, 'Le dialogue entre une juge et une psychologue' (2020) 373(1) Le Journal des psychologues 18, doi:10.3917/jdp.373.0018.

11 Federal Decree-Law no (42) of 2022 (n 1) art 229.

12 Appeal no (581) of 2016 *Personal Status* (Supreme Federal Court of UAE, 7 March 2017).
As decided by the Supreme Federal Court: The principle in custody is the best interest of the child, which must take precedence over the desires of any guardian for custody and over the availability or non-availability of custody conditions or the exploitation of their right to transfer, regardless of the reasons. Therefore, if it is evident that the best interest of the ward lies in staying with a specific guardian, custody is awarded to that guardian, prioritizing the ward's interest even if it results in the ward staying with the mother who has lost her legal right to custody. The focus of custody is the welfare of the ward, and when their benefit is achieved in something, that is where their fate lies, even if it contradicts the guardian's interest, because the child's right to care and protection takes precedence over the guardian's right. The mother is more entitled to custody of the child, provided she is competent and capable, as she is more tender towards the child than others. The key point in all circumstances is appeal no. (581) of 2016 - Civil and Commercial Judgments dated March 7, 2017 Personal Status.

regulate their relationship differently from what is stated in the enforcement document. This aligns with the legal principle applicable in cases where settlement is permissible.

However, a problematic issue arises in the second aspect: the authority granted to the execution judge to unilaterally modify visitation, access, and transportation schedules specified in the enforcement document. While these may appear to be procedural elements, such a provision may affect the validity of judgments and the acquired rights of the parties involved in the judicial process. Upon the issuance of the judgment, the rights and interests of the parties regarding visitation, access, and transportation have been established and are often relied upon by the parties in organising their affairs and schedules according to what was stated in the enforcement document. These matters become acquired rights for them after the judgment is issued, and they should not be easily modified, even though they pertain to procedural matters and scheduling.

The principle of the stability and validity of judgments must take precedence over the immediate need for changing schedules. Additionally, these schedules and locations are determined only after examination and scrutiny by the competent court following the hearing of the parties' arguments and submissions. Modifying the locations and schedules contrary to the enforcement document deprives the parties of the procedural guarantees that are considered part of the general legal framework. Such changes may also come as a surprise to the parties, thereby undermining the stability of legal positions and family relationships.

4 THE PROHIBITION OF TRAVEL FOR WARDS

The legislator granted the judge overseeing personal affairs the authority to prohibit the travel of wards. This matter requires careful consideration for several reasons:

1) It was assumed that the issue of travel prohibition should fall outside the jurisdiction of the judge overseeing personal affairs. This judge's authority should be confined to the boundaries of the judgment issued in the lawsuit and within the framework of the execution document alone. Granting any order or authority beyond the limits of what is stated in the execution document contradicts procedural guarantees, as it deprives parties of those guarantees and their right to present defences, respond to requests, and access a full range of appeal mechanisms.

2) Additionally, the issue of prohibiting the travel of wards is highly sensitive because it affects the rights of wards—individuals who cannot express themselves,[13] defend their rights, or know how to ensure their care and supervision. This issue also intersects with the

13 Mohamed Hassan El-Senoussi, 'The Universal Declaration of the Rights of the Child: Its Concept, Origins, Philosophy, and Contents' (2020) 31 (120) Journal of Research of the Faculty of Arts, Menoufia University 3049, doi:10.21608/sjam.2020.138160.

parents' or guardians' awareness of the children's rights and necessitates strong guarantees to provide the basic assurances prescribed for children in Islamic law and international conventions.[14] Therefore, decisions prohibiting the travel of wards should be entrusted to family courts within an objective lawsuit where all parties to the relationship can present their arguments and defences. Such a process should include the possibility of seeking the opinion of experts from medical committees and social psychiatry professionals. This level of scrutiny is only possible within the context of full litigation procedures before competent family courts, where necessary guarantees can be assured.[15] Leaving such a significant decision to the discretion of the execution judge—based solely on a party's request—may not provide those guarantees.[16] This requires reconsideration and assigning the matter to a judge in family courts within an objective lawsuit rather than a direct decision from the judge overseeing personal affairs without relying on a final judicial ruling.[17]

14 Pierre Calle, 'Les fondements de l'autonomie de la volonté en droit de l'Union européenne (droit des personnes et de la famille)' in Amélie Panet, Hugues Fulchiron et Patrick Wautelet (éd), *L'autonomie de la volonté en droit des personnes et de la famille dans les règlements de droit international privé européen* (Bruylant 2017) 31-2.

15 Mohamed Abdelnabi Elsayed Ghanem, *Civil Case Management and its Procedural System* (Dar Al-Nahda Al-Arabiya 2018) 180; Mustafa Al-Matwally Qandeel, *A Concise Guide to Judiciary and Litigation* (3rd edn, Al-Afaq Al-Mashriqa Publishers 2017) 366.

16 From another perspective, Lawyer Sara Abdullah Ghanem – from the Dubai Courts – believes that the UAE legislator's establishment of the Personal Status Enforcement Judge was a response to the numerous changes that occur after a personal status ruling is issued. These changes necessitate the issuance and swift execution of decisions, particularly concerning custodial children. This is crucial for safeguarding the child's psychological well-being as a priority, preserving society, and ensuring that each party receives their rightful entitlement under the current reality (Sara Abdullah Ghanem, Email interview of 30 March 2025).

17 Appeal no (225) of 2010 (Supreme Federal Court of UAE, 8 June 2010).
The Supreme Federal Court ruled in accordance with Art. 149 of Federal Personal Status Law No. (28) of 2005, stating that "the custodian is not permitted to travel with the ward outside the country without the written consent of the legal guardian, and if the guardian refuses, the matter shall be referred to the judge." According to the explanatory memorandum of this law, the custodian is not allowed to travel with the ward outside the country without the written consent of their legal guardian. If the legal guardian refuses to provide such consent, the matter shall be adjudicated by the judiciary. It was also established that the freedom of travel is guaranteed to every individual under the Constitution of the country, and there is no obstacle preventing the custodian from traveling with the ward if the latter is in need of their custody, such as an infant child. The Hanafi scholars have opined that the custodian is permitted to relocate with their child if they are relocating to their home country, where they were married. They base their opinion on the saying of the Prophet Muhammad (peace be upon him), "Whoever is a resident of a town is considered one of its people." While the Maliki jurists generally do not agree with the custodian relocating with the child, they make an exception if the child is an infant. According to Maliki jurisprudence, the welfare of the ward takes precedence over considerations of custody transfer, as established in the documents, both disputants are of Egyptian nationality, born in the city of Alexandria, and their marriage contract was concluded there. The child in question was born on July 29, 2009, and is still in the nursing stage, dependent on the care of his mother. Therefore, his best interest lies in being with her. Since the defendant failed to issue written consent for the ward to travel with his mother, it constituted unjustified negligence, harming both the plaintiff and the ward,

Decision No. 3 of 2021, which adopts the procedural guide for personal status matters before the Dubai courts, highlights guarantees that are not extended to the execution judge. One such guarantee is stipulated in Article 1 regarding establishing one or more committees for family guidance in the personal status courts. Additionally, Article 14, pertaining to custody regulations, outlines 30 specific criteria the court must adhere to—criteria that may also be applied when the court considers a petition to prevent a child from travelling. The application of these criteria goes beyond the jurisdiction of the execution judge, whose powers are limited to executing the enforcement document. Accordingly, the authority to prohibit a child's travel should be entrusted to the personal status courts under the provisions of Articles 149–157 of the Personal Status Law, where the necessary litigation safeguards are provided.

Furthermore, the principle of prioritising the best interests of the child is reflected in Article 114 of the Personal Status Law,[18] reinforces the significance of considering women's rights as primary caregivers. The law acknowledges that custody is a right of the child and grants mothers the initial priority in custody arrangements following the dissolution of marriage. This principle aligns with the broader framework of women's empowerment, ensuring that mothers can fulfil their caregiving responsibilities without legal barriers. A well-defined judicial process for travel prohibition decisions should consider the role of custodial mothers, preventing undue restrictions that may hinder their ability to care for and protect their children. Strengthening procedural safeguards within family courts, rather than through execution judges, ensures that custody rights are upheld fairly, transparently, and supportive of women's legal standing in family matters.

The same applies to Egyptian legislation, where the Family Court is accompanied by an office composed of legal experts and specialists in family affairs. The Egyptian legislation has regulated the criteria followed by the court when considering the issue of custody comprehensively in Law No. 1 of 2000. This provides the basic guarantees for the rights of the child.[19]

3) There is an issue related to the terminology used: "preventing the wards from travelling."[20] It would be better to use a phrase that indicates preventing "accompanying

and conflicting with the best interest of the child, which is considered legally significant. Thus, the challenged judgment, which prohibited the child from traveling with his mother, was flawed and accordingly overturned by the Supreme Federal Court in Appeal No. (225) of 2010 dated June 8, 2010.

18 Federal Decree-Law no (41) of 2024 'On the Issuance of the Personal Status Law' [2024] Official Gazette of UAE 785(2). The Law will come into effect on April 15, 2025.

19 Law of the Arab Republic of Egypt no (1) of 2000 'Law Regulating of Some Conditions and Procedures of Litigation in Personal Status Matters' <https://lawyer-egy.com/eg-law-codes/kanon-elosra-12000.html> accessed 25 February 2025.

20 Federal Decree-Law no (42) of 2022 (n 1). Art. 324 grants the execution judge the authority to allow wards to travel.

the wards when travelling,"[21] as the prohibition is not directed at the wards specifically but at the person accompanying them. Additionally, the term "prevention" does not align well with the term "wards," as the latter do not have the capacity to manage their affairs or make decisions regarding them.

When comparing the above with the French legal position, several key points emerge:

1. Jurisdiction and Authority: In France, the authority to decide on matters related to the travel of a child lies with the *Juge aux affaires familiales* (Family Court Judge), who is specifically designated to handle family disputes, including custody and travel issues. This is similar to the proposal in Section 4 for entrusting such decisions to family courts rather than the execution judge. The French system ensures that decisions are made within a specialised framework that prioritises the child's best interests, aligning with the view that family courts provide stronger guarantees for litigation.[22]
2. Procedural Guarantees: The French legal system, as outlined in Articles 373-2 of the Civil Code, requires both parents' consent or judicial authorisation for a child to travel abroad. This mirrors the concerns raised in Section 4 about the need for procedural guarantees and the involvement of all parties in the decision-making process. The French approach ensures that both parents have a say in matters affecting the child, which aligns with the argument that decisions should not be left solely to the execution judge.[23]
3. Terminology and Focus: The French system focuses on the accompanying parent rather than the child, as highlighted in Section 4. For example, the French courts evaluate whether the accompanying parent poses a risk of not returning the child. This is consistent with the suggestion to use terminology such as "preventing accompanying the wards when travelling" instead of "preventing the wards from travelling."[24]
4. Expert Involvement: The French system allows for the involvement of experts, such as social workers and psychologists, to assess the child's best interests. This aligns with the proposal in Section 4 to involve medical committees and specialists in social psychiatry when making decisions about travel prohibitions.[25]

21 Federal Decree-Law no (41) of 2024 (n 18). It is notable that the same Emirati legislator employed a more precise term in Personal Status Law, namely "traveling with wards," in Art. 149. Similarly, the Moroccan legislator also used a precise term, "preventing travel with wards," in Art. 179 of the Family Code.

22 Marie-Anne Frison-Roche, '*Les offices du juge*' in *Jean Foyer, Auteur et législateur: Leges Tulit, Jura Docuit : Ecrits En Hommage A Jean Foyer* (PUF 1997) 463.

23 Charlotte Dubois, 'L'autonomie du droit pénal et le droit de la famille' (2021) 4 Cahiers de droit de l'entreprise 24.

24 Flore Capelier, 'De la protection de l'enfant à la protection des enfants: une loi source d'ambiguïtés' (2022) 2 Revue de droit sanitaire et social 348.

25 Jérôme Boursican, 'La preuve en droit de la famille' *Gazette du Palais* (Paris, 14 avril 2020) 56.

5. Legal Framework: The French legal framework, including Articles 373-2-6 and Articles 373-2-9 of the Civil Code, provides clear criteria for evaluating travel requests, such as the risk of abduction or the impact on the child's well-being. This is comparable to the 30 criteria outlined in Dubai's procedural guide, which Section 4 suggests should be applied by family courts rather than the execution judge.

5 IMPLEMENTING JUDGMENTS WITH A FOREIGN ELEMENT

Some issues were expected to be addressed by the law when defining the jurisdiction of the judge in charge of executing personal status matters, especially in cases involving a foreign element—whether due to the nature of the enforcement process or the foreign origin of the judgment. It is known that the United Arab Emirates is home to a large foreign community, accounting for more than 85% of the population, consisting of both citizens and foreigners. The judgments issued by courts overseeing decisions made by the judge responsible for executing personal status matters have resulted in many cases involving a foreign party. This necessitates considering the implications for residents of the UAE who are foreigners.

The presence of foreign elements in the enforcement process raises numerous issues related to conflict-of-law issues. This raises questions about the possibility of granting the judge in charge of personal status matters the authority to amend the content of the judgment clause in a foreign judgment that is valid in the country of issuance and cannot be tampered with. Can the national judge, in cases where the law allows the enforcement of foreign judgments, modify the content of those judgments? And how should the judge in charge of executing personal status matters address these developments in the absence of explicit legal provisions regulating such possibilities?[26]

Addressing these questions requires a dual perspective:

1. Cases where the executive decision involves parties who are foreigners.
2. Cases where the judgment to be executed is foreign.

On the first point, if the judgment is domestic but concerns foreigner nationals residing in the UAE, any dispute falls under UAE law according to the principle of *lex loci executionis* stated in Article 21 of the Civil Transactions Law. This article stipulates that "the rules of jurisdiction and all procedural matters shall be governed by the law of the state in which the action is brought or the proceedings are conducted."[27] Since enforcement proceedings will take place in the UAE, Emirati law applies.

26 Monica-Elena Buruianã, '*L'application de la loi étrangère en droit international privé*' (thèse de doctorat, *Université de Bordeaux* 2016) 18-22 <https://theses.hal.science/tel-01800429v1> accéder 25 février 2025.

27 Federal Decree-Law no (5) of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates' [1985] Official Gazette of UAE 158.

There is a strong case to be made for recognising the will of the individuals in selecting the applicable cases. Where the individuals involved agree to apply UAE law—especially given that they reside in the country—this choice could be seen as establishing local law as their personal law in the relevant context.

This view is supported by legislative reforms. In 2020, the UAE legislature amended its conflict-of-laws rules concerning certain matters of personal status, such as marriage, divorce, and wills.[28] The purpose of this amendment was to permit the application of local law, given the significant presence of foreigners in the country. Applying the law of the place of conclusion rather than national law increases the likelihood of applying local law rather than foreign law.

Similarly, the 2024 amendment to the UAE Personal Status Law reflects this approach, permitting parties to agree on applying local law. Paragraph (3) of Article (1)[29] provides that: "The provisions of this law shall apply to non-citizens unless one of them insists on applying their law or any other law permitted by the legislation in the state."

This provision demonstrates the legislator's position regarding the ability to agree on applying a law other than that determined by the conflict of laws rules. It constitutes a clear departure from the mandatory nature of such rules, as it allows litigants to agree on the application of local law through the phrase "any law permitted by local legislation." Consequently, if neither party insists on applying foreign law, this indicates that their will is directed towards the application of local law.

As for the second aspect, the logical answer to the previously mentioned question is that the execution judge does not have the authority to amend any provision of a foreign judgment, as this would contradict the nature and function of the execution judge, which is generally limited to issuing to enforcement orders without intervening in the content of judgments. However, it is observed that the legislator has granted the execution judge, in personal status matters, the authority to amend appointment times and locations for visitation and accompanying.

Could this serve as a basis for granting the execution judge, in cases where the judgment to be executed is foreign, the authority to modify the content of the judgment? Are there any differences between foreign judgments and domestic judgments in this context? Naturally,

28 ibid. For instance, Art. 12, Para. 1 of the UAE Civil Transactions Law stipulates that: "The substantive conditions for the validity of a marriage shall be governed by the law of the country in which the marriage was concluded." Similarly, Para. 3 of Art. 17 provides that: "The substantive provisions governing wills and all dispositions effective after death shall be subject to the law specified in the will or disposition. If no law is specified, the law of the state to which the testator or disposer belonged by nationality at the time of death shall apply."

29 Federal Decree-Law no (41) of 2024 (n 18). Furthermore, Para. 3 of Art. 1 of Law on Personal Status states that: "The provisions of this law shall apply to non-citizens unless one of them insists on applying their own law or any other agreed-upon law permitted by the applicable legislation in the state."

there should be no differences, indicating that the advantages of designating an execution judge for personal status matters apply equally to the enforcement of both foreign and domestic judgments and decisions in such matters. Thus, the UAE legislator did not distinguish between foreign and domestic judgments when establishing the designation of an execution judge for personal status matters.

Then, there is a question of whether a judgment prohibiting the travel of wards can apply to foreign wards or whether the execution judge, in personal status matters, must consider the nationality law of the wards. According to established principles of private international law, in the absence of a specific provision, which law should prevail—the national law or the nationality law of the wards?[30] By examining various judgments by the execution judge, it becomes clear that there is no distinction between wards who are citizens and those who are foreigners. The national law is applied while also considering the nationality of the ward or the guardian.

The enforcement of personal status judgments involving a foreign element presents significant challenges across comparative legal systems. For instance, the French Court of Cassation ruled in Case No. 19-24.870 (5 November 2020) that when a parent unlawfully relocates a child abroad, they cannot later claim that the other parent's return of the child to the country of origin constitutes an unlawful relocation.[31] This decision underscores the importance of determining the child's habitual residence and establishing jurisdictional authority in cross-border family disputes.

In the UAE, similar considerations arise when executing foreign judgments related to child custody and travel restrictions. However, unlike the French system—which prioritises the jurisdiction of the child's habitual residence before the unlawful removal—the UAE legal framework primarily applies national execution rules with limited reference to the child's nationality law. This contrast highlights the need for clearer legal provisions addressing conflicts of laws in enforcement procedures, particularly regarding the judge's authority to modify foreign judgments or restrict international travel in personal status matters.

30 It is known that comparative legislations differ in their provisions regarding personal status matters according to their cultures, traditions, and heritage, and they have specific positions in this regard. For example, Chinese law does not recognize divorce between spouses holding Chinese nationality unless it is conducted before Chinese courts. So, how should the execution judge in personal status matters deal with a judgment issued outside China decreeing divorce between Chinese spouses? These are issues that can only be resolved by establishing specific texts regulating conflicts of laws in execution.

31 Appeal no 19-24.870 (French Court of Cassation, First Civil Chamber, 5 November 2020) <https://www.courdecassation.fr/decision/5fca2be7d71d5d1063767908> accéder 25 février 2025.

6 CONCLUSIONS

6.1. Results

The UAE legislation establishing a judge for execution in personal status matters is a positive step that provides many advantages, most notably considering the specificity of family disputes and their difference from executing disputes related to debt. This step also provides innovative means and mechanisms to remedy any deficiencies in family relationships that were not resolved during the lawsuit. It ensures the expeditious implementation of judgments by reducing the timeframes. Additionally, it guarantees confidentiality to protect family relationships and prevent disputes from escalating and affecting other family members and relatives.

The law has introduced provisions granting the execution judge, in personal status matters, the authority to approve reconciliation even if it contradicts the content of the executed judgment. It also grants the judge the authority to modify the locations and timings of visitations and escorts contrary to the content of the execution instrument. This raises issues concerning the validity of judgments and the acquired rights of the parties to the lawsuit.

The law grants the execution judge, in personal status matters, the authority to prohibit the travel of the wards. This matter may need to be reconsidered regarding the seriousness of such a decision, perhaps leaving it to the competent court within the specified conditions for filing the lawsuit to provide essential procedural guarantees and to ensure the rights of the wards as stipulated in national laws and international conventions. It was also noted that the terminology used in this regard may need to be reviewed.

It became evident that due to the demographic diversity of residents in the UAE and the presence of a large foreign community compared to the number of citizens, issues related to conflicts of laws may arise when executing personal status matters. This requires legislative intervention with texts regulating these matters and providing solutions to the problems that may arise in this context.

6.2. Recommendations

To enhance the privacy of the work of the judge executing personal status matters, it is advisable that the offices of judges responsible for such execution be located adjacent to personal status courts and distinctly separated from other court premises, particularly criminal courts.

Moreover, expanding the use of remote communication technologies across all stages of execution in personal status matters would significantly alleviate the burden on execution applicants, who are often women burdened with household responsibilities and childcare, making it difficult for them to attend multiple execution sessions in person.

It is also recommended that a dedicated fund be established to support expenses associated with the court of execution in personal status matters. In emergencies, this fund would cover expenses that cannot be fulfilled or are delayed, preventing harm and deprivation for those involved. Once fulfilled, the expenses can be recovered and returned to the fund.

In addition, the appointment of a specialised position in social psychology to support the judge in executing personal status matters is essential. Priority should be given to female professionals in this field to facilitate their communication with the parties involved—especially women—in a manner that respects the traditions of Emirati society.

Introducing a credit registry specifically for personal status matters would further strengthen enforcement mechanisms. Listing the names of individuals who delay execution—particularly in maintenance or child support obligations—could prevent others from falling victim to dealing with them. The existence of such a registry would serve as a deterrent against deliberate procrastination, indicating that those who use procrastination as a means to evade execution will face consequences in their professional lives.

Furthermore, the authority to issue travel bans for wards is proposed to be transferred from the execution judge to the personal status courts. Additionally, the terminology currently used—"prohibiting the travel of wards"—should be revised to "prohibiting the escorting of wards when travelling".

Finally, there is a pressing need to address conflicts of laws in execution matters related to personal status. The following provisions are recommended for inclusion:

- "Judges executing personal status matters are exempted from the authority to modify visitation, custody, and escort schedules in judgments issued in a foreign country. The execution is carried out in accordance with the conditions specified in the executed judgment."
- "In lawsuits concerning prohibiting the escorting of wards when travelling, the provisions of the law of the nationality of the wards shall apply, and no provision to the contrary shall be enforced."

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

СПЕЦИФІКА ВИКОНАННЯ СУДОВИХ РІШЕНЬ У СПРАВАХ, ЩО СТОСУЮТЬСЯ ОСОБИСТОГО СТАТУСУ: ДОСЛІДЖЕННЯ ВИКОНАННЯ НАЦІОНАЛЬНИХ ТА ІНОЗЕМНИХ СУДОВИХ РІШЕНЬ ЗА УЧАСТІ СУДДІ-ВИКОНАВЦЯ

Найлаа Флайїх*, Ахмад Фадлі, Зеана Абдіджабар, Абдулазіз Альхассан та П'єр Маллет

АНОТАЦІЯ

Вступ. *Виконання рішень щодо особистого статусу створює унікальні правові та процесуальні проблеми, особливо в юрисдикціях, де сімейне право глибоко переплетене з релігійними та культурними принципами. Об'єднані Арабські Емірати (ОАЕ) запровадили спеціалізованого суддю-виконавця з питань особистого статусу для підвищення процесуальної ефективності та збереження стабільності сім'ї. Ця реформа, що зважає на делікатність сімейних спорів та надає судді дискреційні повноваження змінювати умови виконання судових рішень, є суттєвим відходом від традиційних механізмів. Однак виникають питання щодо обсягу судового втручання, адекватності процесуальних гарантій і сумісності цієї системи з встановленими правовими принципами, особливо у справах, пов'язаних з іноземними судовими рішеннями. Це дослідження критично оцінює ці аспекти та проводить порівняльний аналіз із правовою системою Франції для вивчення найкращих практик.*

Методи. *У цій статті використовується доктринальна юридична методологія, проаналізовано законодавчу базу, судові прецеденти та наміри законодавця, що сприяли створенню посади судді з виконання особистих статусів в ОАЕ. Порівняльно-правовий аналіз проводиться з правовою системою Франції для вивчення процесуальних гарантій, юрисдикційних обмежень і ролі суддівського розсуду у виконанні рішень у справах сімейного права. Особлива увага приділяється правовим наслідкам зміни прав на відвідування, обмежень на подорожі та умовам виконання судових рішень, особливо у транскордонних справах.*

Результати та висновки. *Висновки показують, що призначення спеціалізованого судді-виконавця з питань особистого статусу дає значні переваги, зокрема прискорене виконання, підвищену конфіденційність та адаптовані процесуальні механізми, узгоджені з унікальною природою сімейних спорів. Однак дискреційні повноваження, надані судді-виконавцю, особливо щодо зміни графіків відвідувань і заборони на поїздки, викликають занепокоєння стосовно стабільності судових рішень і набутих прав. Крім того, дослідження висвітлює проблеми у виконанні іноземних судових рішень щодо особистого статусу, наголошуючи на необхідності більш чітких законодавчих*

положень для вирішення колізій. Порівняльний аналіз, що проводиться із правовою системою Франції, підкреслює важливість судової експертизи у сімейних справах та необхідність інтеграції процесуальних гарантій для підтримки справедливості та правової визначеності. У дослідженні було рекомендовано уточнити обсяг повноважень судді-виконавця, посилити процесуальний захист і переглянути конкретну законодавчу термінологію для забезпечення збалансованого підходу між ефективністю судочинства та основними правовими принципами.

Ключові слова: *оформлення особистого статусу, суддя-виконавець, сімейне право, суддівський розсуд, правова стабільність, іноземні судові рішення, колізійне право, право ОАЕ, порівняння з правовою системою Франції.*

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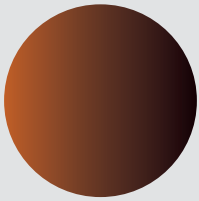

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