East European Law Research Center

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EDITOR-IN-CHIEF 'S NOTE

Iryna Izarova

Current Issues in Access to Justice: An Introduction to Global and Regional Perspectives

RESEARCH ARTICLES

Nataliia Radanovych and Svitlana Synchuk

The Value of Human Security and Legal Means of Its Realization in the Context of the Armed Aggression of the Russian Federation against Ukraine

Zolfakar Alaa Eddin

Right of Victims of Terrorism to Compensation Against the Principle of Jurisdictional Immunity of Foreign State

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by the East European Law Research Center

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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Editorial

CURRENT ISSUES IN ACCESS TO JUSTICE: AN INTRODUCTION TO GLOBAL AND REGIONAL PERSPECTIVES

Iryna Izarova

ABSTRACT

The third issue of Access to Justice in Eastern Europe (AJEE) presents a comprehensive collection of scholarly articles, review articles, and case studies examining critical issues in modern procedural law and judiciary. The contributions delve into a wide array of pressing topics, including the profound impact of armed conflicts, state aggression, and terrorism on the framework of international law. Furthermore, the issue explores emerging trends that are reshaping the legal landscape, such as significant developments in procedural law, the evolving practice of arbitration, and the accelerated digitalization of justice systems. The articles offer valuable insights into the ongoing challenges and transformative reforms within judicial systems globally. A particular emphasis is placed on the unique synthesis of legal traditions found in post-Soviet and EU-integrating countries. Through comparative studies spanning jurisdictions across Europe, Asia, and the Middle East, this issue underscores the universal and interconnected nature of the global pursuit of justice, highlighting both shared challenges and diverse solutions in ensuring effective access to legal recourse.

Founded in 2018 with a specific regional focus, the journal Access to Justice in Eastern Europe (AJEE) has progressively broadened its scope to address the growing global discourse on justice, reflecting an increasing international interest in its core themes. Building on this momentum, the editorial team has announced a significant strategic expansion aimed at creating a family of related publications. This new initiative involves the launch of two sister journals: Access to Justice in the Middle East (AJME) and Access to Justice: Global Edition (AJGE). The primary objective of this expansion is to foster and facilitate professional discourse and cutting-edge research on a much wider geographical scale, creating new platforms for scholars and practitioners from diverse regions. Crucially, this strategic growth will be implemented while carefully preserving the distinct identity, mission, and high scholarly standards of the original AJEE journal, ensuring it continues to serve its dedicated readership and academic community.

Keywords: *access to justice, judicial law, procedural law, international law, digitalization of justice, comparative law, Eastern Europe, Middle Asia.*

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I am pleased to present the third issue of our journal, dedicated to the **most pressing issues of human rights protection, judicial system reforms, and digital justice**.

At a time when the architecture of international law and the foundations of national legal systems are facing unprecedented challenges, our journal's mission—to facilitate professional discourse and seek solutions for ensuring access to justice—is more important than ever. This issue continues our tradition by offering a deep analysis of both urgent problems caused by geopolitical crises and significant trends in the development of procedural law.

The central theme of the first block of publications is a profound and multifaceted analysis of the impact of armed conflicts, state aggression, and terrorism on international law and human rights. We highly recommend paying attention to the following works:

The article by ***Nataliia Radanovych*** and ***Svitlana Synchuk***, "The Value of Human Security and Legal Means of Its Realization in the Context of the Armed Aggression of the Russian Federation Against Ukraine," is a foundational study that analyzes the concept of human security as a legal value during a full-scale war. The authors examine how this doctrine is transforming and being implemented in Ukraine's national legislation and constitutional justice practice, making it highly relevant for understanding contemporary mechanisms of human rights protection.

The study by ***Alaa Eddin Zolfakar***, "Right of Victims of Terrorism to Compensation Against the Principle of Jurisdictional Immunity of Foreign State," raises one of the most complex issues in modern international law: the possibility of holding states accountable for acts of terrorism despite the principle of jurisdictional immunity. The analysis of legislative exceptions in the U.S., Canada, and other jurisdictions makes this a must-read for international lawyers working on compensation for victims of aggression.

This block of articles is complemented by the provocative study by ***awaz Najem*** and ***Abdelnaser Aljahani***, "The Legality of Espionage in Peacetime." The authors analyze espionage at the intersection of state sovereignty, the right to privacy, and international law. This work forces a new perspective on the "gray zones" in relations between states and their impact on the legal order.

As always, among the articles published in this issue, we are proud to present several dedicated to topical issues of procedural law, particularly arbitration and the digitalization of justice. These materials hold exceptional practical and theoretical value for our audience:

The work by ***Azamat Nurtan*** and ***Maigul Abilova***, "Enforcement of Foreign Arbitral Awards in Kazakhstan: A Comparative Legal Analysis of European and Asian Mechanisms,"is of significant interest to practicing lawyers and scholars specializing in international arbitration. Their comparative analysis of arbitration award enforcement mechanisms in Kazakhstan against the backdrop of European and Asian practices offers valuable insights for developing regional arbitration infrastructure.

In the article, "Procedural Rules for Smart Trials in the UAE: Aspirations and Reality," ***Adel Salem Allouzi*** explores the innovative topic of "smart trials." His analysis of the conceptual foundations and operational framework of digital justice in the UAE invites a discussion about the future of the judiciary, its advantages, and the challenges of transitioning to a digital format.

Finally, the profound comparative study by ***Tarek Gomaa EL-Sayed Rashed***, ***Ahmed Youssef Al-Emadi***, and ***Samir Shaaban Saleh***, "Arbitration Without Agreement Under the ICSID Rules: A Comparative Study with Egyptian and Qatari Legal Systems," examines the complex doctrine of ICSID jurisdiction in the absence of a direct arbitration agreement. This article is indispensable for specialists in international investment law.

We are convinced that the research presented in this issue will be a source of new ideas and stimulate further academic discussions. We wish you a productive and inspiring read!

In addition, we are pleased to share with you an important strategic announcement that marks a new stage in our journal's development.

The journal, **Access to Justice in Eastern Europe (AJEE)**, was founded in 2018 with the goal of creating a unique platform for highlighting and discussing the regional specificities of ensuring access to justice. Our mission was to provide a forum for scholars to share research on judicial system and civil procedure reforms in Eastern European countries like Ukraine, Poland, and Romania, among others.

We chose this focus due to the unique blend of the post-Soviet legal doctrine legacy, the influence of Western law, and the legislative approximation to EU law. This specific context created an exceptional model of development that required dedicated scholarly attention. Over the years, numerous studies on European integration and judicial reforms in this context have affirmed the correctness of our chosen direction.

However, in recent years, we have observed a growing global interest in access to justice, regardless of country or region. The pursuit of a fair trial and effective protection of human rights are recognized as universal values, confirmed by key international documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. The fact that the majority of the world's countries are parties to these treaties makes their principles the foundation for ensuring unified approaches to human rights on a global scale.

We are seeing a significant increase in the number of high-quality studies on access to justice and rights protection from various parts of the world. Comparative studies have become especially valuable as they allow us to identify the strengths and weaknesses of popular approaches within different legal systems. This has been made possible by contributions from authors in Europe and Asia, including Saudi Arabia, the United Arab Emirates, Kazakhstan, and Vietnam. Their publications are particularly important because they demonstrate a valuable combination of different legal and religious-cultural traditions, which contributes to a deeper understanding of rights protection mechanisms. Legal

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systems and historical traditions in our respective regions may differ significantly, but it is in this diversity that the greatest value lies—we learn from each other, broaden our perspectives, and cultivate respect for different viewpoints. Combining these various approaches helps us better understand the challenges and find effective solutions for ensuring access to justice on a global scale.

In building a global audience and expanding our circle of authors, we do not want to lose the unique identity of AJEE. Therefore, a logical and strategic step is to create an **"Access to Justice" family of journals**. In this structure, **AJEE** will retain its original focus on Eastern Europe, while new publications will be added: **Access to Justice in the Middle East (AJME)** and **Access to Justice: Global Edition (AJGE)**. These three journals, working together, will facilitate the dissemination of new knowledge and research, covering a wider geographical scope.

We are pleased with the growing number of experts from around the world among our authors, reviewers, and editorial board members. Thanks to their efforts, we have been able to ensure an effective publication process and high-quality evaluation of submissions. With our entire dedicated team, we are ready to contribute to the development and dissemination of research on access to justice and are happy to welcome the further expansion of our journals' scope.

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Disclaimer: The views and opinions expressed in this editorial are those of the author and do not necessarily reflect the official policy or position of the journal, the Editorial Board, or any affiliated institutions.

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УКРАЇНСЬКА ВЕРСІЯ

АКТУАЛЬНІ ПРОБЛЕМИ ДОСТУПУ ДО ПРАВОСУДДЯ: ГЛОБАЛЬНІ ТА РЕГІОНАЛЬНІ ПЕРСПЕКТИВИ

Ірина Ізарова

АНОТАЦІЯ

Третій випуск журналу «Доступ до правосуддя у Східній Європі» (AJEE) представляє збірку наукових статей, оглядових статей та нотаток, в яких досліджуються критичні питання сучасного процесуального права та судоустрою. Статті охоплюють широкий спектр актуальних тем, включаючи глибокий вплив збройних конфліктів, державної агресії та тероризму на систему міжнародного права. Крім того, у випуску досліджуються нові тенденції, що змінюють правовий ландшафт, такі як значні зміни в процесуальному праві, розвиток практики арбітражу та прискорена цифровізація систем правосуддя. Статті пропонують цінну інформацію про поточні виклики та трансформаційні реформи в судових системах у світі. Особливий акцент робиться на унікальному синтезі правових традицій, що існують у пострадянських країнах та країнах, що інтегруються в ЄС. Завдяки порівняльним дослідженням, що охоплюють юрисдикції Європи, Азії та Близького Сходу, цей випуск підкреслює універсальний та взаємопов'язаний характер глобального прагнення до правосуддя, висвітлюючи як спільні виклики, так і різноманітні рішення щодо забезпечення ефективного доступу до правового захисту.

Заснований у 2018 році з регіональною спрямованістю, журнал «Доступ до правосуддя у Східній Європі» поступово розширив свою сферу діяльності, щоб врахувати зростаючий глобальний дискурс щодо правосуддя, що відображає зростаючий міжнародний інтерес до його основних тем. Спираючись на цей імпульс, редакційна команда оголосила про значне стратегічне розширення, спрямоване на створення родини пов'язаних видань. Ця нова ініціатива передбачає запуск двох сестринських журналів: «Доступ до правосуддя на Близькому Сході» (AJME) та «Доступ до правосуддя: Глобальне видання» (AJGE). Головною метою цього розширення є сприяння професійному дискурсу та передовим дослідженням у набагато ширшому географічному масштабі, створюючи нові платформи для науковців та практиків з різних регіонів. Найголовніше, що це стратегічне зростання буде реалізовано, ретельно зберігаючи особливу ідентичність, місію та високі наукові стандарти оригінального журналу AJEE, забезпечуючи його подальше обслуговування відданої читацької аудиторії та академічної спільноти.

Ключові слова: *доступ до правосуддя, судове право, процесуальне право, міжнародне право, цифровізація правосуддя, порівняльне правознавство, Східна Європа, Середня Азія*

Рада представити вам третій номер нашого видання, присвяченого найбільш актуальним питанням захисту прав людини, реформам судової системи та цифровому правосуддю.

У час, коли архітектура міжнародного права та основи національних правових систем зазнають безпрецедентних випробувань, місія нашого журналу — сприяти фаховій дискусії та пошуку рішень для забезпечення доступу до правосуддя — набуває особливої ваги. Цей випуск продовжує нашу традицію, пропонуючи глибокий аналіз як нагальних проблем, спричинених геополітичними кризами, так і важливих тенденцій у розвитку процесуального права.

Центральною темою першого блоку публікацій є глибокий та багатогранний аналіз впливу збройних конфліктів, державної агресії та тероризму на міжнародне право та права людини. Ми наполегливо рекомендуємо звернути увагу на такі роботи:

Стаття «Цінність безпеки людини та правові засоби її реалізації в контексті збройної агресії Російської Федерації проти України» авторок ***Наталії Раданович* та Світлана Синчук*** є фундаментальним дослідженням, що аналізує концепцію людської безпеки як правової цінності в умовах повномасштабної війни. Автори розглядають, як ця доктрина трансформується та знаходить своє втілення в національному законодавстві та практиці конституційного судочинства України, що є надзвичайно актуальним для розуміння сучасних механізмів захисту прав людини.

В своєму дослідженні «Право жертв тероризму на компенсацію згідно з принципом юрисдикційного імунітету іноземної держави» ***Алаа Еддін Зольфакар*** піднімає одне з найскладніших питань сучасного міжнародного права — можливість притягнення до відповідальності держав за акти тероризму всупереч принципу юрисдикційного імунітету. Аналіз винятків в законодавстві США, Канади та інших юрисдикціях робить цю статтю обов'язковою для прочитання юристам-міжнародникам, які працюють над питаннями компенсації для жертв агресії.

Доповнює цей блок статей провокативне дослідження "Законність шпигунства в мирний час" авторів Фаваз Наджем та Абдельнасер Альджахані. Автори аналізують шпигунську діяльність на перетині принципів державного суверенітету, права на приватність та норм міжнародного права. Ця робота змушує по-новому поглянути на «сірі зони» у відносинах між державами та їхній вплив на правовий порядок.

Як завжди, серед опублікованих у цьому номері статей, ми з гордістю представляємо кілька тих, що присвячені актуальним питанням процесуального права, зокрема арбітражу та цифровізації правосуддя. Ці матеріали мають виняткову практичну та теоретичну цінність для нашої аудиторії.

Робота «Виконання іноземних арбітражних рішень у Казахстані: порівняльно-правовий аналіз європейських та азійських механізмів» ***Азамата Нуртана та Майгуль Абілової*** представляє значний інтерес для практикуючих юристів та науковців, що спеціалізуються на міжнародному арбітражі. Порівняльний аналіз

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механізмів виконання арбітражних рішень у Казахстані на тлі європейських та азійських практик пропонує цінні висновки для розвитку регіональної арбітражної інфраструктури.

У статті «Процесуальні правила для смартсудочинства в ОАЕ: прагнення та реальність» автора ***Адель Салем Аллузі*** досліджується інноваційна тема «розумних судових процесів». Аналіз концептуальних основ та операційної рамки цифрового судочинства в ОАЕ запрошує до дискусії про майбутнє правосуддя, його переваги та виклики, пов'язані з переходом до цифрового формату.

Нарешті, глибоке порівняльне дослідження «Арбітраж без угоди за правилами ICSID: порівняльне дослідження з єгипетською та катарською правовими системами» авторів ***Тарек Гомаа Ель-Саєд Рашед*, Ахмед Юссеф Аль-Емаді та Самір Шаабан Салех*** розглядає складну доктрину юрисдикції ICSID за відсутності прямої арбітражної угоди. Ця стаття є незамінною для фахівців у галузі міжнародного інвестиційного права.

Ми переконані, що представлені в цьому номері дослідження стануть джерелом нових ідей та стимулюватимуть подальші наукові дискусії.

Крім того, ми раді поділитися з вами важливою стратегічною новиною, що ознаменує новий етап у розвитку нашого видання.

Журнал **Access to Justice in Eastern Europe (AJEE)**, заснований у 2018 році, мав на меті створити унікальний майданчик для висвітлення та обговорення регіональних особливостей забезпечення доступу до правосуддя. Наша місія полягала в тому, щоб надати форум для науковців, де вони могли б ділитися результатами досліджень щодо реформ судової системи та цивільного процесу в країнах Східної Європи, таких як Україна, Польща, Румунія та інші.

Ми обрали таку спрямованість, враховуючи унікальне поєднання спадщини пострадянської правової доктрини, впливу західного права та законодавчої апроксимації до права ЄС. Ця специфіка створила виняткову модель розвитку, яка потребувала окремого наукового осмислення. За ці роки численні дослідження, присвячені питанням європейської інтеграції та судовим реформам у цьому контексті, підкреслили правильність обраного нами напряму.

Водночас, за останні роки ми спостерігаємо зростання глобального інтересу до питань доступу до правосуддя, незалежно від країни чи регіону. Прагнення до справедливого судового розгляду та ефективного захисту прав людини є загальновизнаними та універсальними цінностями, що підтверджується такими міжнародними документами, як Загальна декларація прав людини, Міжнародний пакт про громадянські та політичні права, Конвенція про права дитини та інші. Більшість країн світу є сторонами цих договорів, що робить їхні принципи основою для забезпечення єдиних підходів до прав людини в глобальному масштабі.

Ми бачимо суттєве збільшення кількості якісних досліджень, присвячених питанням доступу до правосуддя та захисту прав, з різних куточків світу. Порівняльні дослідження є особливо цінними, оскільки вони дають змогу виявити сильні та слабкі сторони в реалізації популярних підходів у різних правових системах. Це стало можливим завдяки внеску авторів з країн Європи та Азії, зокрема, з Саудівської Аравії, Об'єднаних Арабських Еміратів, Казахстану, В'єтнаму та інших. Їхні публікації є особливо важливими, адже вони демонструють цінне поєднання різних правових та релігійно-культурних традицій, яке сприяє глибшому розумінню механізмів захисту прав.

Безумовно, правові системи та культурно-історичні традиції в наших регіонах можуть суттєво відрізнятися. У цьому різноманітті полягає найбільша цінність — ми вчимося одне в одного, розширюємо свій світогляд і виховуємо повагу до іншої точки зору. Поєднання різних підходів допомагає нам краще розуміти виклики та знаходити ефективні рішення для забезпечення доступу до правосуддя в глобальному масштабі.

Нарощуючи глобальну аудиторію та розширюючи коло авторів, ми водночас не хочемо втрачати унікальну ідентичність AJEE. З огляду на це, логічним і стратегічним кроком є створення **серії журналів «Access to Justice»**. У цій структурі **AJEE** збереже свою оригінальну сфокусованість на Східній Європі, а до неї додадуться нові видання: **Access to Justice in the Middle East (AJME)** та **Access to Justice: Global Edition (AJGE)**. Ці три видання, працюючи разом, сприятимуть поширенню нових знань та результатів досліджень, охоплюючи ширшу географію.

Ми раді зростанню кількості фахівців з різних країн світу серед наших авторів, рецензентів та членів редколегії. Завдяки їхнім зусиллям ми змогли забезпечити ефективний публікаційний процес та високу якість оцінки публікацій. З усією нашою відданою командою ми готові зробити посильний внесок у розвиток і поширення досліджень, присвячених питанням доступу до правосуддя, та раді вітати подальше розширення сфери наших видань.

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RESEARCH ARTICLE

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Research Article

THE VALUE OF HUMAN SECURITY AND LEGAL MEANS OF ITS REALIZATION IN THE CONTEXT OF THE ARMED AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE

Nataliia Radanovych* and Svitlana Synchuk

ABSTRACT

Background: *The armed aggression of the Russian Federation against Ukraine and within Ukraine makes the issue of security as a universal human and legal value particularly relevant. Ukrainian legislation defines the concept of national security and links it, among other things, to the protection of vital human interests, safe living conditions, and well-being. This prompts an examination of the phenomenon of human security in view of: 1) the dependence of collective security on external factors, especially under martial law, and 2) the influence of internal factors on individual capabilities, particularly those related to national defence procedures.*

Methods: *The study is based on a system of methods subordinated to a single natural law conceptual research approach, which serves to substantiate the scientific hypothesis that human security is understood as a component of a complex value—the value of the human personality, primarily in terms of its legal protection and development in conjunction with the value of freedom.*

Results and conclusions: *Based on the results of the study, it was found that social relations related to the embodiment of the value of human security are subject to a general permissive type of legal regulation. Aimed at enabling the "general freedom of action" of a person, this type of regulation becomes a guideline and criterion for assessing legislation and legal practice, in particular, legal means that shape the content and scope of constitutional rights that mediate human protection procedures, such as the right to judicial protection. At the same time, the analysis of the practice of Ukraine's constitutional jurisdiction illustrates examples of testing such legal means (justified from the standpoint of preserving and expanding the scope of freedom) in the course of examining issues of compliance with the principles of the non-exhaustiveness of human and civil rights and the prohibition of narrowing the content and scope of existing rights.*

1 INTRODUCTION

The armed aggression of the Russian Federation against Ukraine and in Ukraine has made the issue of security a universal human and legal value extremely relevant. The legislation of Ukraine defines the concept of national security and associates it with the protection of state sovereignty, territorial integrity, democratic constitutional order and other national interests of Ukraine from real and potential threats, and such interests include vital interests of a person, society and the state, the realization of which ensures Ukraine's state sovereignty, its progressive democratic development, and safe living conditions and well-being of its citizens.[1]

This context prompts the study of the phenomenon of individual security, which, on the one hand, is dependent on collective security, and on the other hand, remains an individual social value that the state professes at the level of its main duty (to ensure human rights and freedoms and decent living conditions). This leads to the study of individual security, which, on the one hand, is dependent on collective security. This is relevant to resolving armed conflicts[2] and terrorist threats.[3] On the other hand, security remains an individual social value that the state professes at the level of its main duty (to ensure human rights and freedoms and decent living conditions).

Therefore, the value of human security is determined by external factors, especially in martial law, as well as by internal factors determined by the specifics of national legal regulation. This specificity is primarily related to national defence procedures, including judicial ones.[4]

2 METHODOLOGY

The methodological basis of the study is a system of conceptual research approaches, general scientific, group and special research methods. These guided the direction of the study, the criteria for selecting empirical material and the interpretation of results.

1 Law of Ukraine no 2469-VIII of 21 June 2018 'On the National Security of Ukraine' [2018] Official Gazette of Ukraine 55/1903 <https://zakon.rada.gov.ua/laws/show/2469-19> accessed 10 April 2025.

2 David Andersen-Rodgers and Kerry F Crawford, *Human Security: Theory and Action* (Peace and Security in the 21st Century, 2nd edn, Rowman & Littlefield, 2022).

3 Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) pt 5.

4 Iryna Izarova, Oksana Uhrynovska and Yuliia Hartman, 'Procedural Issues in Compensation Cases: Insights from Court Practice in Ukraine' in Silviu Nate (ed), *Ukraine's Journey to Recovery, Reform and Post-War Reconstruction: A Blueprint for Security, Resilience and Development* (Contributions to Security and Defence Studies, Springer 2024) 119, doi:10.12688/f1000research.136162.1.

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2.1. Conceptual Research Approaches

The following main approaches were used:

- *Dialectical approach* — to form an understanding of the value of human security in terms of its legal protection and development in relation to the value of freedom.
- *Anthropological approach* — to identify the legal grounds for extending the general permissive type of legal regulation and its mechanisms to social relations related to the realization of human security, viewed as the main subject of the right to development.
- *Personalist (human-centred) approach* — to establish the role of the constitutional jurisdiction body of Ukraine in assessing the legal means of legislative fixation from the perspective of preserving and maximising the scope of human freedom.

2.2. General Scientific Research Methods

These methods include:

- *Descriptive method* — to characterise the security of law as a value within the framework of which Ukraine shapes its foreign policy, in particular by joining international agreements that expand legal opportunities for compensation for damage and any losses caused by the aggression of the Russian Federation against Ukraine and in Ukraine.
- *Systemic and structural method* — to understand legal regulation of the general permissive type on the basis of its components - general freedom of action and appropriate legal means of its formalisation.
- *Structural-functional method* — to clarify the nature of the right to development and identify its two aspects: dynamic (active manifestation) and static (passive manifestation).
- *Methods of qualitative and quantitative analysis* — to formulate ideas about the main legal means of shaping the content and scope of constitutional rights and freedoms, including the right to judicial protection.
- *Synthesis method* — to derive a certain algorithm, a legal calculation of freedom by the Constitutional Court of Ukraine in the course of its activities as a "negative legislator" or official interpreter of the Basic Law of Ukraine.
- *Classification method* — to identify certain groups of positions of the Constitutional Court of Ukraine related to problematic issues of the realization of the right to judicial protection.
- *Social deterministic method* — to study human security in the direction of interdependence of various characteristics of the essence of the human personality as a single and complex social value.
- *Factor analysis method* — to identify the impact of martial law in Ukraine on the process of preserving the content and scope of the right to judicial protection.

2.3. Group Methods

The group methods include *the method of specific sociological research*, which allowed to form an appropriate empirical basis for the study, in particular, to select the legal positions of the Constitutional Court of Ukraine which illustrate its analysis of the content and scope of the constitutional right to judicial protection.

2.4. Special Scientific Methods

- *Formal legal method* — to illustrate possible ways of implementing the value of human security within the existing national legal order, in particular, based on the practice of the constitutional justice body in Ukraine.
- *Interpretation of legal provisions* — to analyse the content of a number of concepts that determine the logic of the study, such as "security", "general freedom of action", "right to judicial protection", and "justice".
- *Comparative legal method* — to draw on the practice of constitutional courts of European countries, in particular, the Federal Republic of Germany, to improve the legal guarantee of the value of security.
- *General theoretical method* — to reveal the nature of security as a legal value. This method uses a *modelling method* that links the phenomena of "value", "security", "right to protection" and "general permissive legal regulation" into a single construct.

The combination of these approaches and methods made it possible to obtain reliable and substantiated conclusions and results.

3 HUMAN SECURITY AS A VALUE

Values form the ontological basis of culture, politics, and law in modern states. This is evidence of the realization of the idea of civil society, which expresses not narrow group interests or a position of power but demonstrates the openness and democratic nature of its structures, as well as its interaction with the rule of law.[5]

The constitutional recognition of a human being as the highest social value determines the axiological status of his or her basic existential characteristics, such as life and health, honour and dignity, inviolability and security.[6] As can be seen, security closes the circle of the defining components of the essence ("core") of the human personality, as it triggers their protection mechanism. First, this follows from the understanding of security as a state of

5 Oksana V Hryshchuk, *Constitutional Values: Philosophical and Judicial Aspects* (2nd edn, Vaite 2020) 11.

6 Constitution of Ukraine of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 10 April 2025.

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protection of a person from the risk of harm,[7] which is crucial for the constructs "national interests of Ukraine" and, consequently, "national security of Ukraine."[8]

In the context of human security, Ukraine's accession to the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine,[9] established by Resolution CM/Res(2023)3 of the Committee of Ministers of the Council of Europe, adopted on 12 May 2023 at the 1466th meeting of the Deputy Ministers, can be considered a state of human security.[10] The Resolution is based on:

- *Acts of the United Nations General Assembly*, according to which the Russian Federation should be held legally responsible for the consequences of all its internationally wrongful acts in or against Ukraine, including reparation and any damage caused by such acts, and in this regard recognises the need to establish an international reparation mechanism and an international register of damages in cooperation with Ukraine.[11]
- *Acts of the Parliamentary Assembly of the Council of Europe*, which reiterated its call on member states to establish an international compensation mechanism and, as a first step, to establish an international register of damages to ensure timely compensation to victims of the internationally wrongful acts of the Russian Federation in Ukraine or against Ukraine.[12]

Currently, the following categories of applications are open for submission to the Register:

"A1.1 Forced internal displacement A2.1 Death of a close family member A2.2 Disappearance of a close family member A2.3 Serious bodily injury A2.4 Sexual violence A2.5 Torture or inhuman or degrading treatment or punishment A2.6 Deprivation of liberty A2.7 Forced labour or service A3.1 Damage or destruction of residential real estate."[13]

7 National Standard of Ukraine, *Occupational Safety: Terms and definitions of fundamental conceptions* (DSTU 2293: 2014) (Ministry of Economic Development and Trade of Ukraine 2015).

8 Law of Ukraine no 2469-VIII (n 1).

9 Law of Ukraine no 3432-IX of 8 November 2023 'On Ukraine's Accession to the Extended Partial Agreement on the Register of Damages Caused by the Aggression of the Russian Federation against Ukraine' [2024] Official Gazette of Ukraine 2/8.

10 Resolution of the *Committee of Ministers* CM/Res(2023)3 of *12 May 2023 on the* establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine <https://search.coe.int/cm?i=0900001680acc3f9> accessed 10 April 2025.

11 UN General Assembly Resolution ES-11/5 of 14 November 2022 Furtherance of Remedy and Reparation for Aggression against Ukraine <https://docs.un.org/en/A/RES/ES-11/5> accessed 10 April 2025.

12 Parliamentary Assembly of the Council of Europe Resolution 2482 (2023) On the Legal and Human Rights Aspects of the Aggression of the Russian Federation against Ukraine <https://pace.coe.int/en/files/31620> accessed 10 April 2025.

13 *Register of Damage for Ukraine (RD4U)* (Council of Europe 2022) <https://www.rd4u.coe.int/uk/submit-a-claim> accessed 10 April 2025.

At the same time, the issue of the unlawfulness of the damage caused by the aggression of the Russian Federation is considered, as evidenced by the materials of its discussions,[14] in the plane of the relevant presumption, which serves as a guarantee of the protection of human rights.

The analysis of the above categories demonstrates the close (interdependent) connection between human security (as its protection) and the values of life, health, honour, dignity, inviolability, which are clearly formalised in a number of the following constitutional provisions, including:

- "Everyone has the right to protect his or her life and health, and the life and health of other people from unlawful encroachments" (Article 27);
- "Everyone shall be guaranteed judicial protection of the right to refute false information about himself or herself and members of his or her family..., as well as the right to compensation for material and moral damage caused by the collection, storage, use and dissemination of such false information" (Article 32)
- "Everyone shall be guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. The exercise of these rights may be restricted by law ... to protect the reputation or rights of others" (Article 34);
- "Everyone has the right to proper, safe and healthy working conditions" (Article 43);
- "Citizens have the right to social protection" (Article 46);
- "Everyone has the right to an environment safe for life and health" (Article 50);
- "...the opportunity to defend themselves personally and to have legal assistance from the moment of detention" (Article 29).

The Constitutional Court of Ukraine has also spoken out on this issue. Its legal positions stand in normative unity with the provisions of the Constitution of Ukraine interpreted in these decisions and become direct regulators of public relations—particularly in determining the content and scope of constitutional rights and freedoms.[15] Thus, when examining the problematic issues of protecting dignity and ensuring decent living conditions in the context of the constitutional provision that "the State shall protect the rights of consumers" (Article 42), the Constitutional Court of Ukraine pointed out the importance of the strategic course for Ukraine's full membership in the European Union, as defined in the Basic Law of Ukraine. It stressed that "Ukraine will ensure a high level of consumer protection through the creation and functioning of a mechanism for the

14 Constitutional Court of Ukraine, 'Register of damages caused by the Russian aggression against Ukraine: mandate, functions and categories of claims: Lecture' (*Judiciary of Ukraine*, 6 March 2025) <https://ac.lg.court.gov.ua/press/news/1768393/> accessed 10 April 2025.

15 Case no 1-170/2018(1114/18) *On the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance with the Constitution of Ukraine (constitutionality) of the provisions of the sixth sentence of part one of Article 13 of the Law of Ukraine "On Psychiatric Care"* Decision no 13-r/2018 (Constitutional Court of Ukraine, 20 December 2018) [2019] Official Gazette of Ukraine 7/229.

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exercise and protection of consumer rights. A component of such a mechanism is a jurisdictional judicial form of consumer protection, within which consumers should be provided with access to justice and ensure the effectiveness of judicial protection of their rights and interests"[16].

This connection is also discussed in legal doctrine, in particular as a three-element structure of the concept of security, which includes the following components:

1) physical and psychological safety of a person (safety of the body: physical and psychological health);

2) positive connection with others (guaranteed receipt of assistance);

3) respect for freedom of realization (freedom to choose self-realization).[17]

Therefore, from the perspective of human security (protection), the amendments to the Criminal Code of Ukraine, according to which behaviour related to the fulfillment of the duty to protect the Motherland, independence and territorial integrity of Ukraine is not considered criminal (namely, acts committed under martial law or during an armed conflict aimed at repelling and deterring the armed aggression of the Russian Federation or another country, even if they caused harm to the life or health of the person carrying out such aggression, or caused damage to law enforcement interests, in the absence of signs of torture or the use of means of warfare prohibited by international law, other violations of the laws and customs of war, as provided for by international treaties ratified by the Verkhovna Rada of Ukraine) (Article 43[1]).[18]

The above illustrates the understanding of human security as a component of a complex value—the human personality. This raises the issue of legal support for such value, determining the appropriate legal means, such as legal permissions, obligations, and prohibitions. The state chooses the appropriate type of legal regulation in a particular area of social relations to determine its use.

16 Case no 3-88/2021(209/21, 47/22, 77/23, 188/23) *On the constitutional complaints of Doroshko Olha Yevhenivna, Yevstifeev Mykyta Ihorovych, Kushaba Ivan Petrovych, Yakimenko Volodymyr Petrovych on the compliance with the Constitution of Ukraine (constitutionality) of paragraphs 1, 5 of part six of Article 19, paragraph 2 of part three of Article 389 of the Civil Procedure Code of Ukraine (regarding the guarantee of the right to judicial protection in minor disputes)* Decision no 10-r(II)/2023 (Constitutional Court of Ukraine, 22 November 2023) [2024] Official Gazette of Ukraine 6/285

17 Olesia O Borysova, 'Concepts and Models of Human Security in the Ukrainian and International Legal Field: Theoretical and Legal Analysis' (2022) 2 Juridical Scientific and Electronic Journal 10, doi:10.32782/2524-0374/2022-2/1.

18 Law of Ukraine no 2124-IX of 15 March 2022 'On Amendments to the Criminal Code of Ukraine and Other Legislative Acts of Ukraine to Determine the Circumstances that Preclude Criminal Illegality of an Act and Provide Combat Immunity in the Conditions of Martial Law' [2022] Official Gazette of Ukraine 33/1724.

4 THE VALUE OF HUMAN SECURITY IN THE FIELD OF GENERAL PERMISSIVE TYPE OF LEGAL REGULATION

When choosing the type of legal regulation in a particular area of social relations, the choice is guided by its addressee, i.e., the characteristics of the subject to whom such regulation will apply.

Security is primarily associated with the value of the human personality, positioned within the framework of international legal standards as the main subject of development—a comprehensive economic, social, cultural and political process aimed at continuously improving the well-being of the entire population and all individuals on the basis of their active, free and constructive participation in development and in the fair distribution of the benefits created in the course of it.[19]

According to scholars, development is about overcoming various forms of unfreedom[20] and thus establishing security. This position of the conceptual unity of security and human development is actively defended in doctrinal sources.[21]

Hence, the understanding of a person as a free "active participant and beneficiary of the right to development,"[22] and, consequently, the nature of this right is characterised as:

1) A comprehensive right—"The right to development is a composite right to a process of development; it is not just an umbrella right or the sum of a set of rights. The integrity of these rights implies that if any one of them is violated, the whole composite right to development is also violated";[23]

2) A right characterised by dynamic manifestation (human activity) and static manifestation (acceptance, receipt by a person of certain benefits necessary for his/her development and security). Researchers here demonstrate a broader view of human security that includes the conditions necessary for people to live free from serious threats to their lives and dignity, including access to resources, participation in governance, and protection of fundamental rights.[24]

19 UN General Assembly Resolution 41/128 of 4 December 1986 Declaration on the Right to Development <https://digitallibrary.un.org/record/126476?ln=en&v> accessed 10 April 2025.

20 Amartya Sen, *Development as Freedom* (OUP 1999) XII.

21 Des Gasper, 'Securing Humanity: Situating "Human Security" as Concept and Discourse' (2005) 6(2) Journal of Human Development 221.

22 UN General Assembly Resolution 41/128 (n 19).

23 Stephen P Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal 149.

24 Taylor Owen, 'Human Security – Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition' (2004) 35(3) *Security Dialogue* 373, doi:10.1177/0967010604047555.

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This approach is based on human rights and therefore aims to ensure that all people can claim their rights and empower themselves, although its implementation often faces resistance due to competing political and economic priorities.[25]

Several aspects of the right to development arise when studying the realization of the value of human security. On the one hand, the state guarantees protection from external interference — i.e., the "freedom from" or "right to security" discussed in legal doctrine.[26] On the other hand, there is the dimension of "freedom for", namely, the constitutional provision that states: "Everyone shall have the right to protect his or her rights and freedoms from violations and unlawful encroachments by any means not prohibited by law" (Article 55).

This indicates the dependence of human security on the quality of freedom and therefore projects the direction of legal regulation in areas of social relations related to the embodiment of the value under study, which is reflected in the formula: "everything that is not prohibited by law is permitted," i.e., the general permissive principle. The essence of legal regulation under the general permissive type is to promote the maximum realization of freedom within the existing legal order.

As R. Dvorkin noted, "people have a right to what the law gives them, but they also have a right to equality of concern and respect in the design and administration of the political institutions that govern them."[27] Therefore, the task of legal science and practice is to find appropriate legal opportunities to show such care and respect. One such mechanism is the construction of a general permissive type of legal regulation.

The element-by-element approach to interpreting the general permissive type of legal regulation encompasses components such as general discretion and the appropriate means of its formalisation. This warrants closer examination.

4.1. General Freedom of Action as a Constitutional Principle

The issue of general freedom of action is actualised by the constitutional practice of Ukraine. The Constitutional Court of Ukraine has concluded that "human freedom (liberty) is a priori determinative and priority for respect by the state as a whole, state authorities, local self-government bodies, and other subjects", and that "the constitutional presumption of human freedom necessitates the necessity to justify any significant restriction of it by the state." Furthermore, "the Constitution of Ukraine guarantees freedom of movement and the free choice of place of residence, which is an

25 Paul Gready and Wouter Vandenhole (eds), *Human Rights and Development in the New Millennium: Towards a Theory of Change* (Routledge 2014) 77.

26 Tetiana P Kiriienko, 'Evolution of Approaches to Understanding the Concept of "Human Right to Security": Domestic and Foreign Doctrine' (2023) 1(77) Uzhhorod National University Herald, Series: Law 95, doi:10.24144/2307-3322.2023.77.1.15.

27 Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 93.

integral part of the broader context of personal freedom, namely the general freedom of the individual and their activities in all spheres of life."[28]

At the same time, the Constitutional Court of Ukraine distinguishes between ***general freedom of action***—which, along with human dignity, is contained in the catalog of constitutional human rights and is their essential content—and the right to liberty and security of person (Article 29 of the Basic Law of Ukraine) understood as freedom from arbitrary detention.[29]

In this sense, the Constitutional Court of Ukraine has continued the legal tradition established by the Federal Constitutional Court of Germany, which affirmed the general freedom of action (*Allgemeine Handlungsfreiheit)*, thereby expanding the scope of protection to include freedoms not covered by special constitutional rights.[30] Interpreting the concept of "free development of the personality" in the context of Article 2 (I) of the Basic Law of Germany, the Federal Constitutional Court of Germany noted that the understanding of development only in the basic sphere of the personality, which constitutes the essence of a person as a spiritual and moral person, makes it unclear how development in this basic sphere can violate the moral law, the rights of others or even the constitutional order of liberal democracy. It is these restrictions imposed on a person as a member of society that show that the Basic Law in Article 2(1) implies freedom of action in a comprehensive sense.[31] It has been stated that "the fundamental right provided for in Article 2(1) of the Basic Law grants general freedom of action in a comprehensive sense"[32] and that "by guaranteeing security, the state simultaneously guarantees the freedom of every person; for security is the basis of freedom and therefore its integral part. Compared to this, the encroachments on the fundamental rights of some persons related to systematic search, which are necessary to enhance freedom, are of only minor importance, since they, like all other persons, benefit from ensuring freedom."[33]

28 Case no 3-39/2021(86/21) *On the constitutional complaint of Abramovych Oleksii Volodymyrovych on the compliance of paragraph 2 of part two of Article 40 of the Housing Code of Ukraine (regarding discrimination in the exercise of the right to housing)* Decision no 5-r(II)/2022 (Constitutional Court of Ukraine, 22 June 2022) [2022] Official Gazette of Ukraine 56/3354.

29 Case no 3-88/2022(205/22, 114/24) *On the constitutional complaints of Ruslan Onishchenko, Dmytro Havryliuk on the compliance with the Constitution of Ukraine (constitutionality) of part six of Article 615 of the Criminal Procedure Code of Ukraine (case on guarantees of judicial control over the observance of the rights of persons in custody)* Decision no 8-r(II)/2024 (Constitutional Court of Ukraine, 18 July 2024) [2024] Official Gazette of Ukraine 73/4389.

30 Fritdhelm Hufen, *Staatsrecht II: Grundrechte* (9 aufl, CH Beck 2021) 241; Lothar Michael und Martin Morlok, *Grundrechte* (8 aufl, Nomos 2023) 263

31 Case 1 BvR 253/56 *Elfes* (Federal Constitutional Court, 16 January 1957) BVerfGE 6/32 <https://www.servat.unibe.ch/dfr/bv006032.html> accessed 10 April 2025.

32 Case 2 BvR 854/79 *Taubenfütterungsverbot* (Federal Constitutional Court, 23 May 1980) BVerfGE 54/143 <https://www.servat.unibe.ch/dfr/bv054143.html> accessed 10 April 2025.

33 Case 1 BvR 518/02 *Präventive polizeiliche Rasterfahndung* (Federal Constitutional Court, 4 April 2006) BVerfGE 115/320 <https://www.servat.unibe.ch/dfr/bv115320.html> accessed 10 April 2025; ibid, Dissenting opinion of Judge Haas.

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Thus, by linking the value of human security to the quality of freedom, the vector of legal regulation in social relations related to the realization of this value is oriented toward realizing the maximum amount of freedom.

The legal order in Ukraine is based on constitutional principles, according to which "no one may be forced to do anything that is not provided for by law," and "state and local self-government bodies and their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine" (Article 19). This position is further specified at the level of the State Human Development Strategy: "Taking into account the needs of human development, the task of the state should be to form an economic and social order that will be the basis for the realization of personal freedom and guarantee the realization of the right of citizens to individual development, individual responsibility and social security."[34]

This framework shapes the legal instruments that determine the general freedom of action. Specifically, it concerns the relevant legal permissions, obligations, and prohibitions, which form the content and scope of constitutional rights and freedoms of man and citizen,[35] essentially reflect the actual scope of freedom within these rights.

Human security, as a state of security, is associated with certain procedures for ensuring such a state, which are mediated by the right to defence. This right, in turn, presupposes general freedom of action (Article 55 of the Constitution of Ukraine). Among all types of protection, the decisive role is assigned to judicial protection, which follows from the characteristics of the rule of law principle,[36] and is affirmed in legal practice: "the right to judicial protection is a guarantee of the realization of other constitutional rights and freedoms, their assertion and protection through justice";[37] and "in a state governed by the

34 Decree of the President of Ukraine no 225/2021 of 2 June 2021 'On the decision of the National Security and Defense Council of Ukraine of 14 May 2021 "On the Human Development Strategy"' [2021] Official Gazette of Ukraine 45/2758.

35 Case no 3-243/2018(3254/18, 4772/18, 6232/18, 6820/18, 2945/19, 1821/19) *On the constitutional complaints of Pavlo Viktorovych Baishev, Olha Oleksandrivna Burlakova, Iryna Viliamivna Dats, Viacheslav Viktorovych Dedkovskyi, Mykhailo Vasylovych Zhelezniak, Liudmyla Anatoliivna Kozhukharova on the compliance of paragraphs 2, 3 of Section II "Final Provisions" of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Introduction of a Contract Form of Work in the Field of Culture and a Competitive Procedure for the Appointment of Heads of State" dated 28 January 2016 no 955-VIII as amended* Decision no 5-r(I)/2019 (Constitutional Court of Ukraine, 12 July 2019) [2019] Official Gazette of Ukraine 62/2162.

36 European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law* CDL-AD(2011)003rev (4 April 2011) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e> accessed 10 April 2025; Tom Bingham, *The Rule of Law* (Serhiy Holovaty ed, V Castelli and D Shkreba tr, Vaite 2024) 90.

37 Case no 1-12/2018(3911/15) *On the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance with the Constitution of Ukraine (constitutionality) of the of the provisions of Part one of Article 294, Article 326 of the Code of Ukraine on Administrative Offenses* Decision no 10-r/2018 (Constitutional Court of Ukraine, 23 November 2018) [2019] Official Gazette of Ukraine 2/60.

rule of law, recourse to court is a universal mechanism for protecting the rights, freedoms and legitimate interests of individuals and legal entities."[38]

Therefore, there is a need to study the legal permissions, obligations and prohibitions that formalise and instrumentally "accompany" the right to judicial protection.

5 THE RIGHT TO JUDICIAL PROTECTION AS A PLATFORM FOR INTERACTION OF THE VALUES OF HUMAN SECURITY AND FREEDOM: LEGAL INSTRUMENTS FOR ENSURING

By choosing a general permissive type of legal regulation in social relations related to the implementation of the value of human security through the exercise of judicial protection, a certain criterion is established for assessing the legal means that determine the right to judicial protection. Specifically, this concerns the relevant legal permissions, obligations, and prohibitions that form the content and scope of this right, and their ability to serve the "general freedom of action" of the individual.

The principal testing of such legal means takes place within the framework of constitutional proceedings, in particular in the process of analysing compliance with two principles: (1) the principle of the "non-exhaustiveness of human and civil rights and freedoms," which guarantees maximum freedom of action, and (2) "prohibition of narrowing the content and scope of existing rights and freedoms," or the principle of prohibition of violation of the very essence of human and civil rights and freedoms, the essential content of law,[39] which guarantees minimum freedom of action.

In this regard, two groups of legal positions of the Constitutional Court of Ukraine can be traced.

The first group concerns the assessment by the constitutional jurisdiction body of legal permissions, obligations, and prohibitions from the perspective of preserving and maximising the content and scope of the right to judicial protection— that is, the scope of freedom provided by this right. Several examples illustrate this:

38 Case no 3-9/2019(206/19) *On the constitutional complaint of Margo Polina Oleksandrivna regarding the compliance with the Constitution of Ukraine (constitutionality) of paragraph 1 of part five, part seven of Article 454 of the Civil Procedure Code of Ukraine* Decision no 2-r(II)/2022 (Constitutional Court of Ukraine, 6 April 2022) [2022] Official Gazette of Ukraine 34/1881.

39 Case no 1-17/2005 *On the constitutional submission of 51 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Article 92, paragraph 6 of Section X "Transitional Provisions" of the Land Code of Ukraine (case on permanent use of land plots)* Decision no 5-rp/2005 (Constitutional Court of Ukraine, 22 September 2005) [2005] Official Gazette of Ukraine 39/2490.

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- ***Assessment of legal permits*** **(as reasonable, justified according to the specified criterion):**
  The Court has held that "the establishment by law or contract of pre-trial settlement of a dispute by the will of the parties to legal relations is not a limitation of the jurisdiction of courts and the right to judicial protection".[40]

- ***Assessment of legal obligations*** **(as unreasonable):**
  "The subject of constitutional control in ... the case is part two of Article 3, subparagraph 9 of paragraph 1 of part two of Article 4 of the Law[41] in terms of the obligation of the plaintiff (recoverer in enforcement proceedings) to pay a court fee for filing an appeal and cassation appeal against a court ruling issued as a result of consideration of an appeal against a decision, action or inaction of a state enforcement officer or other official of the state enforcement service or a private enforcement officer during the execution of a judgment. The above indicates that the state has not created proper legal mechanisms for exercising the right of access to court, as well as the lack of real judicial control at the stage of execution of a court decision, since there is a complication in the practical exercise by a person (a creditor in enforcement proceedings) of his right of access to court, which is a violation of the constitutional principles of justice and the principles of civil procedural law".[42]

- ***Assessment of legal prohibitions*** **(as reasonable, justified):**
  "Assessing the constitutionality of paragraph 2 of part three of Article 389 of the Code[43] in terms of the proportionality of the legal means used therein, which establish a "filter" for cassation review of court decisions made by the courts of first instance and appellate courts, the Constitutional Court of Ukraine takes into account that subparagraphs a-d of this paragraph directly define the cases in

40 Case no 3-120/2021(273/21) *On the constitutional complaint of the Primary Trade Union Organization of the All-Ukrainian Trade Union of Science, Production and Finance Workers of PJSC "Arcelor Mittal Kryvyi Rih" regarding compliance with the Constitution of Ukraine (constitutionality), including the provisions of Article 7 of the Law of Ukraine "On the Procedure for Resolving Collective Labor Disputes (Conflicts)" (regarding the right to judicial protection during the resolution of a collective labor dispute)* Decision no 10-r(II)/2024 (Constitutional Court of Ukraine, 13 November 2024) [2024] Official Gazette of Ukraine 108/6893.

41 Law of Ukraine no 3674-VI of 8 July 2011 'On Court Fees' [2011] Official Gazette of Ukraine 59/2349 <https://zakon.rada.gov.ua/laws/show/3674-17> accessed 10 April 2025.

42 Case no 3-187/2023(351/23) *On the constitutional* complaint of Volodymyr Mykhailovych Lopushansky regarding the compliance with the Constitution of Ukraine (constitutionality) of Part two of Article 3, Subparagraph 9, Paragraph 1, Part two of Article 4 of the Law of Ukraine "On Court Fees" (case on the binding nature of a court decision) Decision no 6-r(II)/2024 (Constitutional Court of Ukraine, 13 May 2024) [2024] Official Gazette of Ukraine 53/3156.

43 Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 [2004] Official Gazette of Ukraine 16/1088 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 10 April 2025.

> which cassation proceedings should be opened despite the fact that the case is recognised as insignificant. Such cases, which are defined in paragraph 2 of part three of Article 389 of the Code, are, in particular, the presence in the cassation appeal of a question of law that is fundamental to the formation of a unified law enforcement practice (subparagraph "a"); significant public interest or exclusivity of its importance for the party to the case filing the cassation appeal (subparagraph "c"); classification of the case as insignificant by the court of first instance by mistake (subparagraph "d"). ... the "filter" for cassation review of court decisions made by the courts of first instance and appellate courts, established in paragraph 2 of part three of Article 389 of the Code, such as the insignificance of the case, is not an insurmountable obstacle to a person's access to the court of cassation». Therefore, paragraph 2 of part three of Article 389 of the Code contains adequate means of legislative regulation of procedural relations regarding the opening of cassation proceedings in minor cases."[44]

The second group of legal positions relates to the Constitutional Court of Ukraine's own interpretation of the right to judicial protection, which is the basis for such assessment. This group covers several aspects:

- ***The essence of the right to judicial protection*:**
  "The essential content of the right to judicial protection, established by part one of Article 55 of the Constitution of Ukraine, should be determined both in connection with the basic principles of legal proceedings, as defined by the provisions of part two of Article 129 of the Constitution of Ukraine, and taking into account the content of the right to a fair trial, as defined in the article of the Convention[45] and interpreted by the European Court of Human Rights".[46]

- ***The content (structure) of the right to judicial protection:***
  "The right to judicial protection established by part one of Article 55 of the Constitution of Ukraine should be considered in connection with the basic principles of legal proceedings defined by part two of Article 129 of the Constitution of Ukraine, and taking into account the right to a fair trial (which includes the obligation of the state to execute a court decision) guaranteed by Article 6 of the Convention".[47]

44 Case no 3-88/2021(209/21, 47/22, 77/23, 188/23) (n 16).

45 Law of Ukraine no 475/97-VR of 17 July 1997 'On the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms' [1997] Vidomosti of the Verkhovna Rada of Ukraine 40/263 <https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80#Text> accessed 10 April 2025.

46 Case no 3-173/2018(1186/18, 77/19) *On the constitutional complaints of Kremenchuksky Anatoliy Mykhailovych and Pavlyk Vladyslav Volodymyrovych regarding the compliance with the Constitution of Ukraine (constitutionality) of the provision of part ten of Article 294 of the Code of Ukraine on Administrative Offenses* Decision no 5-r(II)/2021 (Constitutional Court of Ukraine, 21 July 2021) [2021] Official Gazette of Ukraine 65/4139.

47 Case no 3-187/2023(351/23) (n 42).

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"The right to be heard as a component of the right to judicial protection is subject to realization until the state, its bodies or officials take any measures that may adversely affect a person, his/her rights and freedoms".[48]

"The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the finality of providing them with equal legal opportunities, both material and procedural, for the realization of the same rights and freedoms in terms of content and scope".[49]

- ***The scope of the right to judicial protection:***
  "Reduction of the term of court consideration and other procedural features of resolving minor disputes result in lower court costs for a person exercising his or her constitutional right to judicial protection, which generally facilitates access to justice and the very possibility of exercising the right guaranteed by the provisions of Article 55 of the Constitution of Ukraine".[50]

- ***Factors determining the limits of the right to judicial protection:***
  "The fundamental judicial protection of a person from arbitrariness during the deprivation of his/her liberty cannot be limited under any circumstances, even under martial law".

  "Under martial law, the role of the court is decisive in the system of institutional support of the rule of law, and judicial protection of human rights and freedoms from arbitrariness is of utmost importance; in such conditions, arbitrary detention of a person without a reasoned court decision is not allowed."

  "The principle of the rule of law, which is a fundamental principle of a democratic society, makes it mandatory to have judicial control over interference with the right of every person to freedom; the constitutional human right to judicial protection is a crucial guarantee among all human and civil rights and freedoms, judicial protection is considered the most effective guarantee of restoration of these rights and freedoms in case of their violation".[51]

48 Case no 3-88/2022(205/22, 114/24) *On the constitutional complaints of Ruslan Onishchenko, Dmytro Havryliuk on the compliance with the Constitution of Ukraine (constitutionality) of Part six of Article 615 of the Criminal Procedure Code of Ukraine (case on guarantees of judicial control over the observance of the rights of persons in custody)* Decision no 8-r(II)/2024 (Constitutional Court of Ukraine, 18 July 2024) [2024] Official Gazette of Ukraine 73/4389.

49 Case no 3-9/2019(206/19) (n 38).

50 Case no 3-88/2021(209/21, 47/22, 77/23, 188/23) (n 16).

51 Case no 3-111/2023(207/23, 315/23) *On the constitutional complaints of Bychkov Serhiy Andriyovych, Bay Anatoly Anatolyyovych regarding the compliance with the Constitution of Ukraine (constitutionality) of Part six of Article 176 of the Criminal Procedure Code of Ukraine* Decision no 7-r(II)/2024 (Constitutional Court of Ukraine, 19 June 2024) [2024] Official Gazette of Ukraine 64/3876.

> "Under martial law, the supremacy of the Constitution of Ukraine and its principles, in particular the rule of law, separation of powers, respect for human rights and freedoms, are the foundations of the democratic constitutional order of Ukraine. It is the Constitution of Ukraine in peacetime and under martial law that establishes the mechanism for introducing means of restricting human rights and freedoms.... The Constitution of Ukraine (Article 64, part two) and the acts that introduced martial law throughout Ukraine and, accordingly, the mechanism for restricting constitutional rights and freedoms under martial law, do not determine the possibility of restricting the rights and freedoms guaranteed in Article 29 (right to liberty and security of person), Article 55 (right to judicial protection), Article 62 (presumption of innocence), Article 63 (right to defense)".[52]

- ***The nature of justice itself*** "is inherently recognised as such only if it meets the requirements of justice and provides effective redress."[53]

Thus, the study of the specifics of legal regulation in the area of social relations related to the embodiment of the value of human security reveals a number of legal permissions, obligations and prohibitions that form the content and scope of the right to judicial protection. Such legal remedies introduced by the legislator in Ukraine are most often subject to constitutional control, with the Constitutional Court of Ukraine evaluating these remedies from the standpoint of preserving and maximising the scope of human freedom within the framework of judicial protection.

6 CONCLUSIONS

Human security is understood as a state of security, a component of a complex value—namely, the value of the human personality—which is dependent on the quality of freedom and therefore falls within the scope of the general permissive type of legal regulation. This type of regulation is understood as a legal construct identified by means of legal permissions, obligations, and prohibitions addressed to subjects of social freedom. Accordingly, this regulation is aimed at realising "general freedom of action", which serves as a guideline and criterion for assessing legislation, in particular legal means that shape the content and scope of constitutional human rights.

The above also applies to the right to judicial protection, which determines the procedures for protecting a person and, consequently, his or her security. The analysis of the practice of the constitutional jurisdiction in Ukraine, which adheres to the best European legal traditions, including those introduced by the Federal Constitutional Court of Germany, illustrates how legal mechanisms are tested. This is carried out through the course of

52 Case no 3-88/2022(205/22, 114/24) (n 48).

53 Case no 3-88/2021(209/21, 47/22, 77/23, 188/23) (n 16).

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studying the issues of compliance with the principles of "non-exhaustiveness of human and civil rights and freedoms" (which guarantees maximum freedom of action) and the "prohibition of narrowing the content and scope of existing rights and freedoms" (which guarantees minimum freedom of action). In this regard, two groups of legal positions of the Constitutional Court of Ukraine can be traced: the first concerns the assessment by the constitutional jurisdiction body of Ukraine of permissions, obligations, prohibitions as justified, reasonable (constitutional) in terms of preserving and maximising the content and scope of the right to judicial protection—that is, the scope of freedom provided by this right; the second concerns the Constitutional Court of Ukraine's own interpretation of the right to judicial protection, which determines such assessment.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЦІННІСТЬ БЕЗПЕКИ ЛЮДИНИ ТА ПРАВОВІ ЗАСОБИ ЇЇ РЕАЛІЗАЦІЇ В КОНТЕКСТІ ЗБРОЙНОЇ АГРЕСІЇ РОСІЙСЬКОЇ ФЕДЕРАЦІЇ ПРОТИ УКРАЇНИ

Наталія Раданович* та Світлана Синчук

АНОТАЦІЯ

Вступ. *Збройна агресія Російської Федерації проти України та на території України робить питання безпеки як універсальної людської та правової цінності особливо актуальним. Українське законодавство визначає поняття національної безпеки та пов'язує його, серед іншого, із захистом життєво важливих інтересів людини, безпечними умовами життя та благополуччям. Це спонукає до розгляду феномену безпеки людини з огляду на: 1) залежність колективної безпеки від зовнішніх факторів, особливо в умовах воєнного стану, та 2) вплив внутрішніх факторів на індивідуальні можливості, зокрема ті, що пов'язані з процесами національної оборони.*

Методи. *В основі дослідження є система методів, підпорядкованих єдиному природно-правовому концептуальному дослідницькому підходу, який слугує обґрунтуванню наукової гіпотези про те, що безпека людини розуміється як складова комплексної цінності — цінності людської особистості, насамперед з погляду її правового захисту та розвитку у поєднанні з цінністю свободи.*

Результати та висновки. *За результатами дослідження було встановлено, що суспільні відносини, пов'язані з втіленням цінності безпеки людини, підлягають загальнодозвільному типу правового регулювання. Спрямований на забезпечення «загальної свободи дій» особи, цей тип регулювання стає орієнтиром та критерієм для оцінки законодавства та юридичної практики, зокрема, правових засобів, що формують зміст та обсяг конституційних прав, що опосередковують процедури захисту людини, таких як право на судовий захист. Водночас, аналіз практики конституційної юрисдикції України ілюструє приклади апробації таких правових засобів (обґрунтованих з позиції збереження та розширення обсягу свободи) у ході розгляду питань дотримання принципів невичерпності прав людини і громадянина та заборони звуження змісту та обсягу наявних прав.*

Ключові слова: *правове регулювання, загальна свобода дій, право на розвиток, захист прав і свобод, право на судовий захист, гідні умови життя.*

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Research Article

DESIGNING AN EFFECTIVE MANDATORY MEDIATION MODEL: GUIDELINES FROM THE INTERNATIONAL JURISPRUDENCE AND NATIONAL CONSTITUTIONAL LIMITS

Agnė Tvaronavičienė*, Indrė Kasiulaitė and Yuliya Radanova

ABSTRACT

Background: *The general development of mediation in Europe has been inspired by a number of Council of Europe recommendations and strongly supported by the European Union. However, clear rules with respect to mandatory mediation have never been established, leaving it to national legislators to decide whether and in what form mandatory mediation may be introduced. This has sparked public debate over the last two decades in several Member States that have introduced mandatory mediation as a measure to foster mediation. While some Member States, like Italy and Lithuania, have already introduced specific models of mandatory mediation, others, like Romania and Bulgaria, continue to express doubts about the coexistence of mandatory mediation and the effective right to justice. This article aims to compare international and national approaches towards mandatory mediation, seeking to identify guidelines for national legislators planning to introduce mandatory mediation models.*

Methods: *The primary methods used in preparing this article combined systematic analysis of the scientific literature related to various forms and models of mandatory mediation with a doctrinal analysis of supranational legal regulation in the field of mandatory mediation. This was complemented by a thematic review of key judgments from the Court of Justice of the European Union and the European Court of Human Rights. The research was further enriched by an examination of the legal frameworks and constitutional case law of a few selected countries: Italy, Romania and Bulgaria. This approach involved mapping the examined sources according to their hierarchy—starting with binding EU-level instruments, followed by recommendatory ones, and moving vertically down to domestic statutes and relevant case law.*

The source selection criteria established at the outset of the research included whether the respective legal source explicitly referenced mandatory mediation and relied on Article 6 of the European Convention on Human Rights. Additionally, a qualitative content analysis was conducted on significant national constitutional case law from Italy, Romania and Bulgaria to identify a possible list of criteria for constitutionally unchallengeable mandatory mediation models that could be adopted by countries seeking new effective ways to foster mediation.

Results and conclusions: *The research identified common concerns regarding the introduction of mandatory mediation and proposed a set of criteria to ensure a balance between the mandate to mediate and the right to access to justice. It was concluded that, when narrowly tailored and supported by robust safeguards, mandatory or quasi-mandatory mediation can reduce court congestion and encourage earlier settlement without undermining fundamental procedural rights. The overarching European framework already provides adequate human-rights guidance; however, the remaining implementation gap lies in national design choices concerning exemptions, cost allocation, and mediator accreditation. Embedding an automatic yet non-binding first session, guaranteeing legal-aid coverage and interpreter services, aligning mediator-quality rules, and tracking compliance through digital case-management tools would make it less likely that mediation degenerates into a mere box-ticking exercise. Future research should observe the durability of settlements and overall user satisfaction to ensure that efficiency gains do not erode meaningful access to justice.*

1 INTRODUCTION

Mediation has gained significant traction in Europe as an effective dispute resolution mechanism, promoted by various legal instruments such as the Mediation Directive (2008)[1] and the numerous recommendations[2] adopted by the Council of Europe, followed by the Council of Europe Commission for the Efficiency of Justice (CEPEJ) documents[3] to

1 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 On Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136/3.

2 Recommendation No R(98)1 of the Committee of Ministers to Member States on Family Mediation (adopted 21 January 1998) <https://rm.coe.int/1680747b77> accessed 27 May 2025; Recommendation No R(99)19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters (adopted 15 September 1999) <https://rm.coe.int/0900001680910dbb> accessed 27 May 2025; Recommendation Rec(2001)9 of the Committee of Ministers to Member States on Alternatives to Litigation Between Administrative Authorities and Private Parties (adopted 5 September 2001) <https://rm.coe.int/16805e2b59> accessed 27 May 2025; Recommendation Rec(2002)10 of the Committee of Ministers to Member States on Mediation in Civil Matters (adopted 18 September 2002) <https://rm.coe.int/16805e1f76> accessed 27 May 2025.

3 CEPEJ, *Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters* (CEPEJ(2007)13); *Guidelines for a Better Implementation of the Existing Recommendation Concerning Family Mediation and Mediation in Civil Matters* (CEPEJ(2007)14); *Guidelines for a Better Implementation of the existing Recommendation on Alternatives to Litigation between Administrative Authorities and Private Parties* (CEPEJ(2007)15) <https://www.coe.int/en/

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encourage its proactive development. Fostering mediation enhances the efficiency of dispute resolution, reduces court workloads, saves money and, most importantly, contributes to increasing social harmony and societal prosperity.[4] However, in Europe, there are no ancient traditions of the wide application of mediation, and Member States must take active measures to foster its usage. Today, it is evident that soft measures such as education, accessibility, court fee reductions, etc., are not as effective[5] or as quick to produce results as the introduction of mandatory forms of mediation.[6] Several Member States have already implemented and benefit from **mandatory mediation (MM) models,**[7] **while others still have** doubts about the possible coexistence of mandatory mediation with the effective right to justice.[8]

MM, though lacking an universal definition, in general can be understood as a binding requirement for parties to a dispute, whether before or in the course of a court procedure, to attend an information session with a mediator or in some other ways to initiate

web/cepej/mediation> accessed 27 May 2025; CEPEJ, *Mediation Development Toolkit: Ensuring Implementation of the CEPEJ Guidelines on Mediation* (CEPEJ(2018)7rev) <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52> accessed 27 May 2025; CEPEJ, *Roadmap for Mediation Based on the CEPEJ-GT-MED Report on "The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation"* (CEPEJ(2018)8) <https://rm.coe.int/road-map-for-mediation-based-on-the-cepej-gt-med-report-on-the-impact-/16808c3fd5> accessed 27 May 2025; CEPEJ, *European Handbook for Mediation Law-making* (CEPEJ(2019)9) <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> accessed 27 May 2025; CEPEJ, *Guidelines on Designing and Monitoring Mediation Training Schemes* (CEPEJ(2019)8) <https://rm.coe.int/cepej-2019-8-en-guidelines-mediation-training-schemes/168094ef3a> accessed 27 May 2025; CEPEJ, Sector-specific *Mediation Awareness / Training Programmes* for judges, notaries and lawyers (2019) and for judicial officers (2021) <https://www.coe.int/en/web/cepej/mediation> accessed 27 May 2025; CEPEJ, *Study on the State of Play of Mediation in Administrative Disputes* (CEPEJ-GT-QUAL(2022)1rev) <https://rm.coe.int/cepej-gt-qual-2022-1rev-en-state-of-play-of-the-practice-of-mediation-/1680ab3db7> accessed 27 May 2025; CEPEJ, *Promoting Mediation to Resolve Administrative Disputes in Council of Europe Member States* (CEPEJ(2022)11) <https://rm.coe.int/cepej-2022-11-promoting-administrative-mediation-en-adopted/1680a95692> accessed 27 May 2025.

4 Giuseppe De Palo and Romina Canessa, 'Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union' (2015) 16(1) Cardozo Journal of Conflict Resolution 713; Giuseppe De Palo and others, *"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: Study* (European Parliament DG IPOL 2014).

5 Giuseppe De Palo and Bryan J Branon, 'Coalescing an International Consensus: Recent Developments Suggest Mandatory Elements May be Necessary to Save Courts and Litigants Time and Money' (2014) 32(4) Alternatives to High Cost Litigation 59.

6 Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation' (2011) 37(4) North Carolina Journal of International Law 981.

7 Shahla F Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Edward Elgar 2018).

8 Indrė Korsakoviene, Julija Radanova and Agne Tvaronaviciene, 'Mandatory Mediation in Family Disputes: An Emerging Trend in the European Union?' (2023) 53(2) Review of European and Comparative Law 67, doi:10.31743/recl.15707.

mediation to explore the potential benefits from applying it in the case, maintaining unrestricted right of the parties to leave the process. The development of various MM models across Europe has been underpinned by the provisions of the Mediation Directive and the emerging case law of the European Court of Human Rights (ECtHR)[9] and the Court of Justice of the European Union (CJEU),[10] stating that MM may be an effective tool to promote mediation if certain criteria are observed.[11]

However, on a national level, MM has sparked debates in various jurisdictions, raising concerns about voluntariness, access to justice and procedural safeguards. The Constitutional Courts of several member States have already been asked to assess the extent to which emerging national legislation establishing MM models is consistent with their own constitutions and fundamental right to justice. The Constitutional Courts of Bulgaria[12] and Romania[13] have found that their national MM models were an obstacle to effective access to justice, while the Constitutional Court of Italy[14] has found that such models, which require parties to mediate, generally do not undermine the right to justice.

The purpose of this article is to analyse the European and national legal frameworks and case law related to the MM and its compatibility with the right to access to court, with the aim of identifying the main rules and criteria for finding an efficient balance in this field. The methodology applied involves first charting the supranational legal acts, starting with binding EU instruments such as Directive 2008/52/EC, followed by relevant Council of Europe soft-law texts, and then moving to national implementing statutes. Only sources that expressly regulate MM and that refer to, interpret, or are tested against the access-to-

9 *Momčilović v Croatia* App No 11239/11 (ECtHR, 26 March 2015) <https://hudoc.echr.coe.int/eng?i=001-152990> accessed 4 April 2025; *Popadić v Serbia* App No 39094/09 (ECtHR, 30 August 2022) <https://hudoc.echr.coe.int/fre?i=001-219210> accessed 4 April 2025.

10 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (CJEU (Fourth Chamber), 18 March 2010) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0317> accessed 1 April 2025; Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare - Società Cooperativa* (CJEU (First Chamber), 14 June 2017) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0075> accessed 4 April 2025.

11 Cornelis Hendrik (Remco) van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-4.4-a000082.

12 Case No 11/2024 (Constitutional Court of the Republic of Bulgaria, 1 July 2024) <https://www.constcourt.bg/bg/case-660> accessed 10 July 2025.

13 Decision No 266 'On the unconstitutionality Exception of Provisions of Article 200 of the Civil Procedure Code, as well as those of Article 2 Paras (1) and (12) and Article 60^1 of Law no 192/2006 on the Mediation and Organisation of the Mediator Profession' (Constitutional Court of Romania, 7 May 2014) <https://legislatie.just.ro/Public/DetaliiDocument/159260> accessed 12 April 2025; Decision No 17 (Constitutional Court of Romania, 17 September 2018) <https://legislatie.just.ro/Public/DetaliiDocument/206036> accessed 12 April 2025.

14 Decision No 272 (Constitutional Court of the Italian Republic, 24 October 2012) <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2012&numero=272> accessed 14 April 2025.

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justice provisions of the European Convention on Human Rights (ECHR) were included, in order to narrow the scope of the analysis to legal texts specifically targeting the subject. This was then followed by a thematic review of related CJEU and ECtHR decisions in the field of MM, with a focus on identifying the main rules necessary to ensure a balance between MM and the right of access to a court. Subsequently, MM models adopted in Italy, Romania and Bulgaria were examined and briefly presented, with a focus on the national Constitutional Courts' decisions and legal challenges which they have introduced. The aim of this in-depth analysis is to highlight commonalities between the concerns shared by these countries regarding MM. The examination of doctrinal findings, judicial benchmarks and scholarly commentary culminated in reaching several conclusions about the existing trends in the international and national legal regulation and case law of MM in Europe and offering some proposals for a universally applicable model of MM.

2 THE LEGAL LANDSCAPE OF MANDATORY MEDIATION IN EUROPE: INTERNATIONAL STANDARDS AND JUDICIAL INTERPRETATIONS

2.1. Recommendations of the Council of Europe

The usage of alternative dispute resolution methods (ADR), including mediation, is widely encouraged by the recommendations of the Council of Europe. In its earliest Recommendation No. R(81)7, it was stated that Member States should take measures to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes, either before any court proceeding or in the course of it.[15] It was also recommended that judicial policy should encourage, where appropriate, the friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.[16] The broad usage of ADR was positioned as one of the measures for increasing access to justice and, more generally, enhancing the efficiency of national judicial systems.

Specifically, the Council of Europe provided Member States with Recommendations on family mediation and mediation in civil matters.[17] Acknowledging the special characteristics of family disputes and considering the potential of family mediation to satisfy the needs and the interests of the parties, it was recommended to introduce or promote family mediation.[18] This recommendation was complemented by a set of basic guidelines for the Member States, including a clear notion that mediation should not, in

15 Recommendation No R(81)7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (adopted 14 May 1981) <https://rm.coe.int/168050e7e4> accessed 27 May 2025.

16 Recommendation No R(86)12 on Measures to Prevent and Reduce the Excessive Workload in the Courts (adopted 16 September 1986) <https://rm.coe.int/16804f7b86> accessed 27 May 2025.

17 Recommendation No R(98)1 (n 2); Recommendation Rec(2002)10 (n 2).

18 Recommendation No R(98)1 (n 2).

principle, be compulsory.[19] However, this did not amount to a blanket rejection of MM in family cases, as specific forms were considered appropriate for promoting mediation. For example, Member States were recommended in individual cases to provide relevant information on mediation (for example, by making it compulsory for parties to meet with a mediator), thereby enabling the parties to consider whether mediation would be possible and appropriate. This can be interpreted to mean that, according to the Council of Europe, participation in the mediation process should not be mandatory, but parties may be obliged to familiarise themselves with the mediation process before or during judicial proceedings.[20]

The Recommendation on mediation in civil matters[21] reflected a more conservative approach towards mediation. A certain degree of precaution may be seen from such statements, such as: "Although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system."[22] Considerable attention was placed on the need to guarantee access to courts. In regard to MM, it was stated only that states should consider the extent, if any, to which agreements to submit a dispute to mediation may restrict the parties' rights of action. This recommendation relates not only to MM imposed by legal regulation (categorical mandatoriness) or judicial discretion, but rather to MM arising from contractual clauses or agreements between disputing parties to mediate.

In 2007, the European Commission for the Efficiency of Justice (CEPEJ) did not explicitly recommend measures directly concerning MM but provided some statements related to it. For example, it was stipulated that judges should be able to provide information or arrange information sessions on mediation for the litigants "<...> and, where applicable, invite the parties to use mediation and/or refer the case to mediation."[23] CEPEJ also encouraged Member States to use indirect measures, related to specific procedural sanctions, as stated that:

"Parties could be sanctioned if they fail to actively consider the use of amicable dispute resolution. For example, Member States may consider establishing a rule that parties normally entitled for reimbursement of their litigation costs in the civil or family dispute resolved by court judgment or decision do not receive full reimbursement if they have

19 ibid, para II, a.

20 It should be clarified, howe Recommendation No R(98)1er, that in the scope of this article, both the obligation to engage in mediation or participate in the mandatory initial informational session in all or certain categories of disputes defined by statutes before or after a court action has been filed, or the mandatory referral of a judge, will be used in the broadest sense of the term "mandatory mediation", even though the academic community defines these concepts differently. More about the emerging trends on different mandatory mediation, see: Korsakoviene, Radanova and Tvaronavičienė (n 8).

21 Recommendation Rec(2002)10 (n 2).

22 ibid.

23 CEPEJ, *Guidelines for a Better Implementation of the Existing Recommendation Concerning Family Mediation and Mediation in Civil Matters* (n 3) para 12.

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refused to go to mediation or if they failed to present the evidence that they have actively considered the use of amicable dispute resolution."[24]

To sum up, the Council of Europe recognises mediation and other ADR methods as effective tools for resolving civil and family disputes. It also views them as efficient means of reducing court workloads and increasing access to justice in general. While its recommendations and further documents do not restrict MM, they establish ground principles for maintaining a balanced relationship between various forms of MM and access to justice. MM information sessions and other forms of mandatory introduction of the disputants to mediation are permitted, whereas compelling parties to actively engage in the mediation process should not be mandatory.

2.2. The European Union Legal Framework on Mediation

The mediation policy of the European Union (hereinafter, the EU) has been significantly influenced by the position of the Council of Europe. The Mediation Directive, adopted in 2008, was primarily intended to promote mediation in cross-border disputes. However, this directive clearly allowed Member States to apply its provisions also to internal mediation processes. While implementing the Mediation Directive into their national law systems, the majority of Member States opted to apply this regulation to national disputes as well.[25]

In the Mediation Directive, the process of mediation is depicted as voluntary, while at the same time, the possibility of MM is also provided for. Article 5(2) of the Mediation Directive states that "is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."[26]

Almost the exact wording is chosen in the Directive 2013/11/EU on consumer ADR (the Consumer ADR Directive). While acknowledging that consumers can use ADR methods voluntarily, it similarly provides that this is "without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."[27]

These two identical provisions of EU law establish a general rule: MM is permissible so long as the fundamental right of access to a court is preserved. At first glance, this rule appears explicit—it can be interpreted as a guarantee that, if the MM procedure fails, the parties

24 ibid, para 49.

25 Jan Tymowski, *The Mediation Directive: European Implementation Assessment: In-depth analysis* (EPRS 2016) doi:10.2861/902931.

26 Directive 2008/52/EC (n 1).

27 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [2013] OJ L 165/63, art 1.

should always retain their fundamental right to refer their case to the court. Still, the MM process itself may, in certain disputes and under specific circumstances, be costly, time-consuming and ineffective. This raises the question of how an MM model should be arranged to guarantee a sufficient level of access to justice at all its stages. At least in part, the answer to this question can be found in the jurisprudence of the CJEU and the ECtHR.

2.3. CJEU Case Law on Mandatory Mediation

The CJEU has already ruled on MM in several judgements and established a list of criteria, which should be observed in seeking a balanced relationship between MM and the right to justice.

The most significant CJEU judgement in this field was delivered in *Alassini and Others* (the Alassini case).[28] In this case, the CJEU examined whether the Italian law requirement for the customers to attempt an out-of-court conciliation procedure with telecom providers before filing a claim to the court violated EU law, specifically in regard to the principle of adequate judicial protection. The Court acknowledged that imposing an additional procedure before accessing the courts could potentially infringe on the right to effective judicial protection. However, it reaffirmed that even fundamental rights are not absolute and may be restricted for legitimate objectives, provided that the essence of the right is not impaired.

In Alassini, the CJEU established a set of criteria related to the specifics of the mandatory extrajudicial settlement procedures necessary to follow:

1. The procedure must not result in a decision which is binding on the parties unless the parties agree.
2. It must not cost a substantial delay for the purposes of bringing legal proceedings.
3. It must suspend the period for the time-barring of claims.
4. It must not give rise to costs—or give rise to very low costs—for the parties.
5. It must be accessible by means other than exclusively electronic communication.
6. Interim measures must be available in exceptional cases where the urgency of the situation so requires.

It was concluded that if national legislation imposes a mandatory out-of-court settlement procedure, which fully meets the above-mentioned criteria, the principles of equivalence and effectiveness or the principle of effective judicial protection, are not violated or unproportionally restricted.

A few years later, in 2017, the CJEU revised the criteria in *Alassini* in *Menini and Rampanelli* (the Menini case).[29] The CJEU was approached with a question whether a requirement to mediate before reaching the court is in line with the Consumer ADR Directive, which

28 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others* (n 10).

29 Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare* (n 10).

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emphasises voluntary participation in ADR. The CJEU reaffirmed the *Alassini* approach, ruling that MM is permissible if it does not impede the consumer's right to access the judicial system. It repeated the *Alassini* criteria as the test for compatibility of an MM model with the right to justice.

In addition, the Court introduced two new criteria to consumer disputes:

1. Under the Consumer ADR Directive, consumers cannot be obliged to be represented by a lawyer in the ADR process. The Italian requirement for legal assistance in MM was found incompatible with Articles 8(b) and 9 of the Directive, which guarantee access to ADR without legal representation costs.
2. National rules cannot unduly restrict a consumer's ability to withdraw from mediation. Article 9(2) of the Consumer ADR Directive allows parties to exit the procedure at any time; therefore, a national law stating that a consumer needs special justification to withdraw from mediation contradicts EU law.

The CJEU has remained consistent in demanding a balance between mandatory ADR procedures and the protection of access to justice in its recent jurisprudence as well. In *Cajasur Banco SA v. JO* and *IM*,[30] the CJEU examined Spanish national law regulations on the requirement of consumers to make an out-of-court request to the trader before litigating an unfair contract term. Although this was not the central question in the case, the CJEU echoed the principle that pre-litigation requirements are justified only so long as they do not make the exercise of consumer rights significantly more difficult.

The most recent ruling in this field was delivered in *Investcapital Ltd v TK*.[31] The CJEU reaffirmed that national laws may introduce MM either before or after legal proceedings, provided that the right to justice is preserved. It has also stated an important clarification, noting that:

> "Article 5(2) of Mediation Directive read in conjunction with the principle of primacy of Union law, must be interpreted as meaning that: it does not preclude the courts of a Member State from disapplying a decision of the Constitutional Court of that Member State invalidating national legislation under which the admissibility of certain actions, which may fall within the scope of that directive, is subject to compliance, by the applicant, with the obligation to attend an information meeting on the advantages of mediation, where such a decision does not fall within the scope of that provision and cannot therefore be contrary thereto."[32]

Such an approach of the CJEU, according to Romanian and Bulgarian scholars, "<...> empowers Member States to adopt MM frameworks. The court indicated that requiring

30 Case C-35/22 *CAJASUR Banco SA v JO and IM* (CJEU (Fourth Chamber), 13 July 2023) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0035> accessed 4 April 2025.

31 Case C-658/23 *Investcapital* (CJEU (Seventh Chamber), 3 September 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202406067> accessed 4 April 2025.

32 ibid, para 1.

participation in an information session about mediation does not inherently conflict with EU law, thus encouraging a reconsideration of previously dismissed models."[33]

To sum up, CJEU case law confirms that MM may be applied in national legal systems if the adopted national models comply with the established criteria designed to ensure a balance between the mandatory nature of ADR procedures and the right to justice.

2.4. ECtHR Jurisprudence on the Admissibility of Mandatory Mediation

The ECtHR has consistently affirmed that the right of access to a court under Article 6(1) of the ECHR is fundamental, yet not absolute. Mandatory forms of ADR, including mediation, have been analysed as one of the possible restrictions to it.

In this case law, the ECtHR consistently stated that a lawful restriction on access to court may be imposed as long as it: 1) has a legitimate aim and 2) is proportionate. In *Ashingdane v. UK case*,[34] it was explained that legitimate limitations of the right of access to the courts must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It was stated that: "Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[35]

The concept of legitimate aim and the principle of proportionality in relation to mandatory ADR procedures in case law were systematically related to the proper administration of justice.[36] In *Momcilovic v. Croatia*, the Government of Croatia stated that "the purpose of the requirement to institute the friendly settlement procedure before bringing a claim for damages against the State in the competent civil courts aimed at allowing the parties to settle their dispute without the involvement of courts and to avoid long and expensive court proceedings with an intended effect of reducing the number of cases pending before the courts."[37]

ECtHR accepted that requiring a mandatory attempt to settle before filing a claim, pursued a legitimate aim of securing judicial economy and opened the possibility for the parties to settle their claims without the involvement of courts efficiently.[38] Settlement

33 Constantin-Adi Gavrila, Leonardo D'Urso and Julia Radanova, 'The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision' (*Kluwer Mediation Blog*, 14 October 2024) <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/> accessed 4 April 2025.

34 *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR, 28 May 1985) <https://hudoc.echr.coe.int/eng?i=001-57425> accessed 4 April 2025.

35 ibid, para 57.

36 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (FRA 2016).

37 *Momčilović v Croatia* (n 9) para 46.

38 ibid, para 46.

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procedures paused the limitation period and caused minimal delay. Summing up, this restriction on the right to a court did not impair Article 6, as it was legitimate and the adopted measures were proportionate.

A significant case for the development of ECtHR jurisprudence in the field of MM *was Popadić v. Serbia*, concluded with a final decision in 2022.[39] Serbian law mandated mediation in divorce disputes, and in this case, the Court emphasised the importance of the timeliness of mediation. The ECtHR did not condemn the application of mediation per se, respecting parties' autonomy in the process, but it criticised the excessive length of the procedure.

Specifically, the first court hearing was scheduled eight months after the filing was filed, largely due to the compulsory referral of the parties to mediation. The ECtHR concluded that, while the first-instance court could not be held responsible for the time dedicated to mediation, it was unacceptable that the court delayed taking further procedural steps for such an extended period.[40] This ruling implies that mediation should be integrated into judicial proceedings in such a way that does not cause undue delay. Moreover, where mediation is mandatory, the State has a duty to ensure a prompt process.

In *Vujica v. Croatia,*[41] the ECtHR examined a situation where Croatian courts failed to refer the parties to MM before deciding a family dispute. The applicant argued that this omission harmed the judicial process. The Court proclaimed that the purpose of MM before divorce is not only to reconcile spouses with the help of a trained professional but also to facilitate an agreement on the legal consequences of the divorce. The Court stated:

> "*In view of the importance of mandatory mediation before divorce for the (future) welfare of the children, the Court cannot accept that this procedure could be dispensed*."[42]

Accordingly, national courts must comply with laws requiring MM and refer parents to mediation.

It may be concluded that ECtHR case law indicates that MM can be applied before or during the judicial procedures, provided it pursues a legitimate aim and is proportionate. In ECtHR jurisprudence, the legitimate aim of mandatory ADR is primarily grounded in its role as a measure to improve the administration of justice and to promote amicable settlements.

Proportionality can be tested by identifying a few simple criteria. Such processes should not: 1) have a binding effect, 2) cause excessive delay, or 3) impose prohibitive costs. This implies that MM as such does not contradict Article 6 of the ECHR, but certain procedural aspects of the MM models may raise doubts if they fail to meet these criteria.

39 *Popadić v Serbia* (n 9).
40 ibid, para 90.
41 *Vujica v Croatia* App No 56163/12 (ECtHR, 8 October 2015) <https://hudoc.echr.coe.int/eng?i=001-157536> accessed 4 April 2025.
42 ibid, para 91.

MM stands at the intersection of improving the efficiency of justice and preserving fundamental rights. The balance can only be achieved by ensuring that MM complements the judicial process rather than undermines it. When designing new models of MM, it is necessary to clearly define their aim and ground their legitimacy. Having done so, it is vital to scrupulously assess whether the measures used to achieve this aim are proportionate to the restrictions applied. In other words, it is important to consider whether the social value of the expected result will outweigh the reservations made for the full realisation of the right to judicial protection.

3 COMPARATIVE ANALYSIS OF NATIONAL CONSTITUTIONAL COURT PRACTICES ON MANDATORY MEDIATION MODELS IN ITALY, ROMANIA, AND BULGARIA

In addition to being subject to international judicial review, in several European countries, MM models have also been scrutinised by national Constitutional Courts for their compliance with the constitutional provisions. Italy, Romania and Bulgaria have introduced MM schemes that faced significant criticism from the public, especially the legal community, primarily due to the potential violation of the access to courts. These concerns prompted referrals to the respective Constitutional Courts for examination. Analysing this national case law is particularly valuable, especially considering that it has developed alongside the jurisprudence of the ECtHR and the CJEU analysed in the previous chapter.

3.1. Italian Experience

The Italian model[43] referred to MM before court proceedings for a broad range of civil and commercial disputes, including property, inheritance, family business, banking, insurance, medical liability, landlord-tenant conflicts, consumer and other disputes. This MM in Italy faced criticism not only for the possible violation of the right of access to justice but also for excessive privatisation and concentration of dispute resolution within private mediation centres, as well as concerns about the quality of mediators' services. Mediators were granted the possibility, if parties failed to reach an agreement, either at their own discretion or upon request, to make proposals on the dispute's outcomes. Additionally, the system imposed highly punitive sanctions on parties who objected to the mediator's proposal but later succeeded in court.

The MM introduced by Legislative Decree No 28/2010 was annulled by the Constitutional Court in 2012 as unconstitutional on the grounds that the Government had exceeded its

43 Legislative Decree of the Italian Republic No 28 of 4 March 2010 'Implementation of Article 60 of Law No 69 dated 18 June 2009, Regarding Mediation Aimed at the Conciliation of Civil and Commercial Disputes' [2010] Gazzetta Ufficiale 53/1.

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legislative powers. The Constitutional Court ruled that Parliament did not provide the Government with an explicit mandate to introduce MM as a prerequisite before going to court. Thus, although the decision regarding the unconstitutionality of MM was primarily based on formal grounds, the Constitutional Court also relied on other arguments. It recognised that the European institutions explicitly support mediation as an effective voluntary ADR procedure, but not specifically MM. The Mediation Directive, therefore, could not be interpreted as supranational legislation authorising or obliging Member States to implement mandatory MM schemes. Moreover, while MM had been applied to a narrow range of civil disputes in Italy before and was not found to be unconstitutional, the broad scope introduced by Decree No. 28/2010 raised fresh constitutional concerns. These arguments were sufficient to declare the existing mediation regulation as unconstitutional. However, the Constitutional Court recognised that mediation could coexist with litigation, provided that the parties retain the ultimate right to pursue their claims in court.

Following this constitutional rejection in 2012,[44] the Italian MM model was revised to address the potential infringement of the right to court access. Law No. 98 of 9 August 2013[45] introduced significant changes: the obligation to participate in mediation became an obligation to initiate a mandatory initial mediation session, with nominal fees of €40 or €80 per party; the mediation process was limited to 30 days; parties were granted the right to apply to the court after an unsuccessful initial mediation meeting; participation of legal representatives in mediation was mandated; and mediated agreements, once approved by lawyers, were enforceable.

The resistance to the Italian MM model largely stemmed from intense opposition by lawyers, which eventually led to constitutional challenges.[46] As noted by G. Conte, the Italian experience demonstrated that to fully exploit the potential of mediation, it cannot be achieved by merely legislating MM.[47] It demands the engagement of key stakeholder groups—lawyers, enterprises and the public—to raise awareness of the benefits of ADR. The Constitutional Court's previous decision was not against MM per se. Alongside emerging international CJEU jurisprudence, these developments signalled to the Parliament of Italy the need to navigate formal legal obstacles while continuing to develop the MM regulatory framework.

The Italian experience highlights that not only the content and form of the MM model are important, but also the manner in which it is introduced to society. To avoid widespread opposition, it is necessary to collaborate with lawyers during the legislative process and

44 Giuseppe Conte, 'The Italian Way of Mediation' (2014) 6 Yearbook of Arbitration & Mediation 180.

45 Law of the Italian Republic No 98 of 9 August 2013 'Conversion into Law, with amendments, of Decree-Law No 69 dated 21 June 2013, Containing Urgent Provisions for the Relaunch of the Economy' [2013] Gazzetta Ufficiale 194/1.

46 Andrea Zappalaglio, 'Recent Developments Concerning Mandatory Mediation in Italy: Some Comments on a Troubled History' (*SSRN*, 11 August 2013) doi:10.2139/ssrn.2478268 <https://ssrn.com/abstract=2478268> accessed on 12 April 2025.

47 Conte (n 44).

address their concerns early on. Additionally, safeguards must be employed to ensure the procedure does not result in a binding decision unless the parties explicitly agree. The possibility to withdrawing from mediation without consequences should be provided at the earliest possible stage of the mediation. Furthermore, the process should not become prohibitively costly and should guarantee the right to a legal representative.

To further the above conclusions, Italy has currently adopted some further adjustments to its MM model through Legislative Decree 149/2022, popularly known as the "*Cartabia Reform*".[48] Entering into force on 30 June 2023, this reform expanded the dispute categories subject to mandatory initial mediation meetings to include association-in-participation agreements, consortium contracts, franchising agreements, contracts for work or services, network contracts, continuous-supply agreements, partnerships, and sub-supply (sub-contracting) contracts.[49] Separately, the Cartabia Reform introduced digital filing for mediation requests, and capped session fees at €30 per party for claims under €50 000. Early Ministry of Justice statistics (Q1 2024) show a 21 % increase in mediated settlements compared with the same quarter of 2023, while the average time-to-first-hearing in civil courts fell by two months.[50] These figures suggest that the reform has partially met its twin objectives of decongesting courts and promoting consensual dispute resolution,[51] and proves the argument that once all stakeholders endorse a particular model of mandatory mediation, its beneficial effect is strengthened over time.[52]

3.2. Romanian Experience

In Romania, the Mediation Act (2006)[53] was initially amended in 2012 and 2013 to include MM requirements for plaintiffs. Specifically, the law required plaintiffs to attend a cost-free information session with a mediator before proceeding with litigation in family, neighbourhood, property and inheritance disputes, contractual disputes related to payment

48 Legislative Decree of the Italian Republic No 149 of 10 October 2022, 'Implementation of Law No 206 dated 26 November 2021, Delegating the Government to Improve the Efficiency Of Civil Proceedings and to Review the Rules on Alternative Dispute Resolution Tools and Urgent Measures to Streamline Proceedings Regarding the Rights of Individuals and Families as Well as Enforcement Proceedings' [2022] Gazzetta Ufficiale 243/1.

49 Giovanni Matteucci, 'The Trilogy of the Italian Mandatory Mediation Law from the 7th century BC to 2025, including Artificial Intelligence' (*Mediate*, 2 April 2025) <https://mediate.com/italian-mandatory-mediation-law/> accessed on 12 April 2025; G Caporale, 'La riforma Cartabia e la mediazione obbligatoria: primi spunti applicativi' (2024) 12 Rivista di Diritto Processuale 215.

50 Direzione Generale di Statistica e Analisi Organizzativa (DgStat), *Mediazione civile ex D.Lgs 28/2010 – 1 gennaio–31 dicembre 2024* (Ministero della Giustizia 2025) <https://datiestatistiche.giustizia.it/cmsresources/cms/documents/Relazione_mediazione_2024.pdf> assecced 27 May 2025.

51 Giovanni Matteucciorcid, 'Mandatory Mediation, the Italian Experience, a Case Study–2025' (2025) 16(1) Beijing Law Review 353, doi:10.4236/blr.2025.161017.

52 Gavrila, D'Urso and Radanova (n 33).

53 Law of Romania No 192 of 16 May 2006 'On Mediation and Organisation of the Profession of Mediator' [2006] Monitorul Oficial 441.

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claims, performance or damages, consumer protection cases and professional liability disputes. If plaintiffs failed to provide proof of attending such a session, their case would be considered inadmissible by the courts, effectively preventing further legal action from proceeding until compliance was met.

The intention behind this legislation was to promote mediation and alleviate the burden on courts; its implementation faced several difficulties. One major criticism was the lack of incentives or sanctions for defendants to participate in the mediation information session. The focus was solely on the plaintiff, which created an imbalance between the parties to a dispute. Since the sanction of case inadmissibility applied only to plaintiffs, defendants had little incentive to engage in mediation efforts, and their non-participation in the process often rendered the session ineffective.

Although participation in the initial mediation session was supposed to be free for individuals involved, mediators incurred expenses related to organising these sessions, such as sending invitations to the other party, preparing documentation, and issuing certificates confirming attendance at the session. These additional costs effectively turned the "free" session into a paid service, creating an unexpected financial burden for the parties involved.[54] This distorted the essence of the proposed MM model, ultimately turning it into a formalistic and expensive mechanism for reaching the court, rather than a method of educating the parties on the benefits of the mediation.

This approach was found unconstitutional by the Constitutional Court in 2014.[55] The Court ruled that the harsh sanction of case inadmissibility for non-compliance was disproportionate and undermined the right to judicial protection. In other words, the legal instrument used to enforce the mandatory requirement–sanctioning the plaintiff with case inadmissibility–would not be balanced with the purpose sought, i.e., decreasing the heavy caseload in the courts. The Court emphasised that while awareness of mediation is essential, coercing parties like this undermines their right to judicial protection.

A similar conclusion by the Constitutional Court was reached in 2018.[56] The decision was based on the contested provision stating that "the parties shall attempt to settle the dispute by mediation" which led the Court to infer that this created an inherent obligation for the

54 Constantin Adi Gavrila, 'Role of Mediation for Justice Reforms and an Increased Access to Justice' (2022) 2(74) Revista de Științe Politice 19.

55 Decision No 266 (n 13).

56 Decision No 560 'On the unconstitutionality of the provisions of Article I (6) with reference to Article 18 (11) of Law No 192/2006, of Article I (10) with reference to Article 43 (21) of Law No 192/2006, of Article I (12) with reference to Article 58 (3) of Law No 192/2006, of Article I (16) with reference to the introductory part of Article 601 (1) of Law No 192/2006, of Article I (18) with reference to Article 61 (3) and (4) of Law No 192/2006 and of Article I (21) (with reference to Article 76 of Law No 192/2006) of the Law amending and supplementing Law No 192/2006 on mediation and organisation of the profession of mediator' (Constitutional Court of Romania, 18 September, 2018) [2018] Monitorul Oficial 957.

parties to engage in mediation, leaving no room for discretion on how they should proceed. This was seen as an obstacle to the right to effective access to the courts. Additionally, the provisions allowing judges to refer parties to MM in certain cases were deemed inconsistent with the prior ruling in Constitutional Court Decision No. 266 from 7 May 2015 as they stipulated an obligation for the judge to order the referral of the parties to mediation, which limit the free access of the parties to justice and as such were deemed to contradict the Romanian Constitution guaranteeing citizens with effective court protection.[57] As a result, this decision effectively brought an end to the debate over MM in the country.

In conclusion, the Romanian attempts to promote mediation through mandating parties to participate in a cost-free information session were all found unconstitutional. The core issue was the harsh sanctions—case inadmissibility—that barred access to justice until parties complied. Such obligations to participate in the information session on the advantages of mediation were deemed to represent a limitation on the right to access justice freely. Through the sanction of the inadmissibility of the claim having been filed without an attempt to mediation, the right to effective legal protection was regarded not only as limited, but even as prohibited.

3.3. Bulgarian experience

The Bulgarian MM model was designed to promote mediation as a means of reducing court congestion and providing an alternative to the traditional litigation process. This objective was specifically outlined in the explanatory notes accompanying the legislative amendments, which emphasised that introducing MM would seek to overcome the uneven workload of the courts, thus leading to savings of resources and time and reducing the administrative burden of proceedings.[58] Transitioning to an MM model and strengthening the role of ADR was further substantiated by the need to unlock the full potential of mediation in Bulgaria, as noted in the CEPEJ's first appraisal and recommendations from 2017.

Additionally, the need to adjust the national legal framework to incorporate MM was further outlined in Bulgaria's National Recovery and Resilience Plan,[59] aimed at mitigating the negative impact of COVID-19.

Set to enter into force on 1 July 2024, the Bulgarian MM model required parties involved in a legal dispute to attend a mandatory initial information session during a pending litigation within two months of being explicitly required to do so by the judge. The session was to be

57 Decision No 266 (n 13).

58 National assembly of Bulgaria, 'Motives for the Draft Law Amending and Supplementing the Mediation Act No 48-202-01-20' (28 October 2022) <https://mjs.bg/api/part/GetBlob?hash=FBF7F0C6B5F73549DA646D82A78B9EC4 > accessed 1 April 2025.

59 Alina Dobreva and Velina Lilyanova, *Bulgaria's National Recovery and Resilience Plan: Latest State of Play* (EPRS 2024) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733662/EPRS_BRI(2022)733662_EN.pdf> accessed 1 April 2025.

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conducted by mediators working in newly established court-annexed mediation centres. The mandatory session was to inform parties about the benefits of mediation and its potential to resolve disputes amicably. Participation in this session was free of charge for the parties involved, with the state covering the costs of the initial session for up to three hours of mediation at an hourly rate of €50.

If one party refused to attend the information session or participate in the mediation attempt, they would be sanctioned by being required to pay the entire costs of the case, regardless of the case outcome. This penalty was designed to encourage both parties to engage with the mediation seriously.

However, the Bulgarian Constitutional Court was petitioned by the national Bar association to challenge the constitutionality of the MM model, claiming it infringed on parties' right to effective access to justice. A key argument was that the penalty imposed on a party for not attending the MM information session—specifically, requiring them to pay the full legal costs of the case, regardless of the case's outcome—was too severe.

The Constitutional Court intervened at a crucial moment, striking down the newly introduced mediation legislation just before it came into effect through its decision dated 1 July 2024.[60] The court's ruling was based primarily on the fact that the MM would result in delaying access to justice by adding an extra procedural step to an already lengthy and potentially complex litigation process, thereby hindering the timely resolution of disputes.

The Court also found a violation of the principle of voluntariness, finding that compelling parties to participate in mediation under threat of severe financial sanctions undermined the voluntary nature fundamental to mediation. This was deemed to further breach the rule of law as the legislation could disproportionately affect parties' rights.

In summary, the Bulgarian MM model—while aimed at promoting ADR, easing court congestion, and streamlining legal processes—was condemned for infringing constitutional rights, specifically the right to access justice, due to its penalty for non-compliance that required one party to cover the full litigation costs regardless of case outcome. The Constitutional Court emphasised that MM delayed access to justice and undermined the principle of voluntary participation in mediation. This decision once more highlighted the importance of balancing efficiency in legal processes with the safeguarding of fundamental rights.

Discussions are ongoing on how to revise the previously introduced MM model to ensure its constitutional compliance.

60 Case No 11/2024 (n 12).

3.4. Systematic Evaluation of the Presented National Constitutional Jurisprudence

All analysed judgments of the Constitutional Courts have focused on three main challenges concerning MM. Firstly, it is inconsistent with the voluntary nature of mediation. Secondly, it relies on the use of mediation as a sufficiently proportionate measure in assessing whether it constitutes an undue obstacle to access to justice. Thirdly, the need to apply procedural safeguards to ensure fairness, including management of costs and duration, legal representation and the impartiality of the mediator. This leads to the need for further analyses of voluntariness, proportionality and procedural safeguards.

3.4.1. Voluntariness

Romanian, Italian and Bulgarian Constitutional Courts have emphasised that the Mediation Directive defines mediation as a voluntary process. However, this does not preclude national legislation from establishing MM models or providing incentives and sanctions to encourage the use of mediation—provided these measures do not violate a fundamental right of access to justice. While the Directive allows Member States to prescribe such procedures or through judicial referral, it does not require them to be binding.

All three jurisdictions unanimously uphold the principle of the voluntary nature of mediation, which serves as a safeguard and a reassurance that only the parties' voluntary engagement in mediation can enable the parties to come to a mutually agreed-upon solution and will voluntarily comply with it. Thus, the courts have not rejected the idea of MM entirely and acknowledged that it might serve as a way for a more effective judiciary.

However, these courts carefully scrutinise whether national MM models unduly restrict parties' discretion or infringe their right of access to justice. They have developed criteria closely aligned with those identified by the CJEU, emphasising that imposing MM as an absolute prerequisite before filing a lawsuit—together with imposed financial and procedural burdens on parties— hinders access to justice in terms of the proportionality and procedural safeguards.

Thus, the essence of all three judgments is not that the MM model per se is incompatible with the principle of access to justice, but that the specific national models, in terms of the procedural burdens they impose and the potential benefits they may provide, determine to violate the right to a fair and speedy trial.

3.4.2. Proportionality

The debate over the proportionality of MM is the next central argument presented during the discussions preceding its acceptance and implementation. Irrespective of the fact that proportionality has been subject to different interpretations by international courts, they still fail to offer a unified criterion for its assessment. In fact, the CJEU appears to lean

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towards the position that mandating parties to participate in mediation should impose minimal or practically no expense on parties—be it in the form of costs, time or other resources. However, the CJEU's guidance remains insufficiently detailed to ensure the rigid application of the proportionality test and hence leaves Member States to navigate its interpretation in varying ways.

As the analysis of the CJEU's jurisprudence in the preceding chapter suggests, in the context of MM, proportionality requires that the mandatory obligation to participate in mediation must not impose an undue burden on the parties and restrict their fundamental right of access to a court. The essence of the proportionality, therefore, is to ensure that mediation, if encouraged or even required, must be implemented in a reasonable, fair and balanced manner.

When assessing the proportionality of national MM models, Constitutional Courts have considered the primary motivations behind introducing mediation in their legal systems. In most cases, these were either flaws in the legal system or economic crises in the country. Both have led to the need for an urgent and efficient solution that can quickly optimise litigation costs and reduce the burden posed on the courts.

When the sole reason for introducing an MM scheme is to reduce judicial costs and ease court caseloads, it becomes difficult to justify limiting the parties' voluntary choice to mediate—especially if the MM model deviates even partially from the criteria established by the CJEU. However, without clear pragmatic reasons—such as quicker and less expensive dispute resolution for participants and a way to conserve court resources—mediation can be much more beneficial to the parties and society.

Mediation is commonly praised because it allows parties to maintain control over the proceedings and the outcome, increases the likelihood of preserving relationships, and empowers parties' self-determination, which generally leads to more favourable compliance with mediated agreements.[61] Beyond dispute resolution, mediation serves as an effective tool for promoting peaceful and inclusive societies.[62] It is not only a sustainable method for resolving disputes but also a method of strengthening the bonds between community members—and even between different communities—by facilitating peaceful agreements that reduce the risk of future disputes.[63]

61 Laurence J Boulle, Michael T Colatrella Jr and Anthony P Picchioni, *Mediation: Skills and Techniques* (LexisNexis/Matthew Bender 2008) 2-6.

62 United Nations, 'The 17 Sustainable Development Goals' (*UN Department of Economic and Social Affairs, Sustainable Development*, 2025) <https://sdgs.un.org/goals> accessed 2 March 2025.

63 Agnė Tvaronavičienė and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of Court-Connected Mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 633, doi:10.9770/jesi.2021.8.3(40); Natalija Kaminskienė, Inga Žalėnienė and Agnė Tvaronavičienė, 'Bringing Sustainability into Dispute Resolution Processes' (2014) 4(1) Journal of Security and Sustainability Issues 69, doi:10.9770/jssi.2014.4.1(6); Andrea Maia, 'The Importance of Mediation in ESG: Promoting Sustainability in Corporations' (*Kluwer Mediation Blog*, 8 March 2024) <https://legalblogs.wolterskluwer.com/mediation-blog/the-importance-of-mediation-in-esg-promoting-sustainability-in-corporations/> accessed 13 April 2025.

In other words, mediation is not merely a remedy to relieve pressure on an overburdened judicial system; it is, more importantly, a measure to develop a culture of peaceful dispute resolution by educating society and creating sustainable outcomes. Seen in this light, the impact of MM on the parties' self-determination may be perceived as relatively small compared to the potential benefits it could generate.

The example of Moldova perfectly illustrates the above-presented idea. The Moldavian Constitutional Court did not declare its MM model to be unduly disproportionate. On the contrary, it acknowledged the legitimacy of the objectives behind MM and emphasised that the benefits of using MM far outweigh the inconveniences suffered by the parties.[64] The Constitutional Court of Moldova concluded that MM meets the legitimate public policy goals, as it aims to achieve an efficient dispute resolution in a manner that does not unduly delay access to justice, thus ensuring a fair balance between procedural rights and the public interest. It was recognised that even if parties do not want to participate in mediation, they may discover the possibilities of reaching an amicable settlement during it, whilst retaining the right to decide on the outcomes and to withdraw from mediation at any point. Finally, the Moldovan MM does not violate the right to a hearing within a reasonable time—set at 50 days in this case—and is considered a proportional measure since the benefits of mediation outweigh the possible inconvenience, even if the parties do not reach an agreement.

3.4.3. Procedural Safeguards

The Mediation Directive introduced certain procedural safeguards to protect the parties' rights and to avoid mediation from becoming an inferior alternative to court proceedings. These safeguards include guaranteeing the confidentiality of mediation, the suspension of limitation periods, and ensuring the proper recognition of mediated agreements. This legal act encouraged Member States to employ incentives and sanctions where appropriate, while ensuring that mediation does not become an excessively lengthy, costly procedure or an unbearable procedural burden—especially for weaker parties.

The case law of the Constitutional Courts appears to align closely with the practice of the CJEU. Mediation cannot result in a binding decision imposed on the parties. If the parties' decision to participate in mediation can be limited in order to allow them to realistically assess the benefits of mediation in the particular situation, the other aspects of voluntariness must not be undermined. This means that the right to choose the mediator, the impartiality of the mediator, the right to withdraw from the process at any time without facing any consequences and the right to decide whether to enter into an agreement must be safeguarded.

64 Decision No 8 'On the Exception of Unconstitutionality of Some Provisions of the Code of Civil Procedure of the Republic of Moldova, adopted by Law no 225 of 30 May 2003 (Judicial Mediation)' (Constitutional Court of the Republic of Moldova, 26 April 2018) <https://constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=654> accessed 27 May 2025.

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Furthermore, mediation must not become an excessively lengthy procedure that restricts the parties' right to access to justice; hence, there is a need to provide for a maximum duration of the mediation process and to ensure that limitation periods are suspended while the parties try to resolve their dispute amicably. Ensuring the quality of the service is of particular importance, which necessitates clear qualification requirements for mediators. While high-quality mediation must be adequately compensated, a balance should be struck—through establishing certain fees or by ensuring state funding to ensure that mandatory participation in mediation or an initial informational session does not become an undue financial burden for the parties.

To summarise, procedural safeguards are a decisive factor in determining whether a given MM model respects the right to a fair and speedy trial or instead undermines it.

3.5. Other Key Aspects of the MM Models' Success or Failure

It is worth noting that all three decisions of the Constitutional Courts were adopted in countries lacking a strategic government policy on mediation development. The need for a national strategic policy on mediation development is not required or even mentioned in the Mediation Directive, which merely outlines broad guidelines for mediation, thus allowing Member States the flexibility to adopt varying national models. However, a consistent political vision appears essential to ensure mediation becomes a viable alternative to litigation within each country's specific socio-economic context.

None of the governments in the studied countries created a supportive environment for mediation by establishing funding mechanisms, ensuring proper training and certification of meditators, or fostering public awareness. In contrast, countries that have adopted comprehensive policies on mediation development seem largely immune from constitutional challenges. This can be illustrated by the example of Lithuania, where an ambitious and clear policy on the development of mediation existed prior to the adoption of MM in family disputes.[65] This prior policy indicates that extensive consultations had taken place, addressing the major concerns of all stakeholders before MM's adoption.

The introduction of MM requires continuous social dialogue and the safeguarding of the interests of all stakeholders. In all the countries analysed, MM faced resistance from key stakeholder groups. Constitutional complaints were consistently initiated by legal professionals, suggesting that the adoption of MM models was not preceded by discussions or compromises on their regulation. Bulgaria's MM model is a perfect illustration: it was developed almost entirely under the leadership of the Supreme Judicial Council, with little engagement of Bar associations or other legal professionals. As a result, those excluded from the discussion groups were the first to petition against the adoption of such an MM model.

65 Order of the Minister of Justice of the Republic of Lithuania No 1R-268 of 17 September 2015 'On the Approval of the Concept for the Development of a Conciliation (Mediation) System' [2015] TAR 13939.

The persistent tension between mediators and lawyers—rooted in fears that mediation could reduce legal fees—has shifted into the Constitutional Courts, which must then rule for or against MM models without the autonomy to constructively propose alternatives.

By contrast, Lithuania's experience illustrates a different scenario. In Lithuania, MM was first introduced as part of a government strategy in 2015,[66] accompanied by a dialogue with representatives of various legal professions (including attorneys, notaries, and bailiffs). This dialogue led to certain concessions—such as exempting these professionals from meditator qualification exams—to secure their support for the introduction of MM in family cases from 1 January 2020. An ex-post study conducted in 2022[67] showed that lawyers were aware of the upcoming changes to the Law on Mediation and some were preparing for it. Even though the changes were expected with anticipation and some scepticism by lawyers and the judiciary, the Government's choice to introduce MM as a strategic initiative and the maintenance of social dialogue with the stakeholders ensured that mediation in Lithuania was successfully established.

Constitutional Courts play a critical role in assessing the constitutionality of MM models, often challenging legislative frameworks that they deem to infringe on constitutional rights, such as access to justice or the principle of voluntariness in mediation. However, these courts often extend their powers and offer not merely an analysis of the constitutional compliance of a given norm but also adopt more of a substance-oriented approach that seeks to assess the efficiency of the proposed MM models. In this sense, the prevailing trend of Constitutional Courts evolving from negative legislators—as proclaimed by Hans Kelsen in the early 20th century—into positive legislators[68] has extended into the mediation field. Indeed, Constitutional Courts in the context of MM have effectively grown to be legislators by eliminating models they deem unacceptable. In this sense, further development of MM models scrutinised by Constitutional Courts requires an in-depth analysis to distil the underlying *ratio* that should be included in the evolving legal framework on MM. This need is especially valid in light of the CJEU's recent decision,[69] which not only affirms that national laws may mandate mediation before or after legal proceedings but also instructs national courts to disregard prior decisions of their national Constitutional Courts that conflict with this position. This ruling seems to indirectly support the hypothesis that Constitutional Courts have assumed a positive legislative role in determining whether MM should be applied within their jurisdictions.

66 ibid.

67 Order of the Minister of Justice of the Republic of Lithuania No 1R-219 of 30 May 2022 'On the Approval of the Ex-Post Evaluation Plan for the Impact of the Legal Regulation on Mandatory Mediation in Family Disputes'; Ministry of Justice of the Republic of Lithuania, 'Ex-Post Evaluation Report on the Impact of the Legal Regulation of Mandatory Mediation in Family Disputes' (30 December 2022) <https://tm.lrv.lt/lt/teisine-informacija/galiojancio-teisinio-reguliavimo-poveikio-ex-post-vertinimas/> accessed 27 May 2025.

68 Allan R Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (CUP 2011) 5-12, doi:10.1017/CBO9780511994760.

69 Case C-658/23 *Investcapital* (n 31).

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4 CONCLUSIONS AND RECOMMENDATIONS

The analysis of the European and national legislation and case law on MM serves as the guidelines for developing MM models that address key constitutional concerns while aligning with international standards.

A cornerstone of any constitutionally sound MM model is the voluntariness of the mediation process—meaning voluntary participation in mediation and voluntary settlement during mediation. However, national legislators should retain their powers to refer litigants to a reasonable attempt to understand the benefits of mediation concerning their individual case, while ultimately leaving the decision to mediation to the parties themselves. Crucially, parties must always retain control over the choice of mediator, the design of the mediation process and the freedom to settle or withdraw from the process.

The labelling of the mediation as mandatory warrants reconsideration, as the connotation of "mandatory" creates misleading or incorrect interpretations of the actual procedural "obligations" that parties acquire in MM models. In all studied MM models, parties were required only to attend an initial meeting with a mediator to receive information about mediation and engage in discussions focused solely on how mediation might benefit their case.

Effective MM models must be proportional and avoid imposing undue burden on the parties. This means avoiding excessive delays in accessing the courts or overburdening parties with costs or time demands. MM should be ideally positioned ahead of litigation, namely by requiring parties first to become acquainted with mediation, with associated costs either covered by the government or kept nominal. Additionally, MM must ensure fairness for parties and integrate clear procedural safeguards within predictable time limits, including access to legal services, which can be secured by including parties' legal counsel in the process, ensuring the impartiality and neutrality of the mediators, and guaranteeing confidentiality for the entire process.

Implementation of these elements should be complemented by governmental support, including the development of a national policy that encourages its use, promotes mediator training, establishes a clear institutional framework, and raises public awareness of the benefits of mediation. Importantly, before the establishment of MM, it is crucial to engage legal professionals, bar associations, judges and mediators in dialogue to ensure that the designed model is balanced and supported.

Furthermore, the implementation of MM should include mechanisms for collecting statistics necessary for monitoring and evaluating effectiveness. This enables adjustments and improvements over time, based on feedback from stakeholders and the results observed in practice.

By designing an MM model that integrates the above-mentioned elements, policymakers can establish an effective system that increases mediation uptake while safeguarding parties' rights and access to justice.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗРОБКА ЕФЕКТИВНОЇ МОДЕЛІ ОБОВ'ЯЗКОВОЇ МЕДІАЦІЇ: КЕРІВНІ ПРИНЦИПИ МІЖНАРОДНОЇ ЮРИСПРУДЕНЦІЇ ТА НАЦІОНАЛЬНІ КОНСТИТУЦІЙНІ ОБМЕЖЕННЯ

Агне Тваронавічене*, Індре Касюлайте та Юлія Раданова

АНОТАЦІЯ

Вступ. *Загальний розвиток медіації в Європі був натхненний низкою рекомендацій Ради Європи та рішуче підтриманий Європейським Союзом. Однак чітких правил щодо обов'язкової медіації так і не було встановлено, тож за національними законодавцями залишилося право вирішувати, чи може бути запроваджена обов'язкова медіація і в якій формі. Це викликало публічні дебати протягом останніх двох десятиліть у кількох*

державах-членах, які запровадили обов'язкову медіацію як захід для сприяння медіації. Хоча деякі держави-члени, такі як Італія та Литва, вже запровадили конкретні моделі обов'язкової медіації, інші, такі як Румунія та Болгарія, продовжують висловлювати сумніви щодо співіснування обов'язкової медіації та ефективного права на правосуддя. Ця стаття має на меті порівняти міжнародні та національні підходи до обов'язкової медіації, щоб визначити рекомендації для національних законодавців, які планують запровадити моделі обов'язкової медіації.

Методи. *Основні методи, використані під час підготовки цієї статті, поєднували систематичний аналіз наукової літератури, що стосується різних форм і моделей обов'язкової медіації, з доктринальним аналізом наднаціонального правового регулювання у сфері обов'язкової медіації. Це було доповнено тематичним оглядом ключових рішень Суду Європейського Союзу та Європейського суду з прав людини. Дослідження було додатково збагачено вивченням правових баз та конституційної практики кількох вибраних країн: Італії, Румунії та Болгарії. Цей підхід містить зіставлення досліджуваних джерел відповідно до їхньої ієрархії — починаючи з обов'язкових інструментів рівня ЄС, потім рекомендаційних, і рухаючись вертикально вниз до національних законів та відповідної практики. Критерії вибору джерел, встановлені на початку дослідження, вказували на те, чи відповідне правове джерело прямо посилається на обов'язкову медіацію та чи ґрунтується воно на статті 6 Європейської конвенції з прав людини. Крім того, було проведено якісний контент-аналіз вагомої національної конституційної практики Італії, Румунії та Болгарії, щоб визначити можливий перелік критеріїв для конституційно беззаперечних моделей обов'язкової медіації, які могли б бути прийняті країнами, що шукають нові ефективні способи сприяння медіації.*

Результати та висновки. *У дослідженні було виявлено спільні занепокоєння щодо запровадження обов'язкової медіації та запропоновано набір критеріїв для забезпечення балансу між повноваженнями медіатора та правом на доступ до правосуддя. Було зроблено висновок, що за умови вузького спрямування та підтримки надійних гарантій обов'язкова або квазіобов'язкова медіація може зменшити перевантаженість судів та сприяти швидшому врегулюванню спорів без порушення основних процесуальних прав. Загальна європейська система вже забезпечує належні рекомендації щодо прав людини; однак, прогалина у впровадженні, що залишилася, полягає у виборі національних моделей щодо винятків, розподілу витрат та акредитації медіаторів. Впровадження автоматичної, але не обов'язкової першої сесії, гарантування покриття правової допомоги та послуг перекладача, узгодження правил щодо якості роботи медіаторів та відстеження дотримання вимог за допомогою цифрових інструментів управління справами зменшить ймовірність того, що медіація перетвориться на просту формальність. У майбутніх дослідженнях слід спостерігати за стійкістю врегулювань та загальною задоволеністю користувачів, щоб гарантувати, що підвищення ефективності не підриває реальний доступ до правосуддя.*

Ключові слова: *медіація, обов'язкова медіація, доступ до правосуддя, антиконституційність.*

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Research Article

RIGHT OF VICTIMS OF TERRORISM TO COMPENSATION AGAINST THE PRINCIPLE OF JURISDICTIONAL IMMUNITY OF A FOREIGN STATE

Alaa Eddin Zolfakar

ABSTRACT

Background: *Terrorist attacks in various parts of the world have resulted in thousands of victims, injuries and property losses. It is acknowledged that several of these attacks were likely sponsored or facilitated by state actors or committed by movements supported by governments.*

In light of this, it has become necessary for the international community to adopt a multilateral and comprehensive international agreement to combat terrorism and mitigate its effects—particularly following the adoption of the Pact for the Future by the United Nations General Assembly at its seventy-ninth session. Action 23 of the Pact, in Paragraph (c), calls for "revitalising efforts towards the conclusion of a comprehensive convention on international terrorism."[1]

Methods: *This study employed a deductive approach by examining and analysing various domestic judgements from the United States, the UK, Germany, France, Switzerland, Austria, Canada, Italy, Ukraine, Poland, Greece, China and India, as well as scholarly commentary by authors and jurists. It also involved reviewing relevant international agreements and exploring the possibility of integrating provisions from both foreign state immunity frameworks and international judicial cooperation agreements. The aim was to address the problem of protecting states from liability for supporting terrorism while proposing an effective legal formula to enable victims of terrorism to obtain compensation. The anti-terrorism exceptions incorporated into the state immunity acts of the United States and Canada were also examined.*

1 The Pact for the Future (adopted 22 September 2024 UNGA Res 79/1) para 44 <https://docs.un.org/en/A/RES/79/1> accessed 23 May 2025.

Results and conclusions: *The study concludes that state immunity is a well-established principle in both written and customary international law and has gained acceptance by various national judicial systems. However, both national and international jurisprudence and courts have shown hesitation to adopt an anti-terrorism exception, as such an adoption would entail a violation of the international rule of immunity and could lead to discriminatory treatment between states, despite the inherent fairness of holding terrorist-supporting states accountable.*

Therefore, this study proposes a set of legal provisions to be included in any multilateral international agreement on combating terrorism, as well as in related international agreements.

1 INTRODUCTION

In the past, states had general immunity for their kings, emperors and messengers.[2] The principle of *par in parem non habet imperium* originally dates back to Roman law, which formed the foundation and historical basis of the principle of state immunity.[3] The rules governing this immunity began to take their form and diverge later. Lauterpacht described state immunity as:

> "Like the jurisdictional immunity of a domestic state, it is against the broader principle which accepts the submission of state institutions to the normal legal practice as it is directed by the courts."[4]

The concept of state immunity has generally evolved through the various immunities recognised with regard to ambassadors, warships and heads of state. The need to protect representatives of foreign states led to the development of diplomatic immunity.[5] The presence of warships of states in the ports of other states in times of peace sometimes required recognition of those ships' immunity from local jurisdiction.[6] Similarly, visits by kings and princes required the development of rules relating to their immunity and the inviolability of their property and entourage, as well as immunity from being sued in local courts.[7]

2 Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, OUP 2008) 256.

3 Xiaodong Yang, *State Immunity in International Law* (Cambridge Studies in International and Comparative Law, CUP 2012) 52.

4 Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Yearbook of International Law 237.

5 Denza (n 2).

6 *Schooner Exchange v McFaddon* [1812] 11 US 116 <https://supreme.justia.com/cases/federal/us/11/116/case.htm> accessed 23 May 2025; ILC, 'Draft Articles on Jurisdictional Immunities of States and their Property and commentaries thereto' [1991] Yearbook of the ILC 2(2)/13, 24, art 6; 50, art 16.

7 Ian Brownlie, 'Contemporary Problems Concerning Immunity of States: Preliminary Report' (1987) 62(1) Annuaire de l'Inistitut de Droit International 45, 49.

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Today, the principle of state immunity in the international legal order still prevents the adjudication of cases involving states as parties. Although there are various international dispute settlement bodies worldwide, including the International Court of Justice, these bodies still lack a mechanism in international law; the execution of judgments is subject to the good faith of states.[8]

Based on this principle of immunity, lawsuits against states that sponsor terrorist attacks cannot be heard by domestic courts. Nonetheless, many such lawsuits have been filed in domestic courts against foreign governments. The right of litigation in these cases is often hampered by the principle of state immunity.

This paper examines the evolution of the principle of immunity, from its original approach to its current restrictive one. It further highlights the adoption of the anti-terrorism exception by a number of states. It analyses the feasibility of establishing a legislative custom to combat state support for terrorism.

2 DEVELOPMENTS OF THE JURISDICTIONAL IMMUNITY OF STATES

The principle of state immunity has developed in two stages: the absolute immunity stage and the restricted immunity stage. The absolute doctrine grants the state—along with its institutions, agencies and properties—complete immunity from any lawsuit, seizure or confiscation. This immunity is not subject to any exception except in rare cases. The restricted doctrine is the doctrine that limits immunity from prosecution to sovereign government actions, and from execution to property owned exclusively for sovereign purposes, excluding any commercial or private activity and any property owned for commercial purposes.

The principle of jurisdictional immunities of states and their property emerged primarily at the levels of national jurisprudence and international law with the declaration by US Chief Justice John Marshall in 1812. In the case concerning *The Schooner Exchange,* a vessel belonging to the French Imperial Navy, Marshall held that the ship was immune from seizure or any other legal action due to the principles of sovereignty and the need to maintain friendly relations between nations—a rationale he explained in his ruling.[9]

In the broader context of extending the provisions of immunity to all state ships—warships and non-warships—several opinions have supported the view that ships owned, managed or operated by the government for the purpose of engaging in trade, whether to promote

8 Carter of the United Nations (1945) <https://www.un.org/en/about-us/un-charter> accessed 23 May 2025. Article 94, para 2 stipulates that 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.'

9 *Schooner Exchange v McFaddon* (n 6).

the commerce of its people or to secure income for the treasury, should be considered as public ships on an equal footing with warships.[10]

During the nineteenth century, a fluctuation occurred between the absolute and restricted doctrines of state immunity. Over time, state immunity began to retract, and increasing interest began in the issue of exceptions to immunity. The increasing activity of states in the economic field, specifically the expansion of state trade, made it necessary to exclude non-governmental actions *acta jure gestionis* from enjoying state immunity.[11]

British courts continued to adhere to absolute immunity and did not recognise the commercial exception.[12] However, over time, British courts gradually shifted from the application of the absolute doctrine towards the restricted doctrine; they were more willing to deny immunity to independent commercial entities.[13] This shift culminated in the enactment of the State Immunity Act in 1978, which formally adopted the restricted doctrine of immunity in the United Kingdom.[14]

Similarly, Germany continued to adhere to the absolute doctrine until after World War II. In 1921, its courts upheld the immunity of a merchant ship owned by the US government.[15] However, German courts later moved to restrict immunity concerning cases to which a state was a party, especially after Germany ratified the Brussels Convention of 1926 on the immunity of state-owned vessels.[16] German courts began to adopt a more restrictive approach by applying the restrictive doctrine, particularly involving private and maritime law activities conducted by states.[17]

The European Court of Human Rights has, in several cases, adopted an attitude that state immunity achieves a legitimate aim through promoting courtesy and friendly relations between states.[18] Accordingly, the Court ruled that limiting an individual's right to access

10 *Berezzi Bros Co v SS Pesaro* [1926] 271 US 562, 574 <https://supreme.justia.com/cases/federal/us/271/562> accessed 23 May 2025.

11 Yang (n 3) 35.

12 *Mighell v Sultan of Johore* [1894] 1 QB 149. The Court of Appeal made it clear that by applying the precedent of *Parlement Belge*, the question should not arise as to whether the private or commercial nature of the state's activities deprived it of immunity. Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 261.

13 *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529; ILC, Draft Articles on Jurisdictional Immunities (n 6) 25.

14 UK State Immunity Act 1978 (1978 c 33) ss 3–11 <https://www.legislation.gov.uk/ukpga/1978/33> accessed 23 May 2025.

15 Yang, (n 3) 17, 475.

16 International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (signed 10 April 1926) [1937] LNTS 176/199.

17 Yang (n 3) 35, 496.

18 *Fogarty v United Kingdom* App no 37112/97 (ECtHR, 21 November 2001) para 34 <https://hudoc.echr.coe.int/eng?i=001-59885> accessed 23 May 2025; *McElhinney v Ireland* App no 31253/96 (ECtHR, 21 November 2001) para 37 <https://hudoc.echr.coe.int/eng?i=001-59887> accessed 23 May 2025.

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court in consideration of the sovereignty of other states can constitute a proportionate measure.[19] On the other hand, it confirmed that the court must examine the nature of the transaction in the case, and the rules of customary international law applicable to the issue of the acceptability of the case.[20]

In the United States, the approach to state immunity was historically characterised by referral of cases to the State Department to decide on granting state immunity—thus deterring the cases from the executive power. Courts would typically adhere to the State Department's suggestions in this regard.[21] This approach led to the issuance of the Tate Letter in 1952, which, for the first time, demonstrated the restrictive theory of foreign state immunity.[22]

Following the Tate Letter, the US administration officially embraced the restrictive approach, allowing for the denial of immunity in cases involving the commercial activities of foreign governments. However, the Tate Letter was very general and failed to mention several matters. Notably, it did not address the question of immunity from enforcement, and subsequent case law suggested that courts continued to adhere to the absolute approach.[23]

Due to these shortcomings, momentum grew for transferring the determination of immunity from the executive to the judiciary. This culminated in the enactment of the Foreign State Immunity Act (hereinafter referred to as the FSIA) in 1976, which adopted the restrictive doctrine.[24] The FSIA divided immunity into two categories: immunity from jurisdiction, covered in Sections 1604-1607, and immunity from execution, addressed in Sections 1609-1611. Section 1604 states that "a foreign state shall be immune from the jurisdiction of the courts of the United States...," while Section 1609 and the following sections indicate clearly that immunity from execution is separate from jurisdictional immunity. Therefore, a waiver of execution must be granted and cannot be inferred solely from a waiver of jurisdictional immunity.

Despite efforts to remove the executive branch from immunity determinations, the US administration continues to play an important role under the FSIA. This is due to its

19 Committee of Legal Advisers on Public International Law, *State Immunity under International Law and Current Challenges: Proceedings of the Seminar, Strasbourg, 20 September 2017* (CAHDI 2017) 20.

20 *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013) paras 71, 72, 73 <https://hudoc.echr.coe.int/eng?i=001-117124> accessed 23 May 2025.

21 In the abovementioned *Schooner Exchange* case, the US Attorney presented a 'suggestion' of immunity to the court, and since the early nineteenth century it has been the practice of the courts to refer the matter to the US administration. See, Fox (n 12) 219.

22 US Department of State, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments: letter of 19 May 1952 addressed by the Department of State's Acting Legal Adviser Jack B Tate to the Acting Attorney General Phillip B. Perlman' [1952] Department of State Bulletin 26/984 (Tate letter).

23 Fox (n 12) 220.

24 US Foreign Sovereign Immunity Act 1976 (FSIA), Public Law 94–583 (21 October 1976) <https://www.congress.gov/bill/94th-congress/house-bill/11315/text> accessed 23 May 2025.

continued interference in cases where a foreign state is a party, as well as the courts' continued referral to the administration in determining whether immunity should be granted.[25] The US administration often appears as *amicus curiae* in cases of great importance to its interests.[26]

Globally, although the principle of state immunity has evolved—and the scope of protection afforded to states and their property has narrowed—many countries still tend to adopt broader immunity. For example, Eastern European countries have generally avoided addressing the topic within their jurisdictions.[27] This may be attributed to the legacy of communist era policies, which aimed to protect state property beyond their borders through the principle of reciprocity. Even following the collapse of communist regimes in Eastern Europe, the Supreme Court of Poland refused to consider the violations of *jus cogens* of international law as an exception to state immunity.[28]

However, a notable shift has occurred in Ukraine in response to the 2022 Russian invasion. The Ukrainian judiciary, including the Supreme Court, has relied, *inter alia,* on the territorial tort principle.[29]

Elsewhere, Indian law permits the prosecution of a foreign state in limited circumstances, provided for in Subsection 86(2) of the Civil Procedure Code.[30] In China, the restrictive doctrine was not adopted until recently, when the Chinese Congress enacted the Foreign State Immunity Law on 1 September 2023.[31]

25 Joseph W Dellapenna, *Suing Foreign Governments and their Corporation* (2 edn, Brill Nijhoff 2003) 44, 49.

26 *Tel Oren v Libyan Arab Republic* [1984] 726 F 2nd 774, 233 US App DC 384 <http://uniset.ca/other/cs4/726F2d774.html> accessed 23 May 2025; *United States v Noriega* [1990] 746 F Supp 1506 (SD Fla) <https://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/> accessed 23 May 2025; *Lafontant v Aristide* [1994] 844 F Supp 128 (EDNY) <https://law.justia.com/cases/federal/district-courts/FSupp/844/128/1523518/> accessed 23 May 2025.

27 Cristina Elena Popa Tache, 'State Immunity, Between Past and Future' (2023) 6(1) Access to Justice in Eastern Europe 98, doi:10.33327/AJEE-18-6.1-a000121.

28 Roman Nowosielski, 'State Immunity and the Right of Access to Court: The Natoniewski Case Before the Polish Courts' (2010) 30 Polish Yearbook of International Law 271-2.

29 Ielyzaveta Badanova, 'Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine' (*EJIL:Talk!*, 28 September 2022) <https://www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-reflections-on-new-developments-from-ukraine/> accessed 5 June 2025; Case No 308/9708/19 (Supreme Court of Ukraine, 14 April 2022) <https://reyestr.court.gov.ua/Review/104086064> accessed 5 June 2025.

30 Sonal Sharma, 'Sovereign Immunity in India - Absolute or Qualified?' (*Kluwer Arbitration Blog*, 4 June 2014) <https://arbitrationblog.kluwerarbitration.com/2014/06/04/sovereign-immunity-in-india-absolute-or-qualified/> accessed 4 June 2025.

31 Tony Dymond and others, 'China's New Foreign State Immunity Law Targets Commercial Assets and Transactions' (*Debevoise & Plimpton*, 16 January 2024) 1-2 <https://www.debevoise.com/insights/publications/2024/01/chinas-new-foreign-state-immunity-law-targets> accessed 4 June 2025.

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Currently, almost only Western jurisdictions have adopted the restrictive doctrine through either legislation or judicial practice. Nonetheless, jurisdictional immunity still plays a significant role in protecting states; this aspect can be observed in arbitration cases to which states are parties, where domestic courts are still not certain.[32]

At the multilateral level, although not yet in force, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property[33] represents a significant achievement. The European Convention, adopted in 1972, remains the only international convention currently in effect regarding state immunity.[34] It has had a significant impact on the development of the principle of state immunity.[35]

Importantly, the 2004 UN Convention excludes immunity for diplomatic missions, their officials, and consular posts and their officials and "…immunities accorded under international law to heads of State *ratione personae.*"[36]

3 EXCEPTIONS TO STATE IMMUNITY IN TERRORISM CASES AT THE DOMESTIC LEVEL

Both the United States and Canada have amended their domestic foreign state immunity legislations to allow victims of terrorism to sue the governments that support terrorist acts.[37] While other countries considered the matter through their courts without enacting specific legislation on it.

32 Popa Tache (n 27) 99; Hannepes Taychayev and Gladwin Issac, 'Is the Last Bastion of State Immunity Under Siege?: Some Reflections on the English High Court's Decision in General Dynamics v Libya' (*Kluwer Arbitration Blog*, 12 September 2024) <https://arbitrationblog.kluwerarbitration.com/2024/09/12/is-the-last-bastion-of-state-immunity-under-siege-some-reflections-on-the-english-high-courts-decision-in-general-dynamics-v-libya/> accessed 22 May 2025.

33 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004 UNGA Res 59/38) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 22 May 2025.

34 ibid, UN treaty status.

35 European Convention on State Immunity (adopted 16 May 1972) ETS 74.

36 UN Convention on Jurisdictional Immunities (n 33) art 3, paras 1, 2.

37 US Antiterrorism and Effective Death Penalty Act 1996 (AEDPA), Public Law 104–132 (24 April 1996) <https://www.congress.gov/bill/104th-congress/senate-bill/735/text> accessed 26 May 2025; US Justice Against Sponsors of Terrorism Act 2016 (JASTA), Public Law 114–222 (28 September 2016) <https://www.congress.gov/bill/114th-congress/senate-bill/2040/text> accessed 26 May 2025; Canada Justice for Victims of Terrorism Act (JVTA) SC 2012, c 1, s 2 (13 March 2012) <https://laws-lois.justice.gc.ca/eng/acts/J-2.5/> accessed 26 May 2025.

3.1. US Legislative Exceptions to Sovereign Immunity in Terrorism Cases

The 1996 Antiterrorism and Effective Death Penalty Act (hereinafter AEDPA) granted jurisdiction to American courts over certain terrorist acts, even if they occurred abroad, thereby exceeding the territorial jurisdiction of the American courts contrary to the text of subparagraph (a)(5) of Section 1605 of FSIA which waives immunity from the jurisdiction only in cases:

> " … in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property—occurring in the United States—and caused by the tortious act or omission of that foreign state..."[38]

Through this amendment, subparagraph (a)(7) was added to Section 1605, depriving a foreign state engaged in supporting terrorist acts of immunity.[39] This amendment has been applied in most cases before the United States courts to Iran.[40] A corresponding amendment was made to Section 1610, allowing the attachment of the foreign state's property to enforce a judgment, provided the state's immunity has been waived in accordance with the provisions of the Section above.[41]

Notably, this exception applies exclusively to lawsuits filed by American citizens. Based on this amendment, lawsuits have been initiated against Syria, Iraq, Sudan, Cuba and Iran.[42]

38 FSIA (n 24) art 1605, spara (a)(5).

39 ibid, art 1605, spara (a)(7).

40 *Oveissi v Islamic Republic of Iran* [2009] 573 F 3rd 835 (DC Cir) <https://callidusai.com/wp/ai/cases/187411/oveissi-v-islamic-republic-of-iran> accessed 23 May 2025; *Brewer et al v Islamic Republic of Iran et al* [2009] 664 F Supp 2nd 43 (DDC) <https://www.casemine.com/judgement/us/591465edadd7b04934295756> accessed 23 May 2025; *Wachsman v Islamic Republic of Iran* [2009] 603 F Supp 2nd 148 (DDC) <https://www.casemine.com/judgement/us/591467c4add7b049342b8804> accessed 23 May 2025; *Wanger v Islamic Republic of Iran* [2001] 172 F Supp 128 (DDC), 134, n 7 <https://case-law.vlex.com/vid/wagner-v-islamic-republic-886226605> accessed 23 May 2025; *Nikpin v Islamic Republic of Iran* [2007] 471 F Supp 2nd 53 (DDC) <https://case-law.vlex.com/vid/nikbin-v-islamic-republic-893701066> accessed 23 May 2025.

41 AEDPA (n 37) s 221, para (b) (1) (B).

42 *Baumel v Syrian Arab Republic* 1:06-cv-00682 [2009] DDC <https://www.courtlistener.com/docket/4204562/idb/baumel-v-syrian-arab-republic/> accessed 25 May 2025; *Gates, et al v Syrian Arab Republic, et al* No 08-7118 [2011] 646 F 3d 1 (DDC) <https://law.justia.com/cases/federal/appellate-courts/cadc/08-7118/08-7118-1308962-2011-05-20.html> accessed 25 May 2025; *Simon v Republic of Iraq* [2008] 529 F 3rd 1187 (DC Cir) <https://callidusai.com/wp/ai/cases/187177/simon-v-republic-of-iraq> accessed 25 May 2025; *Rux v Republic of Sudan* [2009] 672 F Supp 2nd 726 (ED Va) <https://www.casemine.com/judgement/us/59146582add7b0493428d6af> accessed 25 May 2025; *Saludes v Republica de Cuba* [2009] 655 F Supp 2nd 1290 (SD Fla) <https://www.casemine.com/judgement/us/5914b155add7b04934758a84> accessed 25 May 2025; *Kirschenbaum v 650 Fifth Ave & Related Props* [2017] 257 F 3nd 463 (SDNY) <https://case-law.vlex.com/vid/kirschenbaum-v-650-fifth-889036149> accessed 25 May 2025.

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What distinguishes this amendment is the lack of any requirement for territorial connection to the territory to the United States. This may reflect the passive personality principle in American law, which allows US jurisdiction over any crime committed against an American national abroad. Under this principle, American courts may judge any negligent act issued by a foreign country that causes harm to an American national anywhere in the world.[43] This approach can be aligned with the universal jurisdiction of national courts related to serious international crimes—such as war crimes, crimes against humanity, and genocide—when no traditional criterion for exercising ordinary criminal jurisdiction, such as the place where the crime occurred or one of the acts that constitute it, or the nationality of the perpetrator exists.[44]

The most prominent aspect of ignoring the territorial provision is the absence of any requirement for territorial connection in enforcement, not even a link between the funds and the activity underlying the lawsuit, nor a requirement that the assets be owned by the institution or government agency against which the lawsuit was filed. This marks a complete departure from the traditional American approach to execution against foreign state property, which is among the strictest globally in requiring a territorial connection.[45] This provision is derived from the explicit text of Section 1610(a), which states the following:

> "The property in the United States of a foreign state, … used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a state after the effective date of this Act, if
>
> (2) the property is or was used for the commercial activity upon which the claim is based..."

Trooboff has pointed out that the provision of connection is necessary to prevent an influx of lawsuits against foreign states in the United States which—in his opinion—could lead to undermining diplomatic relations.[46]

It must be emphasised that the US State Department must have designated the foreign state targeted by the amendment as a State Sponsor of Terrorism at the time of the act—or as a

43 Curtis A Bradley, 'Universal Jurisdiction and US Law' (2001) 2000 University of Chicago Legal Forum 323.

44 Most countries adopt the universal jurisdiction provision, including: Bosnia and Herzegovina, South Korea, the Russian Federation, Sudan, Ukraine, the United Kingdom, and the United States of America, see the list of countries according to their adoption of universal jurisdiction, and the crimes they cover. 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update' (*Amnesty International*, 9 October 2012) IOR 53/019/2012 <https://www.amnesty.org/en/documents/ior53/019/2012/en/> accessed 25 May 2025.

45 FSIA (n 24) s 1605, para (a)(7), s 1610, paras (a)(7), (b)(2), (g)(1).

46 Peter D Trooboff, *Foreign State Immunity: Emerging Consensus on Principles* (Recueil des Cours de l'Académie de droit international de La Haye (R de C) 200, Brill Nijhoff 1986) doi:10.1163/1875-8096_pplrdc_A9789024736447_03; Fox (n 12) 83.

consequence of the act—in accordance with the provisions of Sections 1605(a)(7)(A) and 1605A(a)(2)(A)(i)(I) of FSIA.[47]

This exception has been criticised by many researchers.[48] In particular, the discretion given to the executive—i.e. the US administration—to consider states as supporters of terrorism, thereby determining the application of the immunity exception, effectively revives the very problem the FSIA of 1976 sought to eliminate: the executive's power to control the judicial determination of state immunity. US courts themselves have expressed their concerns about the deficiencies of the AEDPA.[49]

This represents the situation at both the political and legal levels in the United States. On the international level, it appears that the legal mechanism employed in the fight against terrorism must, to be effective, align with the principles of justice. It would be inconsistent with justice to authorise the executive authority of a state to issue decisions that entail legal and judicial consequences for parties to legal relations, without appropriate judicial scrutiny.

In this context, the International Court of Justice established important jurisprudence in its judgement issued on 3 February 2012, in which it held Italy responsible for violating the immunity Germany enjoys under international law.[50]

The US subsequently enacted the Justice Against Sponsors of Terrorism Act (hereinafter JASTA) on 28 September 2016, legislation that sparked political and legal controversy. JASTA was enacted primarily to enable lawsuits filed by victims of the 11 September 2001 attacks and their families.[51] Section 3 of JASTA added Section 1605B to the Foreign Sovereign Immunities Act (FSIA) of 1976. One of the most important features of this amendment is that it lifts the immunity of foreign states without requiring a determination by the executive branch regarding whether the state in question is considered a supporter of

47 The countries designated by the US State Department as sponsors of terrorism are: Cuba, North Korea, Iran, Iraq, Sudan, Syria, and Libya, but it later removed the names of Iraq, Libya, and North Korea from the blacklist, leaving only four countries to which this exception to judicial immunity applies. For a list of countries classified as state sponsors of terrorism by the U.S. State Department, see: Bureau of Counterterrorism, 'Terrorist Designations and State Sponsors of Terrorism' (*US State Department*, 2025) <https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/> accessed 25 May 2025.

48 Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10(2) European Journal of International Law 266, doi:10.1093/ejil/10.2.237; Curtis A Bradley and Jack L Goldsmith, 'Pinochet and International Human Rights Litigation' (1999) 97(7) Michigan Law Review 2157.

49 *In re Islamic Republic of Iran Terrorism Litigation* [2009] 659 F Supp 2nd 31, 37, 38 <https://case-law.vlex.com/vid/in-re-islamic-republic-893484580> accessed 25 May 2025.

50 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (ICJ, 3 February 2012) paras 139 (2, 3 and 4) <https://www.icj-cij.org/case/143> accessed 22 January 2025.

51 JASTA (n 38) s 7, para (2); US Senate, 'Justice against Sponsors of Terrorism Bill' [2016] Congressional Record 162(147)/S6204 <https://www.congress.gov/congressional-record/2016/9/28/senate-section/article/s6204-1> accessed 24 February 2025.

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terrorism. As a result, any foreign state may be subject to US jurisdiction, regardless of its designation on the pre-prepared list of countries supporting terrorism.[52]

Moreover, the amendments link both the terrorist act and its consequences to US territory,[53] requiring that acts and their results occur within the United States. However, the act of support by the foreign state for the terrorist activity is not required to have taken place on US territory.[54]

Notably, this amendment does not establish any mechanism for investigating a foreign state's involvement in supporting terrorism prior to lifting immunity. Immunity may be revoked solely based on the filing of a lawsuit alleging that the state sponsored a terrorist act causing casualties, human or property damage, without any conclusive determination of whether the state supported such an act.[55]

This issue raises complex concerns in international law, specifically in relation to the immunity of state officials from criminal proceedings. Diplomatic and consular immunities remain broadly observed to preserve friendly relations among states.[56] From another perspective, such immunities are essential for ensuring that state officials can perform their state functions.[57] Recently, the ILC of the United Nations adopted draft articles on the immunity of state officials from foreign criminal jurisdiction on first reading.[58] While draft Articles 4 and 6 provide for immunity enjoyed so far,[59] Article 7 outlines exceptions which are linked to the most dangerous international crimes, such as genocide, war, and crimes against humanity. These exceptions notably do not extend to the support of terrorism,[60] given that terrorism has not yet been characterised as an international crime, though it is widely characterised as "a matter of grave concern to the international community".[61]

52 FSIA (n 24) s 1605B, subs (b).

53 ibid, subs (b) stipulates that '… for physical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States …'

54 ibid, subs (b), paras (1) and (2) stipulate:
…for physical injury to person or property or death occurring in the United States and caused by—
(1) an act of international terrorism in the United States; and
(2) a tortious act or acts of the foreign State, or of any official, employee, or agent of that foreign State while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign State occurred.

55 ibid, according to subs (b) 'A foreign State shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign State for physical injury to person or property or death occurring in the United States…'

56 ILC, 'Immunity of State officials from foreign criminal jurisdiction' [2022] Report of the ILC (A/77/10), ch 6/188, 197, gen comment para (9).

57 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (ICJ, 14 February 2012) para 53 <https://www.icj-cij.org/case/121> accessed 22 January 2025.

58 ILC, Immunity of State officials from foreign criminal jurisdiction (n 56) 188, para 66.

59 ibid 189.

60 ibid 190.

61 Kimberley N Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice' (2012) 3 (2) Journal of International Dispute Settlement 289, doi:10.1093/jnlids/ids006.

JASTA also restricts the revocation of immunity to acts, explicitly excluding omissions and acts of negligence.[62] It further excludes acts of war from the scope of its application.[63] This is in harmony with the general trend in the US FSIA, and before it, the judgments of American courts, including the Schooner Exchange judgment, which respected the sovereign functions of foreign states and their property.

As with the 1996 AEDPA, JASTA has faced extensive criticism. Former US President Barack Obama, in his veto message to Congress, highlighted concerns. He warned that JASTA places the authority to search and investigate any foreign country's involvement in providing support for terrorism in the hands of private litigants and courts rather than in the hands of intelligence and national security experts. He referred to the potential risks posed by reciprocity, suggesting that American civil and military employees deployed abroad could be exposed to litigation and legal accountability in foreign courts. He expressed concerns about the possibility of exposing American government property located outside the borders of the United States to coercive measures such as seizure, execution, and more. Obama also noted the serious political implications of allowing any country allied with the United States to be subject to the jurisdiction of the US courts, which could jeopardise the United States' relations with its allies at a time when it is most in need of building coalitions.[64]

Nonetheless, one notable aspect of JASTA is that it adheres to the principle of sovereign equality by subjecting all foreign states equally to US jurisdiction, without deferring to the opinion of the US administration—whose stance involves mixing politics and justice. However, like its predecessors, this law violates the principle of state immunity under international law and contravenes the principle approved by the US legislator when it enacted the FSIA in 1976.

Several lawsuits have been filed before the US courts under the JASTA amendment, including lawsuits filed against Sudan[65] and Saudi Arabia[66] in relation to the September 11 attacks. Regarding Sudan, after the fall of former President Omar al-Bashir in 2019, the US Congress passed the Consolidated Appropriations Act, which resolved many of the claims against Sudan and reinstated its sovereign immunity under Section 1605A and related

62 FSIA (n 24) s 1605B, subs (d).

63 ibid, s 1605B, subs (a), para (2).

64 US Senate, 'Justice against Sponsors of Terrorism Bill-Veto' [2016] Congressional Record 162(145)/s6072 <https://www.congress.gov/congressional-record/2016/9/26/senate-section/article/s6071-6> accessed 24 February 2025.

65 *Chava Mark v Republic of the Sudan* No 21-5250 [2023] DC Cir <https://law.justia.com/cases/federal/appellate-courts/cadc/21-5250/21-5250-2023-07-21.html> accessed 25 May 2025.

66 *Ashton et al v Kingdom of Saudi Arabia* No 1:2017cv02003 [2023] SDNY <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2017cv02003/471132/290/> accessed 25 May 2025.

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provisions.[67] However, the Act explicitly excluded lawsuits filed by victims of the September 11 attacks and their families, which remain ongoing under JASTA.[68] This partial restoration of Sudan sovereign immunity confirmed the impact of political considerations on justice mechanisms and their reflection on the US judicial system.[69]

3.2. Canadian Legislative Exceptions to Sovereign Immunity in Terrorism Cases

Canada has also amended its State Immunity Act (hereinafter SIA)[70] through the enactment of the Safe Streets and Communities Act.[71] This legislative amendment introduced sections 2.1, 6.1 and 12.1 into the SIA,[72] along with some amendments in the structure of the Act.[73] Under the Canadian (JVTA), a foreign state must be included on a list established by the Governor in Council to remove its immunity lifted in any action brought against it before Canadian courts for allegedly supporting terrorism or terrorist activities.[74]

This listing requirement has been criticised for its restrictive approach. Specifically, the JVTA limits the characterisation of support for terrorism to specific countries provided for in subsection 6.1(2),[75] thereby narrowing the scope of potential legal relief available to victims. This mechanism raises similar concerns to those seen in the US under the AEDPA, where the executive's role in determining the applicability of immunity risks politicising judicial decisions and undermining the separation between political discretion and legal adjudication.

To date, only two states have been designated on Canada's list of foreign states supporting terrorism: Iran and Syria.[76] In response, Iran has instituted proceedings against Canada

67 US Consolidated Appropriations Act 2021, Public Law 116–260 (27 December 2020) division FF, title XVII Sudan Claims Resolution <https://www.congress.gov/bill/116th-congress/house-bill/133/text> accessed 20 March 2025.

68 ibid, subss 1706(a)(2)(A) and (B).

69 US Senate, A BILL 'To Resolve Certain Pending Claims against Sudan by United States Citizens, and for other Purposes' (ROS20B43 9SR, 18 May 2025) s 2, para (3) <https://www.foreign.senate.gov/download/ros20b43> accessed 25 May 2025.

70 JVTA (n 37).

71 Canada Safe Streets and Communities Act (SC 2012, c 1) pt 1 <https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_1/page-1.html> accessed 26 May 2025.

72 JVTA (n 37) ss 4, 5 and 8.

73 ibid, ss 3.1, 6, 7, 8 and 9.

74 Canada State Immunity Act (RSC, 1985, c S-18) subss 6.1 (1) and (2) <https://laws-lois.justice.gc.ca/eng/acts/s-18/page-1.html> accessed 26 May 2025.

75 Reem Zaia and Darren Johnston, 'Canada's Justice for Victims of Terrorism Act Needs a Rewrite' (*Policy*, 18 July 2024) <https://www.policymagazine.ca/canadas-justice-for-victims-of-terrorism-act-needs-a-rewrite/> accessed 28 May 2025.

76 Order Establishing a List of Foreign State Supporters of Terrorism PC 2012-1067 (7 September 2012) [2012] Canada Gazette II 146(20) <https://gazette.gc.ca/rp-pr/p2/2012/2012-09-26/html/sor-dors170-eng.html> accessed 28 May 2025.

before the International Court of Justice, claiming that Canada has violated its obligations under customary international law by failing to respect the immunities of Iran and its property.[77] While these proceedings were initiated against Canada, a favourable judgement for Iran may have broader implications, particularly for the United States. An ICJ Judgment[78] characterising the terrorism-support exception to state immunity as a breach of international law would pose a direct challenge to the legal basis of various U.S. measures taken against Iran.

In most cases involving the recognition and enforcement of US court judgments, Canadian courts have not fully considered Iran's jurisdictional immunity. However, full proceedings on this issue have taken place in relation to claims arising from the tragic incident of Ukraine International Airlines Flight PS 752.[79]

3.3. Exceptions to State Immunity in Terrorism Cases in Other Jurisdictions

By contrast, no similar texts can be found in the state immunity laws of European jurisdictions. At the judicial level, the French Court of Cassation upheld immunity in such a case, ruling that a state's support for a terrorist group does not, in itself, justify the revocation of immunity in compensation cases brought by victims of that group's activities and their families.[80] Similarly, a UK court considered that: "The act of state-sponsored terrorism is of its own character a governmental act as opposed to an act which any private citizen can perform."[81]

However, the Italian Court of Cassation took a different approach, recognising a US judgment against Iran concerning the September 11 attacks.[82] Meanwhile, the Ukraine

77 *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* Press Release No 2023/34 (ICJ, 28 June 2023) <https://www.icj-cij.org/case/189> accessed 22 May 2025.

78 Maryam Jamshidi, 'Iran's ICJ Case against Canada Tests the Terrorism Exception to Sovereign Immunity' (*Just Security*, 24 July 2023) <https://www.justsecurity.org/87357/irans-icj-case-against-canada-tests-the-terrorism-exception-to-sovereign-immunity/> accessed 22 May 2025.

79 *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* Application instituting proceedings (ICJ, 27 June 2023) 10, para 18 <https://www.icj-cij.org/case/189> accessed 29 May 2025; *Zarei v Iran* CV-20-635078 [2021] ONSC 3377 (CanLII) <https://canlii.ca/t/jg0tx> accessed 29 May 2025.

80 Gilles Cuniberti, 'Flatow v Iran – French Supreme Court Rules on Sovereign Immunity in Exequatur Proceedings' (*EAPIL European Association of Private International Law*, 21 September 2023) <https://eapil.org/2023/09/21/flatow-v-iran-french-supreme-court-rules-on-sovereign-immunity-in-exequatur-proceedings/> accessed 3 June 2025.

81 *Heiser v Islamic Rep of Iran & MOIS* No HQ12X03803 [2019] EWHC 2074 (QB), 190 ILR 586, para 184 <https://www.quadrantchambers.com/sites/default/files/media/document/neutral_citation_number_2019_ewhc_2074.pdf> accessed 30 May 2025.

82 *Estate/Trust Case* 39391 (Corte Suprema di Cassazione, 10 December 2021) paras 8, 11 <https://all-in-lavoro.seac.it/document/2/4743838/0?link=true> accessed 29 May 2025.

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Supreme Court held that the grant of sovereign immunity to Russia in cases of compensations to Ukrainian nationals would violate the Council of Europe Convention on the Prevention of Terrorism and the International Convention for the Suppression of the Financing of Terrorism, in particular its Article 8.[83] Although this judgment links the lifting of immunity to international counter-terrorism instruments, the conventions cited do not explicitly provide for the lifting of state immunity in cases involving support for or commission of terrorist acts.[84]

4 THE FEASIBILITY OF FORMULATING AN EXCEPTION TO THE PRINCIPLE OF STATE IMMUNITY FOR THE BENEFIT OF VICTIMS OF TERRORISM IN DOMESTIC LAWS

As seen in recent lawsuits, plaintiffs have brought claims against states accused of financing or sponsoring terrorist acts that caused profound personal and material harm—whether through the loss of their loved ones, permanent injuries and disabilities that changed their lives forever, or severe losses to their property and interests. These claims often faced the barrier of state immunity. Even if this hurdle were overcome, they faced another barrier: the immunity of states' property within the territories of other states. This second layer of immunity is even stronger—it strips any given judgment of its practical value.

In recognition of this injustice, legislators in the USA and Canada amended their state immunity acts. While these amendments offer victims a solution to the problem of state immunity preventing individuals from their right to a fair trial and the execution of the resulting rulings, they also introduce difficult questions. Among them is the issue of how states that support terrorism are identified, and whether the resulting compensation—potentially significant—should be borne by the millions of citizens of those states.

The approach adopted by the US and Canada could serve as a model. By enacting similar legislation, other countries could put pressure on the governments of countries involved in supporting and financing terrorist operations in other countries. However, such a solution faces two major challenges.

83 Badanova (n 29).

84 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 UNGA Res 54/109) [1999] UNTS 2178/197; Council of Europe Convention on the Prevention of Terrorism (16 May 2005) [2018] OJ L 159/3.

4.1. Adopting a Legislative Anti-Terrorism Approach That Amends International Custom Related to The State Immunity

States and property immunity remain cornerstones of international law, protected by two international legal documents, the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted in 2004,[85] and the ICJ Judgement on 3 February 2012 in *the Jurisdictional Immunities of the State case* between Germany, Italy and Greece.[86]

Article 5 of the 2004 Convention states:

> "A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state, subject to the provisions of the present convention."

This article imposes an obligation on the courts of all states parties to the convention to respect such immunity. Article 6 elaborates further under the title "Modalities for giving effect to state immunity," outlining how this obligation must be upheld:

> "1. A state shall give effect to state immunity under Article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another state and to that end shall ensure that its courts determine on their own initiative that the immunity of that other state under Article 5 is respected.
>
> 2. A proceeding before a court of a state shall be considered to have been instituted against another state if that other state:
> (a) is named as a party to that proceeding; or
> (b) is not named as a party to the proceeding, but the proceeding in effect seeks to affect the property, rights, interests or activities of that other state."

The obligation is clear: states should refrain from exercising jurisdiction over another state in accordance with the provisions of Article 5. This duty is derived from the combined effect of Articles 5 and 6.[87] The text referenced above in paragraphs (1) and (2) of Article 6 reinforces this interpretation.[88]

However, a reading of Articles 5 and 6 of the United Nations Convention reveals that they do not explicitly establish international responsibility for breaching the immunity of states and their property. Nor does the Convention contain any provision outlining the consequences of such a breach. In such cases, responsibility is determined by the general principles and established rules of customary international law.

This conclusion is by the Draft Articles on The Responsibility of States For Internationally Wrongful Acts, adopted by the International Law Commission (ILC) at the fifty-third

85 UN Convention on Jurisdictional Immunities (n 33).
86 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50).
87 UN Convention on Jurisdictional Immunities (n 33) art 5.
88 ibid, art 6, paras 1, 2.

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session in 2001. Draft Article 12 states: "There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character."[89]

According to paragraph (1) of the General Commentary to the draft articles, the ILC aimed to codify "the basic rules of international law concerning the responsibility of states for their internationally wrongful acts." The focus was on "the secondary rules of state responsibility"—rules that specify the mechanism and method of establishing responsibility for a certain act on a state.[90]

Paragraph (1) of the commentary also clarifies that "the articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility." That task falls to the "primary rules" of international law—whether customary or written—that define the specific obligation in question. In the context of state immunity, these primary rules are represented by Articles 5 and 6 of the 2004 United Nations Convention, as well as by longstanding customary practices, including judgments of national courts in various states.

In its arguments before the ICJ, specifically in its last request before the judgment, Germany invoked the rules on state responsibility for internationally wrongful acts as set out in the 2001 draft articles.[91] In its fourth submission, Germany asked the court to rule on the international responsibility of Italy.[92]

Although the final judgement refrained from explicitly mentioning the international responsibility of Italy, it did affirm that Italy had breached its obligations and requested Italy to take measures to suspend the legal effects of its rulings that violated Germany's jurisdictional immunity. This requirement aligns with key provisions of the 2001 draft articles, particularly Article 34, which stipulates:

"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

Article 35 also stipulates:

> "A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed ..."

89 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] Yearbook of the ILC 2(2)/26, 54, gen comment art 12.

90 ibid 54.

91 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50) 49, [137].

92 ibid, 11, [17] (4).

Despite the enormity of the crimes committed by the forces of the Third Reich during World War II—crimes that were the subject of the Distomo case—the International Court of Justice held that Italy was internationally responsible for violating Germany's immunity. Italy had imposed enforcement measures on *Villa Vigoni,* a property owned by the German government and located in northern Italy.[93]

4.2. Creating Mechanisms to Enforce the Judgements Issued in Accordance with The Anti-Terrorism Exception in The Judicial Systems of Various Countries

If a judgment is issued by the US or Canadian courts in accordance with their anti-terrorism exceptions, no issue arises if the property of the state against which the judgment is rendered is found within the territory of the trial jurisdiction. However, difficulties emerge but when the enforcement is sought outside such a territory—particularly regarding whether current bilateral or multilateral judicial agreements are sufficient to oblige states to enforce judgments that violate the principle of state immunity.

In the US, there is no bilateral or multilateral agreement in force for the mutual recognition and enforcement of judgments with any country in the world. As a result, it is difficult to enforce judgments issued by US courts based on the Justice Against Sponsors of Terrorism Act (JASTA)— outside the United States. This lack of cooperation stems from other countries' concerns over the excessive compensation awarded by American courts, which are viewed as disproportionate.[94]

Although the United States have instituted a Crime Victims Fund,[95] this fund is financed exclusively through fines and criminal forfeits collected by US competent authorities; compensation from foreign states is not deposited into it.[96]

93 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50) 51.

94 'Enforcement of Judgments' (*US Department of State - Bureau of Consular Affairs*, 2025) <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judgements.html> accessed 1 March 2025.

95 US Code, 42 USC The Public Health and Welfare, ch 112, § 10601(c) <https://tile.loc.gov/storage-services/service/ll/uscode/uscode1982-03004/uscode1982-030042112/uscode1982-030042112.pdf> accessed 5 June 2025.

96 ibid, § 10601(b). Institution of victims fund is used as a means of insuring that victims receive the compensation awarded to them, there has been many examples of such funds like national foundations in Austria and Germany and the victims trust fund mentioned in Art. 79 of the Statute of the ICC. Stefan Kadelbach, 'State Immunity, Individual Compensation for Victims of Human Rights Crimes, and Future Prospects' in Valentina Volpe, Anne Peters and Stefano Battini (eds), *Remedies against Immunity?: Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 297, Springer 2021) 143, doi:10.1007/978-3-662-62304-6_7.

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In contrast, many other countries have entered into bilateral and multilateral agreements on judicial cooperation and mutual recognition and enforcement of judgments. For example, Article 25(b) of the Riyadh Arab Convention for Judicial Cooperation 1983 obliges each contracting party to recognise and enforce judgments issued by the courts of any other contracting party.[97] However, Article 25(c) excludes judgments issued against the government of the requested party, as well as judgments whose recognition or enforcement would be inconsistent with international treaties or agreements in force in that party.[98]

Accordingly, this provision grants sovereign immunity to the property of the requested state, but does not extend immunity to third-party states whose property may be located in the territory of the enforcing state.

In Europe, Article 2(4) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2019 stipulates that:

> "A judgment is not excluded from the scope of this convention by the mere fact that a state, including a government, a governmental agency or any person acting for a state, was a party to the proceedings."[99]

However, no similar provision exists in European Parliament Regulation No. 1215/2012 adopted on 12 December 2012 on jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters. Nor does this regulation refer to the 1972 European Convention on State Immunity. Notably, Article 45(1)(a) stipulates the refusal to recognise judgments issued by the courts of a member state if they are manifestly contrary to the general policy of the member state requested to implement. This could be invoked to refuse enforcement of judgments against the government or official bodies of another member state, in addition to referring to international custom in this regard.[100]

Enforcement against the property of a foreign state often contradicts the general policy pursued by states. For instance, in the LIAMCO case, the Swiss Federal Court noted the coercive measure against Libyan funds was unjustified, stating:

"Switzerland's interests do not require such a measure; on the contrary, it may cause political and other difficulties."[101]

97 Riyadh Arab Convention for Judicial Cooperation (6 April 1983) art 25 (b) <http://www.leagueofarabstates.net/ar/legalnetwork/Pages/agreements_details.aspx?RID=67> accessed 1 March 2025.

98 ibid, art 25 (c).

99 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) [2022] OJ L 187/4, art 2, para 4.

100 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, art 45, para 1.

101 *Libya v LIAMCO* (Switzerland, 19 June 1980) <https://vlex.ch/vid/libya-v-liamco-swiss-868582902> accessed 29 May 2025.

It is worth noting here that the European Union—with the exception of Denmark—[102] is a party to the 2019 Hague Convention.[103] The United States' adoption of both the AEDPA of 1996 and the JASTA of 2016 does not significantly affect its relations with other countries due to its power and influence in the world. The implementation of the two acts and the judgment on compensation in favour of victims of terrorist acts against the governments of certain countries will not lead to significant harm to the United States' relations and interests, despite internal criticism—such as the objections expressed by former President Barack Obama.

However, the adoption of such laws by other countries, especially third-world countries, will result in negative political, diplomatic and economic consequences upon implementation. This highlights the importance of a unified multilateral international text, under the auspices of the United Nations, to regulate the process of compensation for victims of terrorist acts. Such a framework should obligate member states to uphold the rights of terrorism victims through a complete system that provides a compensation mechanism and prevents any retaliatory measures by the state from which such compensation is demanded.

The core principle of any such instrument should be the removal of state immunity if it is proven that a state supported or sponsored a terrorist act. However, this stripping of immunity must be confined to the context and scope of the legal claim brought by the affected individuals.

5 CONCLUSIONS

State immunity is still widely recognised in relation to states' non-commercial activities. The terrorism support exception is not recognised by most legislations and courts, and is currently only found in US and Canadian legislation. This fact can be attributed to the unwillingness of most countries to adopt such a doctrine that may put them in confrontation with other countries.

Given this context, it would be preferable for any future multilateral agreement to include a provision enabling victims and their relatives to obtain appropriate compensation from states proven to have supported the terrorist acts that caused them harm. By formulating this principle in a binding international agreement, it would become a norm of international law. This would relieve individual states from diplomatic embarrassment, establish the right to compensation as a human rights norm, and help avoid violating the principle of equality between states by treating certain countries as those that support terrorism, thereby refraining from applying sovereign jurisdictional immunity to them.

102 Council Decision (EU) 2022/1206 of 12 July 2022 Concerning the Accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2022] OJ L 187/1, Preamble, para (13).

103 ibid, art 1.

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Importantly, such a legal rule would bind the domestic jurisdiction of state parties to the agreement, thereby allowing victims to pursue their claims in national courts even if the defendant state is not party to the agreement. Unlike the requirements for jurisdiction of international courts—which obligate the defendant state's prior consent—national courts would acquire jurisdiction automatically through the treaty's effect on domestic legal systems once immunity is lifted. The defendant state would thus be subject to national jurisdiction without needing to explicitly accept it.

To strengthen the enforceability of this principle and encourage broader state participation, the following text could be included in a future multilateral agreement in line with Action 23(c) of the Pact for the Future:[104]

> "A state found to be sponsoring the terrorist act which causes death, injuries or property loss shall not enjoy immunity conferred upon it under international law from jurisdiction or execution."

Additionally, execution-related provisions may include safeguards, such as:

> "The court may refuse the execution if—
>
> - The person against whom recognition or enforcement is sought did not appear in the trial, or was not properly represented therein.
> - The judgment to be recognised or enforced is not a final judgment and is not enforceable in the state of origin.
> - It finds that the compensation awarded is excessive."

The third paragraph is proposed to prevent the execution of exaggerated compensations. Such a provision would promote justice, rationality, helping to balance the rights of victims in each case and encouraging states to sign and accept the proposed convention. Courts may base their determination of excess compensation on their domestic laws and the jurisprudence of the supreme courts in their countries.

It is also possible to introduce a provision revoking the immunity of government employees involved in supporting terrorism, but only at the investigation stage, while maintaining their immunity from trial and judgment, recognising that these individuals may have been acting under orders.

To further institutionalise the terrorism support exception, two key amendments can be proposed:

1. Insert a new article after Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property, providing a terrorism support exception to state immunity.[105]

104 The Pact for the Future (n 1).

105 UN Convention on Jurisdictional Immunities (n 33) art 12. This article provides for Personal injuries and damage to property exception from immunity.

2. Add a subparagraph to Draft Article 7(1) of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, listing the support of terrorism activity as one of the most dangerous international crimes.

These proposed provisions would solidify an international prohibition on supporting terrorism and thereby strengthen the position of terrorism victims before the national courts of various states in both the trial and enforcement phases.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО ЖЕРТВ ТЕРОРИЗМУ НА КОМПЕНСАЦІЮ ЗГІДНО З ПРИНЦИПОМ ЮРИСДИКЦІЙНОГО ІМУНІТЕТУ ІНОЗЕМНОЇ ДЕРЖАВИ

Алаа Еддін Зольфакар

АНОТАЦІЯ

Вступ. *Терористичні атаки в різних частинах світу призвели до тисяч жертв, ушкоджень та втрат майна. Визнано, що деякі з цих атак, ймовірно, були здійснені за сприяння державних суб'єктів, або спонсорувалися ними, або були скоєні рухами, що підтримуються урядами.*

З огляду на це, міжнародному співтовариству стало необхідним ухвалити багатосторонню та всеосяжну міжнародну угоду щодо боротьби з тероризмом та

пом'якшення його наслідків, особливо після прийняття Генеральною Асамблеєю Організації Об'єднаних Націй «Пакту заради майбутнього» на її сімдесят дев'ятій сесії. Дія 23 Пакту, у пункті (c), закликає до «активізації зусиль, спрямованих на укладення всеосяжної конвенції про міжнародний тероризм».

Методи. *У цьому дослідженні було використано дедуктивний підхід, який охопив вивчення та аналіз різних національних рішень зі Сполучених Штатів, Великої Британії, Німеччини, Франції, Швейцарії, Австрії, Канади, Італії, України, Польщі, Греції, Китаю та Індії, а також наукових коментарів авторів та юристів. У статті також міститься огляд відповідних міжнародних угод та вивчення можливості інтеграції положень як із систем імунітету іноземних держав, так і з угод про міжнародне судове співробітництво. Метою роботи було вирішення проблеми захисту держав від відповідальності за підтримку тероризму, а також запропонувати ефективну правову формулу, яка б дозволила жертвам тероризму отримати компенсацію. Також були розглянуті винятки щодо боротьби з тероризмом, зазначені у законах про імунітет держав Сполучених Штатів та Канади.*

Результати та висновки. *У дослідженні зроблено висновок, що державний імунітет є усталеним принципом як у писаному, так і у звичаєвому міжнародному праві і отримав визнання в різних національних судових системах. Однак як національна, так і міжнародна судова практика та суди демонструють нерішучість у прийнятті винятку щодо боротьби з тероризмом, оскільки таке рішення означало б порушення міжнародного принципу імунітету та могло б призвести до дискримінації між державами, незважаючи на справедливість притягнення до відповідальності держав, що підтримують терористів.*

Таким чином, у цьому дослідженні пропонується набір правових положень, які слід додати до будь-якої багатосторонньої міжнародної угоди про боротьбу з тероризмом, а також до пов'язаних міжнародних угод.

Ключові слова: *державний імунітет, імунітет державних посадовців, виняток щодо боротьби з тероризмом, право на компенсацію, віктимологія, угоди про правову допомогу, розвиток міжнародного права.*

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Research Article

EVALUATING THE EFFECTIVENESS OF THE COMMITTEE AGAINST TORTURE (CAT) IN ACHIEVING STATE COMPLIANCE: A CASE STUDY OF NEW ZEALAND, ZAMBIA AND MEXICO

Zeyad Jaffal, Maya Khater*, Ziad AL-Enizi and Rawan Allouzi

ABSTRACT

Background: *This study examines the effectiveness of the Committee against Torture (CAT) in achieving state compliance with the United Nations Convention against Torture (UNCAT). Although the prohibition of torture constitutes a jus cogens norm in international law, torture persists globally, revealing a serious gap between states' formal ratification of UNCAT and the practical realisation of its obligations. While the CAT provides a comprehensive monitoring framework–through periodic reporting, individual complaints, and general comments–it lacks binding enforcement powers, raising questions about its practical impact in diverse legal and political settings.*

Methods: *Using a qualitative, comparative legal approach, this study evaluates the extent of CAT's influence on domestic compliance in three states–New Zealand, Mexico, and Zambia–selected for their legal system diversity, geographical distribution, and distinct compliance trajectories. The analysis draws on CAT concluding observations, state reports, national legislation, civil society shadow reports, and third-party documentation. Each country is assessed for both formal compliance (ratification, legislative incorporation, reporting) and substantive compliance (investigations, accountability, and redress mechanisms). A structured comparison model ensures consistency across cases.*

Results and Conclusions: *Findings reveal stark contrasts. New Zealand demonstrates strong formal compliance, with detailed legislation and constructive CAT engagement. However, gaps remain concerning Indigenous rights, detention safeguards, and procedural protections. Mexico, despite enacting the 2017 General Law on Torture, continues to face systemic issues, including widespread torture, impunity, and militarised security forces. Zambia, the weakest performer, lacks specific anti-torture legislation and institutional frameworks, resulting in minimal implementation. Across all cases, CAT's impact depends heavily on domestic*

political will, institutional independence, and the participation of civil society. The study concludes that while CAT serves a critical normative and advisory role, its influence remains constrained in practice by its non-binding nature. Strengthening CAT's follow-up mechanisms, enhancing regional cooperation, and integrating recommendations into national legal and political agendas are essential for bridging the gap between formal ratification and the actual prevention of torture.

1 INTRODUCTION

The prohibition of torture stands among the most universally recognised norms of international law, classified as *jus cogens* and binding on all States under any circumstances.[1] Kolb emphasizes that this hierarchy establishes *jus cogens* as a unique category within international law, one that serves as an ethical and legal imperative above other obligations.[2] This status reflects the deeply embedded notion that torture constitutes a grave assault on human dignity and the fundamental rights of individuals, a principle that transcends cultural, political, and legal divides across the international community.[3]

Judicial bodies have reinforced the principle of non-derogability in landmark decisions. For example, in *Prosecutor v. Furundžija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the prohibition of torture is a *jus cogens* norm, thereby immune from waiver or modification even by the States themselves. This ruling underscored the non-derogable nature of *jus cogens*, positioning these norms as inviolable constraints on state behavior.[4] Similarly, the European Court of Human Rights (ECtHR), in the case of *Al-Adsani v. United Kingdom*, held that the prohibition against torture is a universally accepted *jus cogens* norm, which could not be circumvented by sovereign immunity defenses. This ruling emphasised that the prohibition on torture, as a non-derogable right, supersedes other legal defences, further solidifying the non-derogable nature of *jus cogens*.[5]

Nevertheless, despite the strength of its legal status, the effective eradication of torture remains elusive. Reports from international organisations and empirical studies confirm that torture persists in many regions, often shielded by practices of impunity, political instability, or institutional weakness.

1 Winston P Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001) 14 Harvard Human Rights Journal 87.

2 Robert Kolb, *Peremptory International Law — Jus Cogens: A General Inventory* (Hart Publishing 2015).

3 Manfred Nowak, Moritz Birk and Giuliana Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford Commentaries on International Law, 2nd edn, OUP 2019).

4 Case No IT-95-17/1-T *Prosecutor v Furundžija* (ICTY, 10 December 1998) para 153 <https://www.icty.org/en/case/furundzija> accessed 11 March 2025.

5 *Al-Adsani v United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) para 61 <https://hudoc.echr.coe.int/eng?i=001-59885> accessed 11 March 2025.

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The international community, through instruments such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[6] has sought to institutionalise the fight against torture. The Convention is considered one of the cornerstones of modern international human rights law, building upon the commitments first articulated in the Universal Declaration of Human Rights.[7] Central to this framework is the Committee Against Torture (CAT Committee),[8] an independent body tasked with monitoring state compliance.

UNCAT defines torture in Article 1(1) as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes such as obtaining information, punishment, intimidation, coercion, or discrimination, when inflicted by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.[9] This definition requires four key elements: the infliction of severe pain or suffering; intentionality; a prohibited purpose; and involvement or acquiescence of a public official.

Expanding upon this, Nowak, Birk, and Monina explain that torture differs from cruel, inhuman, or degrading treatment primarily through the severity and the purposive element of the act, stressing that both physical and psychological suffering are equally protected.[10] Moreover, they highlight that state responsibility extends even where private individuals commit acts of torture if public authorities consent or fail to prevent such abuses.[11]

To achieve that, the Convention established "a comprehensive scheme with the aim ultimately to end torture around the world."[12] This framework encompasses a broad range of measures, including "prohibitions in criminal law, strong principles of criminal responsibility, [and] the elimination of certain defences."[13] It further imposes "regulations for security forces" and mandates "training" intended to ensure that those entrusted with public authority do not engage in torture or cruel treatment.

The Convention also creates duties for States Parties "to investigate and prosecute regardless of where the torture was committed," emphasising the universal jurisdictional

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (adopted 10 December 1984) [1996] UNTS 1465/85.

7 Max Lesch, 'From Norm Violations to Norm Development: Deviance, International Institutions, and the Torture Prohibition' (2023) 67(3) *International Studies Quarterly* 1, doi:10.1093/isq/sqad043.

8 'Committee against Torture (CAT)' (*UN Human Rights: Office of the High Commissioner*, 2025) <https://www.ohchr.org/en/treaty-bodies/cat> accessed 11 March 2025.

9 UNCAT (n 6) art 1(1).

10 Nowak, Birk and Monina (n 3) 509-612, arts 19, 20, 22

11 ibid.

12 Christopher Keith Hall, 'The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18(5) European Journal of International Law 921, doi:10.1093/ejil/chm050.

13 ibid 922.

obligation attached to acts of torture.[14] In addition, the Convention requires the "exclusion of statements obtained through torture" from legal proceedings, thereby upholding the principle that evidence derived through coercion is fundamentally unreliable and inadmissible.

Supplementing these criminal measures, the Convention establishes "procedures supplementing criminal proceedings to enable victims and their families to obtain civil reparations from those responsible for torture, regardless of where it was committed."[15] This integrated approach reflects the Convention's overarching objective not only to prevent torture but also to ensure accountability and redress for victims on a global scale.

The United Nations treaty body system, of which the CAT Committee is a part, represents a significant achievement in terms of international human rights protection, described as "one of the greatest achievements in the history of the global struggle for human rights."[16] Treaty bodies are committees created by international human rights treaties to monitor the implementation of treaty obligations by State Parties. Each treaty body is tasked with reviewing periodic reports submitted by states, assessing their compliance with substantive and procedural obligations under the treaty. As Salama highlights, "the ten treaty bodies are the custodians of the legal norms established by human rights treaties," providing independent oversight and interpretative guidance while not holding judicial status.[17] Although often described as quasi-judicial bodies, their outputs, such as Concluding Observations and Views on individual complaints, are not legally binding but possess significant normative authority.[18]

The importance of treaty bodies lies in their ability to serve as "custodians of universal values" while maintaining independence from political influences within the UN system.[19] Their role is critical because, as Nagan and Atkins emphasise, international monitoring mechanisms are essential to moving norms like the prohibition of torture from universal proscription to effective application and enforcement.[20]

The CAT Committee operates within a quasi-judicial framework, performing a range of functions, including reviewing periodic state reports, considering individual complaints, conducting confidential inquiries, and issuing General Comments to interpret the

14 ibid.

15 ibid.

16 Ibrahim Salama, 'Strengthening the UN Human Rights Treaty Body System : Prospects of a Work in Progress' in Olivier de Frouville (dir), *Le système de protection des droits de l'Homme des Nations Unies*: *Présent et avenir* (Publications du CRDH, Université Panthéon-Assas Paris 2 2018) 95.

17 ibid 96.

18 ibid 96-7; Christen Broecker, 'The Reform of the United Nations' Human Rights Treaty Bodies' (2014) 18(16) ASIL Insights <https://www.asil.org/insights/volume/18/issue/16/reform-united-nations%E2%80%99-human-rights-treaty-bodies> accessed 11 March 2025.

19 Salama (n 16).

20 Nagan and Atkins (n 1).

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Convention's provisions. While these mechanisms reflect a sophisticated model of international human rights oversight, the Committee's findings are not legally binding in the traditional sense of judicial decisions. Rather, their authority derives from principles of cooperation, normative persuasion, and moral legitimacy.[21] Despite this comprehensive mandate, enforcement challenges remain significant. Unlike domestic or regional human rights courts, the CAT Committee lacks coercive power to compel state action, relying instead on sustained dialogue, structured follow-up, and the political will of national institutions.

These structural limitations are further compounded in contexts where international human rights norms are perceived as ideologically external or inconsistent with domestic values. Critics have highlighted the risk of Western-centric interpretations of treaty obligations, particularly when applied across culturally diverse and post-colonial legal systems. The legitimacy and efficacy of treaty bodies such as the UNCAT depend not only on the normative content of the obligations they monitor but also on their ability to engage plural legal traditions with sensitivity to cultural, religious, and epistemological diversity. As Jack Donnelly observes, "all societies cross-culturally and historically manifest conceptions of human rights," suggesting that the principle of human dignity is neither culturally exclusive nor the product of a singular Western lineage.[22] This insight invites a broader understanding of universality–one that affirms shared values while acknowledging distinct legal and moral frameworks.

In Muslim-majority societies, for example, human rights compliance is often mediated through the lens of religious law. Baderin argues that "the implementation of all rights and freedoms of international human rights principles must consider a multicultural approach to realise an inclusive theory of universalism."[23] He critiques the anthropocentric orientation of prevailing human rights doctrine, which privileges human rationality as the sole moral source, as misaligned with the theocentric foundations of Islamic legal theory–where divine revelation constitutes the ultimate normative authority.[24]

Abdullahi An-Na'im similarly observes that although Islamic law is the product of human interpretation, it is widely viewed by Muslims as sacred and immutable: "Islamic law is not divine because it is the product of human interpretation of Qur'an and hadith," yet it derives

21 Heli Niemi and Martin Scheinin, *Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective* (Institute for Human Rights, Åbo Akademi University 2002) 3; Nowak, Birk and Monina (n 3) 475.

22 Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly 284.

23 Mashood A Baderin, 'Dialogue among Civilisations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law' (2001) 2(2) Asia Pacific Journal on Human Rights and the Law 8, doi:10.1163/157181501400649008; Al Khanif, Religious Minorities, Islam and the Law: International Human Rights and Islamic Law in Indonesia (ICLARS Series on Law and Religion, Routledge 2021) 38.

24 Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003) 8; Khanif (n 23).

enduring legitimacy from its perceived divine source.[25] From this perspective, meaningful implementation of international human rights norms in these settings requires engagement with Sharia, rather than its marginalisation.[26]

These considerations underscore the importance of adopting a dialogical, culturally responsive approach to treaty body engagement–one that affirms universal principles while also respecting the diverse legal traditions through which they are realised.

In the same context, the core problem addressed by this study is the persistent gap between states' formal ratification of international anti-torture obligations and the substantive implementation of those commitments in practice. Despite the CAT Committee's detailed monitoring framework, widespread and systemic violations of the prohibition against torture continue across various jurisdictions. This paradox challenges the assumption that ratification alone is sufficient to secure compliance and raises fundamental questions about the actual effectiveness of treaty body mechanisms in achieving their intended protective outcomes.

The significance of this study lies in its potential to contribute to a deeper understanding of the conditions under which treaty bodies such as the CAT Committee can meaningfully influence State behaviour. By conducting a comparative case study of three States with differing compliance profiles–New Zealand, Mexico, and Zambia–this research provides empirical insights into the factors that enhance or inhibit the domestic implementation of UNCAT obligations. Analysing these variations is crucial for informing ongoing debates about treaty body reform, the need for enhanced enforcement mechanisms, and the future of international human rights law.

2 METHODOLOGY

This study employs a qualitative, comparative legal methodology to evaluate the CAT committee in promoting compliance with the obligations established under the UNCAT. It undertakes a structured comparative analysis of three States–New Zealand, Mexico, and Zambia–each exemplifying a distinct pattern of engagement with the Convention and representing diverse geographic, legal, and political contexts:

1) **New Zealand** demonstrates a high degree of formal compliance and constructive engagement with international human rights mechanisms. However, it continues to face critical challenges related to the rights of Indigenous peoples, conditions of detention, and psychiatric care practices.

25 Charles Kurzman (ed), *Liberal Islam: A Sourcebook* (OUP 1998) 237.

26 Baderin (n 23) 8.

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2) **Mexico** reflects extensive formal engagement and legislative reform, notably through the 2017 General Law on Torture. Yet, systemic patterns of torture, institutional impunity, and the militarisation of public security severely undermine substantive compliance with UNCAT obligations.

3) **Zambia** represents a case of low compliance, marked by the absence of specific anti-torture legislation, prolonged delays in domesticating international standards, weak institutional enforcement mechanisms, and a limited capacity to translate international commitments into concrete protections against torture.

The selection of these three countries was guided by the aim of capturing regional diversity and divergent approaches to implementing UNCAT. Geographically, the cases span Oceania (New Zealand), Latin America (Mexico), and Sub-Saharan Africa (Zambia). They also vary significantly in legal tradition, economic development, and institutional capacity. New Zealand, a high-income parliamentary democracy, operates under a common law system derived from the British legal tradition. Mexico, an upper-middle-income federal republic, follows a mixed legal system that combines civil law influences from Spanish colonial history with elements of common law in certain procedural aspects. Zambia, a lower-middle-income unitary state, also follows a common law system inherited from British colonial rule, though it lacks a specialised anti-torture legal framework. Instead, it relies primarily on general criminal law provisions, which fail to address the specific legal and normative dimensions of torture as defined under international law. This comparative framework enables a robust evaluation of how factors such as geopolitical context, legal systems, and institutional integrity shape the CAT Committee's influence over national compliance trajectories.

Formal compliance is evaluated through the lens of ratification status, legislative incorporation of UNCAT obligations, timely submission of reports, engagement with individual complaint mechanisms under Article 22, and participation in inquiries under Article 20. On the other hand, substantive compliance is assessed by examining the actual practices of law enforcement, the judiciary, and correctional facilities; the prevalence of torture and ill-treatment; the effectiveness of complaints and investigative mechanisms; and redress available to victims. The analysis is framed within a longitudinal perspective, covering developments between 2000 and 2024.

The study also integrates an assessment of national legislative frameworks, focusing on their conformity with UNCAT's definition of torture as outlined in Article 1 of the Convention. Particular attention is given to:

1) The criminalisation of torture as a distinct offence,
2) The existence of statutes of limitations,
3) The presence or absence of exclusions for national security or emergencies,
4) Procedural safeguards for detainees, including access to legal counsel, medical examinations, and judicial review.

For New Zealand, relevant legislation includes the Crimes of Torture Act 1989, which criminalises torture in terms consistent with the Convention's requirements. For Mexico, the General Law is critically examined in light of the CAT Committee's observations about implementation deficiencies.[27] In contrast, Zambia has not enacted a dedicated anti-torture law. Although torture is prohibited under Article 15 of the Constitution and Zambia has ratified the UN Convention Against Torture, national legislation defining and criminalising torture remains absent.[28] As emphasised by the Human Rights Commission in 2025, this legal vacuum means that courts continue to rely on general assault provisions, which fall short of the international standards required under UNCAT.[29]

In terms of comparative technique, the study adopts a structured, focused comparison model, whereby each case study is analysed according to the same set of criteria to enable meaningful cross-case comparison.

3 FINDINGS / RESULTS

This section presents the empirical findings derived from the comparative analysis of New Zealand, Mexico, and Zambia. It evaluates both formal legal compliance and substantive implementation of the Convention against Torture, drawing on state reports, the CAT Committee's concluding observations, national legislation, and third-party sources. The findings illuminate patterns of engagement and resistance, highlighting the contextual factors that facilitate or impede the realisation of treaty obligations at the domestic level.

3.1. New Zealand

The CAT Committee, in its 2023 concluding observations on the Seventh Periodic Report of New Zealand, provided a detailed and critical assessment of the State party's efforts to fulfil its obligations under UNCAT. While acknowledging New Zealand's many positive reforms, the Committee identified serious ongoing concerns that illustrate a persistent gap between formal legal commitments and substantive compliance in practice.[30]

27 UN CAT, *Concluding Observations on the Seventh Periodic Report of Mexico* CAT/C/MEX/CO/7 (24 July 2019) <https://digitallibrary.un.org/record/3859795?ln=en&v> accessed 11 March 2025.

28 UN CAT, *Consideration of Reports Submitted by States Parties UNDER Article 19 of the Convention: Concluding Observations of the Committee against Torture: Zambia* CAT/C/ZMB/CO/2 (26 May 2008) para 3 <https://digitallibrary.un.org/record/630807?ln=en&v> accessed 11 March 2025.

29 Augustine Sichula, 'HRC Wants Enactment of Anti-Torture Law, as Zambia Marks International Day for Victims of Torture' *Zambia Monitor* (Lusaka, 26 June 2025) <https://www.zambiamonitor.com/hrc-wants-enactment-of-anti-torture-law-as-zambia-marks-international-day-for-victims-of-torture/> accessed 19 July 2025.

30 UN CAT, *Concluding Observations on the Seventh Periodic Report of New Zealand* CAT/C/NZL/CO/7 (27 January 2023) paras 1–6 <https://digitallibrary.un.org/record/4019282?ln=en&v> accessed 11 March 2025.

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The Committee emphasised the need for fuller domestic incorporation of the Convention, noting that while New Zealand's dualist system employs a combination of legislation and policy, it remains a matter of concern that "the State party has not yet fully incorporated the Convention into the domestic legal order" and that "judicial decisions make little reference to international human rights instruments, including the Convention."[31]

The treatment of customary law also raised serious concerns. The Committee expressed disquiet about "a lack of clarity regarding the relationship of customary law with international legal norms in general and with provisions of the Convention in particular,"[32] urging that, where conflicts arise, the Convention's supremacy must be ensured.[33]

As for criminalisation of torture, while Section 2 of the Crimes of Torture Act 1989 was found to be broadly aligned with Article 1 of the Convention, the Committee expressed concern that "no mandatory minimum penalty is provided for acts of torture," thereby allowing "a very broad margin of discretion to the sentencing judge."[34] Consequently, it recommended the amendment of the Crimes of Torture Act to introduce "mandatory minimum or graduated penalties" proportional to the gravity of the acts.[35]

The Committee observed significant weaknesses in the procedural safeguards available at the moment of deprivation of liberty. It lamented "the scant information provided on the measures and procedures in place to ensure that, in practice, detained persons, including children and young people, enjoy all fundamental legal safeguards from the very outset of deprivation of liberty".[36] Particular issues included inadequate access to lawyers and medical examinations, and insufficient information on the right to inform a family member or another person of the detention. Additionally, the Committee criticised the continued use of spit hoods, urging New Zealand to "take all measures necessary to end the use of spit hoods in all circumstances."[37]

The Committee highlighted ongoing issues in detention conditions, including overcrowding, poor facilities, and staff shortages, despite some improvements. It noted inadequate mental health services and limited rehabilitation access.[38] The overrepresentation of Māori and Pasifika individuals in prisons was criticised, prompting calls for systemic reforms. Additionally, concerns were raised about pretrial detention practices, particularly the absence of maximum time limits and the increasing number of

31 ibid, para 8.
32 ibid, para 10.
33 ibid, para 11.
34 ibid, para 12.
35 ibid, para 13.
36 ibid, para 14.
37 ibid, para 16.
38 ibid, para 27.

Māori detainees awaiting trial.[39] The Committee recommended expanding the use of non-custodial measures.[40]

Accountability mechanisms for acts of torture and ill-treatment were deemed insufficient. The Committee observed that no prosecutions had been pursued under the Crimes of Torture Act 1989, and it criticised the requirement of the Attorney-General's consent for such prosecutions.[41]

Further concerns centred on the need to guarantee comprehensive redress for victims of torture and ill-treatment, with the Committee urging New Zealand to consider withdrawing its reservation to Article 14 of the Convention.[42] Moreover, unnecessary medical surgeries performed on intersex children without informed consent were identified as another area requiring urgent reform.[43] Finally, the Committee stressed the importance of strengthening human rights training for all public officials, emphasising adherence to international standards such as the Istanbul Protocol.[44]

In conclusion, although New Zealand exhibits a relatively high degree of compliance with its international obligations, the extensive criticisms from the Committee against Torture underline that even states with strong legal frameworks must engage in continuous reform and vigilance to meet the substantive demands of the Convention against Torture.

3.2. Mexico

Mexico presents a striking and troubling example where extensive formal legal reforms have failed to eliminate the widespread practice of torture, arbitrary detention, and pervasive impunity. Despite being a longstanding party to the UNCAT and enacting major domestic legal reforms–most notably the General Act on the Prevention, Investigation and Punishment of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2017)–substantive compliance with international obligations remains critically deficient.[45]

While the CAT Committee welcomed Mexico's legislative progress, including the adoption of the 2017 General Act, which defines the offence of torture and establishes specialized mechanisms for investigation, it emphasized that torture and ill-treatment remained "a widespread problem that the State party has not yet succeeded in eradicating," particularly in criminal investigations, detention, and migration control contexts.[46]

39 ibid, paras 43–44.
40 ibid, paras 47, 48.
41 ibid, paras 43, 44.
42 ibid, paras 51, 52.
43 ibid, paras 53, 54.
44 ibid, paras 55, 56.
45 CAT/C/MEX/CO/7 (n 27) para 3(a).
46 ibid, para 8.

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The empirical record reflects alarming deficiencies. According to data provided by the State party, the Office of the Prosecutor General had 4,296 preliminary investigations underway for torture as of January 2019. Still, convictions remained exceedingly rare: only 45 federal convictions between 2013 and 2018.[47] Confessions extracted under torture remain pervasive despite their formal inadmissibility under Mexican law. The Committee found that the use of confessions obtained through torture continues to be invoked against defendants and that allegations are often not investigated during judicial proceedings, shifting the burden of proof onto victims.[48]

In the landmark case of *Ramiro Ramírez Martínez et al. v. Mexico*, the Committee found that federal forces subjected the complainants to severe torture, including electric shocks, beatings, simulated asphyxiation, and toenail extraction, causing severe physical and mental suffering.[49] The CAT Committee concluded that Mexico violated Articles 1, 2, 12, 13, and 14 of the Convention, emphasising that the State "failed to act with due diligence to prevent, investigate, prosecute and punish acts of torture."[50]

This case reflects broader structural patterns. The Committee documented that individuals were frequently held incommunicado, denied access to legal counsel and independent medical examinations, thereby facilitating torture and obstructing investigations.[51] Furthermore, the Committee emphasised the critical importance of conducting physical and psychological assessments of alleged victims of torture in accordance with the Istanbul Protocol, to ensure impartiality and adherence to international standards.[52]

Human Rights Watch's 2024 World Report underscores that "torture is widely practised by police, prosecutors, and soldiers to obtain confessions and extract information."[53] Alarmingly, a national survey found that nearly half of incarcerated respondents reported having been physically abused post-detention and that 38 per cent confessed solely because authorities beat or threatened them.[54]

Despite the establishment of a national registry intended to record complaints, the State party had not yet created the operational national register of cases of torture required under the General Act.[55] Between 2013 and 2018, the Attorney General's Office registered 870 complaints of torture in 2013 and 466 complaints in 2018, but the Committee expressed

47 ibid, para 24.
48 ibid, para 20.
49 UN CAT, *Communication No 500/2012 Ramiro Ramírez Martínez et al v Mexico* CAT/C/55/D/500/2012 (4 August 2015) <https://digitallibrary.un.org/record/3993637?ln=en&v> accessed 11 March 2025.
50 ibid, para 9.
51 CAT/C/MEX/CO/7 (n 27) para 15.
52 ibid, para 27(b)-(c).
53 Human Rights Watch, 'Mexico' in *World Report 2024: Events of 2023* (Human Rights Watch 2024) 422 <https://www.hrw.org/world-report/2024/country-chapters/mexico> accessed 11 March 2025.
54 ibid 423.
55 CAT/C/MEX/CO/7 (n 27) para 23(b).

concern that no comprehensive data were provided for the intervening years, and that convictions were extremely rare.[56] These figures underscore a profound and persistent gap between formal commitments and real-world practices. As Broecker aptly observed, "legislative reforms alone cannot eliminate entrenched practices without corresponding shifts in political will, institutional culture, and public accountability."[57]

The militarisation of public security represents another major obstacle to compliance. While noting the creation of the National Guard, the Committee expressed concern that the body would be under military leadership, thereby risking the continuation of human rights violations, including torture.[58] Impunity remains entrenched at staggering levels. Human Rights Watch reports that "about 90 per cent of crimes are never reported, one-third of reported crimes are never investigated, and just under 16 per cent of investigations are resolved."[59] The Committee urged Mexico to ensure that "all complaints of torture and ill-treatment are investigated in a prompt and impartial manner" and that suspected perpetrators are immediately suspended from duty during the investigation.[60]

Mandatory pretrial detention (prisión preventiva oficiosa) and "arraigo" practices further exacerbate systemic violations. Judges are legally obliged to impose pretrial detention for a wide array of offences without individualised assessment. As a result, over 40% of imprisoned persons in 2021 had not yet been convicted of any crime.[61] The Committee reiterated its previous recommendations urging Mexico to eliminate the practice of "arraigo" detention without charge, as it facilitates torture and arbitrary detention.[62]

Migrants represent a particularly vulnerable population within Mexico. The CAT Committee expressed concern that "migrants, particularly those in an irregular situation, are especially vulnerable to torture and ill-treatment by public officials."[63] These concerns echo earlier findings by the Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families,[64] which highlighted that torture, disappearances, and killings of undocumented migrants were often carried out "with the complicity, consent and/or collusion of federal, state and municipal authorities".[65]

56 ibid, para 22.
57 Broecker (n 18) 3.
58 CAT/C/MEX/CO/7 (n 27) para 31(c)
59 Human Rights Watch (n 53) 422.
60 CAT/C/MEX/CO/7 (n 27) para 25(a)-(c).
61 Human Rights Watch (n 53) 423.
62 CAT/C/MEX/CO/7 (n 27) para 19.
63 ibid, para 48.
64 UN CMW, *Consideration of reports submitted by States parties under article 74 of the Convention: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families*: Mexico CMW/C/MEX/CO/2 (3 May 2011) para 29 <https://digitallibrary.un.org/record/704956?ln=en&v> accessed 11 March 2025.
65 ibid, para 29.

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Socioeconomic inequalities further compound vulnerabilities. Although Mexico's official poverty rate fell from 41.9 per cent in 2018 to 36.3 per cent in 2022, extreme poverty has remained stubbornly high, and access to health care has deteriorated.[66] These inequalities create fertile ground for human rights abuses to proliferate, particularly in marginalised communities.

Despite Mexico's formal engagement with the CAT Committee's processes, actual follow-up has been limited and insufficient. In its 2019 concluding observations, the Committee expressed concern that recommendations from previous reviews had not been fully implemented, and that there was only "partial implementation" regarding oversight of security forces.[67]

Based on the aforementioned, it becomes apparent that Mexico's situation starkly illustrates the critical challenges that arise when sophisticated legal reforms are not matched by operational independence, political will, and cultural transformation. As Lesch argues, "normative advances must be matched by sustained political commitment, institutional reform, and accountability mechanisms if international oversight is to be effective."[68] Despite notable formal strides, the persistence of torture, endemic impunity, militarisation of public security, and systemic human rights abuses demonstrates that Mexico remains far from fulfilling its obligations under the Convention against Torture.

3.3. Zambia

Zambia's engagement with its obligations under the UNCAT highlights the profound challenges faced by States with weak institutions, limited resources, and fragile political environments. Although Zambia ratified UNCAT in 1998, it has yet to enact comprehensive legislation specifically criminalising acts of torture, as mandated by Article 4 of the Convention. Article 4 requires each State Party to ensure that all acts of torture, as well as attempts to commit torture and acts of complicity or participation in torture, are criminalised under the national law and made punishable by penalties that reflect the grave nature of such offences. Despite this clear and binding obligation, Zambia has not fully incorporated these requirements into its domestic legal framework,[69] reflecting a persistent gap between international commitments and national implementation.

66 Human Rights Watch (n 53) 422.

67 CAT/C/MEX/CO/7 (n 27) para 7.

68 Lesch (n 7).

69 Human Rights Commission of Zambia, *A Submission by the Human Rights Commission of Zambia to the Working Group on the Universal Periodic Review (UPR), in Preparation for Zambia's 4th Review, 2023* (July 2022) 4 <https://www.ohchr.org/en/hr-bodies/upr/zm-stakeholders-info-s42> accessed 18 July 2025; Southern Africa Litigation Centre, *Submission on the Review of the Zambia Penal Code and Criminal Procedure Code* (*SALC* 2021) <https://www.southernafricalitigationcentre.org/zambia-submission-on-the-review-of-the-penal-code-and-criminal-procedure-code/> accessed 11 March 2025.

In June 2023, the Human Rights Commission of Zambia publicly urged the government "to enact a law that criminalises torture and other cruel, inhuman and degrading treatment" to effectively combat such crimes and ensure adequate punishment of perpetrators.[70] In response to this, Mwelwa Muleya, the Commission's spokesperson stressed that "the enactment of the anti-torture law will not only greatly contribute to the effective protection of suspects from acts of torture from law enforcement agencies but also provide for adequate punishment of perpetrators and compensation of victims of torture."[71] Muleya further noted that "as a result of lack of an anti-torture law, perpetrators are only charged with offenses relating to assault," warning that "by using the law relating to assault to punish crimes of torture, Zambia is falling short of meeting her international and national obligation to effectively combat the heinous acts of torture."[72]

CAT Committee's concluding observations, in its 2008, welcomed the enactment of reforms such as the abolition of corporal punishment through the enactment of the Criminal Procedure Code (Amendment) Act No. 9 of 2003, the Penal Code (Amendment) Act No. 10 of 2003, the Education Act (Amendment) Act No. 11 of 2003, and the Prisons (Amendment) Act No. 16 of 2004.[73] However, it expressed serious concern that "allegations of the excessive use of force during criminal investigations" persisted and were "inflicted by law enforcement personnel."[74] The Committee noted a systemic failure to investigate allegations of torture adequately and highlighted a pervasive culture of impunity among law enforcement officials, which continues to undermine both legal reforms and victims' rights to redress.[75]

It is worth emphasising that the lack of fundamental legal safeguards for detainees significantly exacerbates the risk of torture and ill-treatment. As the Committee reported, "persons deprived of liberty are often not informed of their rights, do not have prompt access to a lawyer, and do not benefit from prompt medical examinations."[76] The Committee also expressed concerns that Zambia's police relied merely on "judges' rules," which are non-binding, rather than enforceable legislation to guide detention and interrogation procedures.[77]

The heavy reliance on confession-based evidence within the criminal justice system, combined with the absence of effective oversight, entrenches the use of torture as a coercive tool to extract confessions, thereby undermining fair trial guarantees and due process. In

70 'Human Rights Body in Zambia Calls for Criminalizing Torture' (*Xinhua News Agency*, 29 June 2023) <https://english.news.cn/africa/20230629/26a2560237cd47c4b5b026e16c18300b/c.html > accessed 11 March 2025.

71 ibid.

72 ibid.

73 CAT/C/ZMB/CO/2 (n 28) para 3.

74 ibid, para 20.

75 ibid, para 10.

76 ibid, para 11.

77 ibid.

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this respect, the Committee was particularly concerned that "there is no legislation or other measures to ensure that any statement made as a result of torture cannot be invoked as evidence in any proceedings."[78] It called on Zambia to adopt the necessary legislative, judicial, and administrative measures to ensure strict compliance with Article 15 of the Convention and to provide information on any cases where evidence obtained under torture had been excluded or used.[79]

The Committee found that Zambia remained "insufficiently resourced and lacking independence," thereby limiting the country's capacity to prevent and respond effectively to acts of torture.[80] Nevertheless, the Committee urged Zambia to strengthen the Commission's independence, enhance its enforcement powers, and enable it to initiate legal proceedings and ensure that its recommendations are promptly and fully implemented.[81] The Committee also criticised Zambia's failure to establish a National Preventive Mechanism (NPM) under the Optional Protocol to UNCAT (OPCAT), to which Zambia has not yet acceded. The Committee emphasised that establishing an NPM is critical for "independent, regular inspections of detention facilities" as a means of proactively preventing torture and ill-treatment.[82]

The culture of impunity for torture and related human rights violations is reinforced by the limited availability of effective redress mechanisms for victims. Although the Constitution of Zambia prohibits torture in Article 15, the absence of dedicated criminalisation means that victims must rely on general assault provisions, which do not capture the gravity of torture as a distinct crime.[83] As the Civil Society Organisations (2020) report noted, "Punishment of perpetrators of torture in Zambia remains elusive" due to the lack of specific legislation criminalising torture.[84] Procedural barriers, fear of reprisals, corruption, and the lack of access to legal aid prevent victims from successfully seeking remedies. As Birk and Monina emphasise, "the right to redress for victims of torture must be effective, accessible, and enforced through practical remedies, not merely theoretical rights."[85] Without operational structures to deliver justice and reparations, the mere existence of legal rights provides no practical protection.

Zambia's experience powerfully illustrates the structural and political obstacles that confront treaty bodies like the CAT Committee when seeking to enforce compliance in States characterised by weak institutions, fragile governance, and limited resources. As Biswa notes, "Where domestic institutions are fragile, the normative power of international

78 ibid, para 14.
79 ibid.
80 ibid, para 8.
81 ibid.
82 ibid, para 16.
83 Southern Africa Litigation Centre (n 69) 8.
84 Human Rights Commission of Zambia (n 69) 4.
85 Nowak, Birk and Monina (n 3) 509.

human rights treaties is often insufficient to induce real change without significant international and domestic pressure."[86] The limitations of legal formalism, without genuine political commitment and institutional reinforcement, remain evident.

In conclusion, while the constitutional prohibition of torture in Article 15 and Zambia's accession to UNCAT in 1998 represent important symbolic commitments, the reality is that the lack of a dedicated anti-torture law continues to obstruct accountability, redress, and prevention efforts. The persistence of torture, arbitrary detention, degrading prison conditions, lack of effective accountability mechanisms, and failure to provide redress to victims demonstrates that formal legal commitments must be accompanied by systemic reforms, operational independence of oversight bodies, political will, and empowered civil society engagement. Without these conditions, international human rights obligations under UNCAT risk remaining hollow promises rather than lived realities for victims of torture in Zambia and beyond.

4 DISCUSSION

The findings from New Zealand, Mexico, and Zambia vividly illustrate the complexities and limitations inherent in the international human rights treaty body system, particularly concerning the monitoring and enforcement roles of the Committee against Torture. The divergence in compliance outcomes across these case studies reaffirms McQuigg's assertion that "the impact of the Committee's recommendations is largely determined by the domestic political and institutional environment in which they are received."[87] Despite sharing a standard set of formal obligations under the Convention against Torture, the three States markedly exhibit different trajectories in translating these obligations into substantive protections for individuals against torture and ill-treatment.

The case of New Zealand offers a compelling illustration of how robust domestic institutions, judicial independence, and an active civil society can foster meaningful compliance with obligations under the UNCAT. As emphasised in the CAT Committee's 2023 concluding observations, New Zealand has developed significant legislative and institutional frameworks, particularly through the Crimes of Torture Act 1989 and the establishment of a comprehensive National Preventive Mechanism (NPM) network under the Optional Protocol to the Convention against Torture.[88] This experience demonstrates the critical importance of integrating international human rights norms into domestic legal systems in a way that enables systematic oversight, accountability, and public engagement.

86 Astika Biswa, 'International Human Rights Law: Enforcement Mechanisms and Challenges in a Globalized World' (2024) 15(2) International Journal for Research Publication and Seminar 157, doi:10.36676/jrps.v15.i2.20.

87 Ronagh McQuigg, 'How Effective is the United Nations Committee Against Torture?' (2011) 22(3) European Journal of International Law 814, doi:10.1093/ejil/chr048.

88 CAT/C/NZL/CO/7 (n 30) paras 35, 36.

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Moreover, broader theoretical debates about the enforcement of international human rights law reveal that treaty bodies alone cannot guarantee compliance. As discussed in *Towards a World Court of Human Rights*, there is an increasing recognition that the fragmentation of international mechanisms and the absence of robust enforcement powers limit the ability of treaty bodies to effect deep, systemic change. New Zealand's experience supports this insight, suggesting that international supervision must be complemented by strong domestic legal cultures, active civil societies, and independent judiciaries to bridge the gap between norm creation and norm implementation.

Importantly, while New Zealand was praised for engaging in serious dialogue with the CAT Committee and for maintaining its reporting obligations, its continued compliance will depend on its ability to address the Committee's concerns regarding systemic inequalities, detention conditions, and counter-terrorism safeguards. Although New Zealand's record illustrates how international norms can be meaningfully incorporated into domestic frameworks, it simultaneously demonstrates that legal compliance must be accompanied by structural reforms to achieve the full realisation of the prohibition against torture. Ultimately, the New Zealand case confirms that treaty body engagement, domestic incorporation, and judicial openness to international law are necessary but not sufficient conditions for the realisation of human rights norms. Thus, New Zealand's experience underlines that the fight against torture must be continually renewed, requiring sustained legal reforms, comprehensive education, institutional accountability, and above all, a political and cultural commitment to the protection of human dignity.

The experience of Mexico vividly illustrates the profound limitations of solely relying on formal legal reforms to achieve substantive compliance with international human rights obligations. Despite adopting the General Law to Prevent, Investigate and Punish Torture (2017)–a landmark piece of legislation praised for criminalising torture and establishing specialised investigative mechanisms–the CAT Committee's concluding observations found that "torture and ill-treatment appear to be generalised practices" across multiple contexts, including criminal investigations, detention, and migration control.[89] This striking gap between normative frameworks and practical realities reveals the enduring obstacles facing international human rights law in effecting material change without profound domestic transformation.

Treaty bodies, such as the CAT Committee, while powerful in articulating clear normative standards and identifying state failures, lack coercive enforcement powers. The authority of treaty bodies mainly depends on moral persuasion, political pressure, and the willingness of States Parties to engage in good faith with their obligations.[90] Consequently, substantive compliance is heavily contingent upon internal factors, including genuine political will, operational independence of prosecutorial and judicial institutions, and a vibrant civil society capable of sustaining pressure for reform.

89 CAT/C/MEX/CO/7 (n 27) para 10.
90 Nowak, Birk and Monina (n 3).

Mexico's case thus exemplifies a broader systemic challenge where international human rights law, despite its powerful normative force, often falls short of achieving its transformative potential without genuine domestic implementation. As the CAT Committee poignantly noted, the persistence of torture and impunity "creates a climate of tolerance for violations" and underscores the urgent need for comprehensive institutional reforms extending beyond mere legislative adoption.[91]

Several interrelated factors help explain Mexico's persistent failure to achieve substantive compliance. First, widespread impunity for acts of torture reflects the chronic weakness of investigative and prosecutorial institutions. Although the General Law established specialised anti-torture units, the Committee observed that "political interference, resource shortages, and threats against prosecutors and human rights defenders" severely hampered their effectiveness.[92] Recent findings reinforce this analysis, showing that "the justice system regularly fails to provide accountability for violent crimes and human rights violations," with only about 1 per cent of crimes effectively resolved. This near-total impunity not only discourages victims from seeking justice but emboldens perpetrators, perpetuating cycles of abuse.[93]

Systemic corruption within law enforcement agencies continues to sustain environments where torture is normalised. Torture is routinely used to extract confessions, intimidate detainees, or punish political opponents. As the Oxford Commentary emphasises, "Effective prevention of torture requires more than legal prohibitions; it demands comprehensive institutional reforms and deep cultural changes within law enforcement and security sectors."[94] Human Rights Watch confirms this structural pathology, reporting that nearly "half of detainees reported physical abuse after arrest" and that "38 per cent confessed only after torture or threats."[95]

The militarisation of public security, particularly through the deployment of the National Guard under military control, exacerbates systemic human rights violations. Despite government assurances of civilian oversight, the Committee remains concerned that the presence of armed forces in internal security tasks "increases the risk of human rights violations, including torture".[96] Human Rights Watch similarly observes that "military and navy forces continue to detain civilians without due process,"[97] creating an opaque and unaccountable security environment. Moreover, the ongoing reliance on mandatory pretrial detention and the practice of "arraigo" detention systematically undermines fundamental safeguards for detainees, contravening international standards and facilitating conditions

91 CAT/C/MEX/CO/7 (n 27) para 8.
92 ibid.
93 Human Rights Watch (n 53) 422.
94 Nowak, Birk and Monina (n 3) 493.
95 Human Rights Watch (n 53) 423.
96 CAT/C/MEX/CO/7 (n 27) para 14.
97 Human Rights Watch (n 53) 423.

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where torture and ill-treatment flourish. Despite the Inter-American Court's rulings condemning such practices, Mexico's domestic reforms have yet to fully eliminate these entrenched violations.[98] Finally, the structural inequalities facing vulnerable groups–including migrants, indigenous communities, and individuals in poverty–further expose the failure of Mexico's legal reforms to secure substantive human rights protection. As the Committee on Migrant Workers noted, abuses against migrants are often committed "with the complicity, consent and/or collusion of federal, state and municipal authorities."[99]

Despite these deeply rooted challenges, Mexico has yet to submit its eighth periodic report to the CAT Committee, despite it being due. While the Committee requested follow-up information within one year after the 2019 concluding observations,[100] Mexico's delayed compliance reflects broader structural weaknesses. The COVID-19 pandemic further contributed to these delays, but ultimately, Mexico's failure to submit a new report has prevented the Committee from conducting a full updated assessment.

The case of Zambia perhaps presents the most profound challenges to UNCAT's effectiveness. Despite ratifying the Convention in 1998, Zambia has not enacted specific legislation criminalising acts of torture. As civil society organisations have highlighted, "punishment of the perpetrators of torture in Zambia remains elusive" because "there is no legislation that criminalises torture."[101] Confirming this, the Human Rights Commission (HRC) in 2023 reiterated that "as a result of lack of an anti-torture law, perpetrators are only charged with offences relating to assault," and warned that Zambia is "falling short of meeting her international and national obligation to effectively combat the heinous acts of torture."[102] This legal vacuum has been repeatedly confirmed by the Human Rights Commission of Zambia in 2025.[103]

Unlike Mexico, where at least formal legal compliance has been achieved, Zambia's delayed legislative implementation and weak institutional capacity reflect more profound structural barriers to effective compliance. As Biswa emphasises, "structural weaknesses in national institutions severely hinder the realisation of international human rights obligations."[104] Augustine Sichula elaborates that "without an enabling legislation that defines and prescribes penalties against torture, cruel, inhuman or degrading treatment or punishment, Article 15 of the Constitution and the UNCAT cannot be operationalised and enforced in Zambia."[105] Moreover, Zambia's limited engagement with the CAT Committee further weakens prospects for improvement. The State party was significantly overdue in submitting

98 ibid.
99 CMW/C/MEX/CO/2 (n 64) para 29.
100 CAT/C/MEX/CO/7 (n 27) para 64.
101 Human Rights Commission of Zambia (n 69) 2.
102 Human Rights Body in Zambia (n 70).
103 Sichula (29).
104 Biswa (n 86) 157.
105 Sichula (29).

its periodic reports and has provided only partial follow-up to the Committee's recommendations.[106] This pattern of non-engagement underscores Pedone and Kloster's concern that "state resistance and selective cooperation pose significant obstacles to the effectiveness of treaty body monitoring."[107]

From a broader perspective, Zambia's experience illustrates the limitations of international oversight mechanisms in contexts characterised by fragile governance, limited resources, and political instability. As Birk and Monina note, "the impact of treaty body recommendations is heavily mediated by the domestic political environment, including the availability of political will, administrative capacity, and civil society support."[108]

In summary, the three case studies analysed reveal that the CAT Committee's influence is not uniform but varies significantly depending on the domestic context. New Zealand's example highlights the conditions under which treaty body engagement can lead to substantial human rights improvements. Mexico's experience illustrates the paradox of formal compliance without substantive change, while Zambia's case demonstrates the profound challenges faced by treaty bodies in engaging with fragile or resistant states.

Beyond the case-specific findings, broader reflections emerge regarding the strengths and limitations of the CAT Committee as an enforcement mechanism under international human rights law. These reflections highlight both the achievements and persistent challenges of the treaty body system as it seeks to fulfil its mandate in an increasingly complex global legal environment.

One of the CAT Committee's principal strengths lies in its role as a norm developer. Through its general comments, concluding observations, and individual communications, the Committee has significantly clarified and expanded the understanding of states' obligations under the Convention. As the Oxford Commentary emphasises, "General Comments and individual case law have contributed to the dynamic development of the prohibition of torture, ensuring its adaptability to emerging challenges such as migration detention, counter-terrorism measures, and psychiatric care."[109] In particular, the Committee's interpretation of non-refoulement under Article 3 has broadened the protective scope of the Convention, ensuring that individuals are protected not only from direct acts of torture but also from other forms of cruel, inhuman, or degrading treatment.[110]

Moreover, the Committee's engagement with civil society organisations and national human rights institutions has strengthened its information base and enhanced the transparency and legitimacy of its proceedings. As highlighted in the CAT Committee's 2023 Report,

106 CAT/C/ZMB/CO/2 (n 28) para 3.

107 Joanne Pedone and Andrew R Kloster, 'New Proposals for Human Rights Treaty Body Reform' (2013) 22 *Journal of Transnational Law & Policy* 31, doi:10.2139/ssrn.1885758.

108 Nowak, Birk and Monina (n 3) 482.

109 ibid 492.

110 ibid 498.

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"NGO participation remains indispensable for providing independent, credible information that enhances the Committee's assessments."[111] Shadow reports submitted by civil society actors have been especially valuable in uncovering violations that might otherwise remain hidden, particularly in countries with restricted press freedom or state-controlled information environments. This process reflects a broader trend in which civil society "shadow reports" aim to "give voice to facts and views that may not be reflected in the governments' reports."

Since approximately 2007 (2009 for the CRC), such reports have been reliably published on the OHCHR's website, contributing to what Creamer and Simmons describe as an "intensification of public–and increasingly domestic–scrutiny of states' reports."[112] Beyond their informational value, these reports have proven instrumental in bridging international and domestic legal accountability. As the authors further note, "not only are reporting and adjudication consistent, there is substantial evidence of mutuality between these systems," with courts increasingly citing "state reports, shadow reports, or committee recommendations," thereby affirming their "usefulness in domestic law enforcement."[113]

Nevertheless, the CAT Committee's work remains constrained by the non-binding nature of its findings and recommendations. Unlike regional human rights courts such as the European Court of Human Rights or the Inter-American Court of Human Rights, the CAT Committee lacks the authority to issue legally binding judgments. As Niemi and Scheinin observe, "treaty bodies must rely primarily on persuasion, moral authority, and diplomatic pressure, rather than judicial coercion, to achieve compliance." This structural limitation becomes particularly problematic when engaging with states characterised by weak political will, authoritarian tendencies, or chronic governance challenges, as seen in the cases of Zambia and, increasingly, Mexico.

The tension between the Committee's normative aspirations and its limited enforcement capacity reflects broader challenges within international human rights law. As Biswa aptly notes, "the efficacy of human rights treaty bodies depends not only on the strength of international norms but also on the robustness of domestic enforcement structures and the political incentives facing states."[114] Where domestic institutions are strong and civil society is active, CAT's recommendations can catalyse meaningful reforms. Conversely, where domestic systems are weak or resistant, international oversight often struggles to achieve more than a symbolic impact.

This dynamic is starkly illustrated in Mexico, where torture persists despite formal compliance with international obligations. A 2021 national survey of incarcerated

111 CAT/C/NZL/CO/7 (n 30) para 3.

112 Cosette D Creamer and Beth A Simmons, 'The Proof is in the Process: Self-Reporting under International Human Rights Treaties' (2020) 114(1) American Journal of International Law 41, doi:10.1017/ajil.2019.70.

113 ibid 45.

114 Biswa (n 86) 158.

individuals found that nearly half reported physical abuse by police or soldiers after detention, and 38 per cent confessed only after being beaten or threatened. In 2022, 6,226 criminal complaints related to torture or other ill-treatment were filed, yet only 82 resulted in criminal charges and just 10 concluded with a verdict–highlighting a pervasive culture of impunity and the failure to translate legal norms into effective protection.[115]

A similarly troubling pattern of widespread abuse and non-enforcement persists in Zambia, where credible reports confirm that torture by law enforcement remains prevalent, including in official detention facilities, with no officers charged or prosecuted for such violations as of December 2023, despite multiple investigations.[116]

Furthermore, the evolving debate over State immunity and *jus cogens* norms has significant implications for the anti-torture regime. Torture, recognised as a violation of a peremptory norm of international law, challenges traditional doctrines of sovereign immunity. In this context, Knuchel argues that "serious violations of jus cogens norms, such as torture, call into question the continued application of absolute sovereign immunity."[117] While the CAT Committee itself does not directly adjudicate immunity claims, its consistent emphasis on the non-derogable nature of the prohibition of torture reinforces the broader trend toward limiting immunity defences in cases involving gross human rights violations.

This persistent non-compliance has prevented the CAT Committee from conducting a new full review or issuing updated recommendations. Thus, Zambia's experience powerfully illustrates the limitations of the treaty body system in contexts of fragile governance. The absence of an effective anti-torture law, combined with the persistence of torture, degrading detention conditions, impunity, and lack of effective redress, demonstrates that genuine compliance demands far more than formal ratification. Without systemic reforms, operational independence of oversight bodies, political will, and empowered civil society engagement, international human rights obligations under UNCAT risk remaining hollow promises rather than lived realities.

In light of these challenges, scholars have proposed various reforms to strengthen the treaty body system. Some proposals, such as those discussed by Lhotsky, advocate for the creation of a Unified Treaty Body System (UTBS) that would consolidate the multiple committees into a single entity with specialised chambers.[118] Others, like Scheinin, propose the

115 Human Rights Watch, 'Mexico' in *World Report 2025: Events of 2024* (Human Rights Watch 2025) 308 <https://www.hrw.org/world-report/2025/country-chapters/mexico> accessed 18 July 2025.

116 Bureau of Democracy, Human Rights, and Labor, '2023 Country Reports on Human Rights Practices: Zambia' (*US Department of State*, 22 April 2024) 3-4 <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/zambia/> accessed 19 July 2025.

117 Sévrine Knuchel, 'State Immunity and the Promise of *Jus Cogens*' (2011) 9(2) Northwestern Journal of International Human Rights 150.

118 Jan Lhotský, 'Human Rights Treaty Body Review 2020: Towards an Integrated Treaty Body System' (Theses, Geneva Academy of International Humanitarian Law and Human Rights 2020) 53, doi:10.2139/ssrn.4938284.

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establishment of a World Court of Human Rights empowered to issue binding judgments on grave human rights violations, including torture.[119] These ambitious proposals aim to enhance coherence, efficiency, and enforceability across the human rights system.

While such structural reforms face significant political hurdles, more practical and incremental measures could also enhance the CAT Committee's effectiveness. These include:

- Strengthening follow-up procedures to ensure systematic monitoring of state implementation;
- Enhancing protection measures for individuals and organisations cooperating with the Committee;
- Improving coordination between treaty bodies, regional human rights mechanisms, and domestic actors;
- Increasing resources and staffing to address backlog issues and improve the timeliness of reviews.[120]

In addition, building stronger partnerships with national actors–including NHRIs, Ombudsperson institutions, and civil society networks–can help ensure that CAT's recommendations are not merely received but actively implemented at the local level.

Finally, the findings of this study confirm that while the CAT Committee plays a crucial role in articulating, promoting, and monitoring the prohibition of torture, its impact remains heavily dependent on broader domestic political, legal, and institutional dynamics. Bridging this gap requires not only stronger international mechanisms but also deeper domestic commitment to human rights principles.

The comparative analysis of New Zealand, Mexico, and Zambia underscores that there is no "one-size-fits-all" approach to achieving compliance. Effective implementation depends on a constellation of factors, including political will, judicial independence, resource availability, civil society engagement, and international support. Treaty bodies such as the CAT Committee can facilitate progress by setting standards, providing guidance, and maintaining international attention, but they cannot substitute for the hard work of domestic reform.

United Nations human rights treaties rely heavily on periodic state reporting and the issuance of non-binding recommendations by treaty bodies, a structure that inherently permits prolonged non-compliance. This structural weakness undermines the universal human rights regime and contrasts sharply with the stronger enforcement mechanisms present in regional systems such as the European Court of Human Rights.[121]

119 Niemi and Scheinin (n 21) 12.
120 CAT/C/NZL/CO/7 (n 30) para 5.
121 Niemi and Scheinin (n 21) 8.

5 CONCLUSIONS

The prohibition of torture, universally recognised as a *jus cogens* norm, imposes non-derogable obligations on all States regardless of their legal, political, or economic systems. Despite this elevated legal status, the global eradication of torture remains unfulfilled. This study's comparative analysis reveals a persistent gap between formal adherence to the Convention against Torture and the substantive realisation of its protective standards. While the establishment of the CAT Committee marks a significant institutional advance in international law, its capacity to promote compliance is shaped by a range of domestic political and legal factors.

The divergent experiences of New Zealand, Mexico, and Zambia underscore the extent to which the CAT Committee's influence is mediated by national context. In jurisdictions with independent institutions, responsive judiciaries, and active civil societies, treaty body engagement is more likely to result in meaningful implementation. In contrast, where political will is lacking and enforcement mechanisms are underdeveloped, the Committee's recommendations often fail to be implemented in practice. These findings affirm that norm development, though essential, is not self-executing; its impact depends on the willingness and ability of domestic actors to internalise and enforce international commitments.

The Convention requires more than legislative prohibition of torture–it demands comprehensive procedural safeguards, including the exclusion of coerced evidence, judicial oversight, prompt legal representation, and independent medical evaluation. The failure to implement these guarantees undermines the Convention's efficacy and perpetuates cycles of impunity. The continued reliance on confession-based convictions and the ineffective operationalisation of anti-torture statutes illustrate how legal form can mask substantive gaps in protection.

As both a norm-setting and compliance-monitoring body, the CAT Committee has contributed to the evolution of anti-torture jurisprudence. Through its general comments, concluding observations, and individual communications, it has refined the substantive content of state obligations. However, its institutional structure–reliant on voluntary cooperation and non-binding outputs–limits its enforcement capacity. These challenges are amplified in States that deprioritise treaty obligations, delay reporting, or under-resource follow-up mechanisms.

The Committee's limitations reflect broader tensions within the fragmented international human rights system. Reforms aimed at procedural harmonisation, improved inter-treaty coordination, and the potential creation of a unified adjudicatory mechanism have gained traction. Yet, no international body can substitute for robust domestic accountability. Full implementation of anti-torture norms ultimately requires national legislation, independent oversight institutions, and the sustained engagement of public actors.

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Looking forward, further research should explore the effectiveness of treaty bodies in authoritarian and hybrid regimes, where centralised power and limited legal pluralism pose distinct barriers to implementation. Greater attention is also needed on the interplay between international treaty bodies and regional human rights courts–whether they act synergistically or contribute to institutional fragmentation. Additionally, as global actors increasingly include non-state entities, such as private military contractors or de facto authorities, the CAT Committee's role in addressing violations by these actors deserves a deeper inquiry. As international accountability evolves, so too must the legal tools and institutions tasked with confronting torture in all its contemporary forms.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОЦІНКА ЕФЕКТИВНОСТІ ДІЯЛЬНОСТІ КОМІТЕТУ ПРОТИ КАТУВАНЬ (КПК) У ЗАБЕЗПЕЧЕННІ ДОТРИМАННЯ ДЕРЖАВАМИ СВОЇХ ЗОБОВ'ЯЗАНЬ: ТЕМАТИЧНЕ ДОСЛІДЖЕННЯ ВИПАДКІВ У НОВІЙ ЗЕЛАНДІЇ, ЗАМБІЇ ТА МЕКСИЦІ

Зейад Джаффал, Майя Хатер*, Зіад АЛЬ-Енізі та Раван Алузі

АНОТАЦІЯ

Вступ. *У цьому дослідженні було проаналізовано ефективність Комітету проти катувань (КПК) у забезпеченні дотримання державами Конвенції проти катувань та інших жорстоких, нелюдських або таких, що принижують гідність, видів поводження і покарання (Конвенція). Хоча заборона катувань є нормою jus cogens у міжнародному праві,*

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катування продовжують існувати в усьому світі, що свідчить про серйозний розрив між офіційною ратифікацією державами Конвенції та практичною реалізацією їхніх зобов'язань. Хоча КПК забезпечує комплексну систему моніторингу – через періодичну звітність, індивідуальні скарги та загальні коментарі – він не має обов'язкових повноважень щодо забезпечення виконання, тож виникає питання щодо його практичного впливу у різних правових і політичних умовах.

Методи. *Використовуючи якісний та порівняльно-правовий підхід, це дослідження оцінює ступінь впливу КПК на дотримання Конвенції на національному рівні у трьох державах – Новій Зеландії, Мексиці та Замбії, що були обрані за різноманітність їхніх правових систем, географічне розташування та різні траєкторії дотримання Конвенції. Аналіз ґрунтується на заключних зауваженнях КПК, звітах держав, національному законодавстві, альтернативних звітах громадянського суспільства та документації третіх сторін. Кожна країна оцінюється як за формальним дотриманням (ратифікація, законодавче впровадження, звітування), так і за суттєвим дотриманням (розслідування, підзвітність та механізми відшкодування). Структурована модель порівняння забезпечує узгодженість у різних випадках.*

Результати та висновки. *Результати дослідження виявляють великі відмінності. Нова Зеландія демонструє високий рівень формальної відповідності, маючи детальне законодавство та конструктивну взаємодію з КПК. Однак залишаються прогалини щодо прав корінних народів, гарантій утримання під вартою та процедурних захисних заходів. Мексика, незважаючи на прийняття у 2017 році Загального закону про тортури, продовжує стикатися з системними проблемами, зокрема це поширені тортури, безкарність та мілітаризовані сили безпеки. Замбія, яка має найгірші показники, не має конкретного законодавства проти тортур та інституційних рамок, що призводить до мінімального виконання. У всіх випадках вплив КПК значною мірою залежить від внутрішньополітичної волі, інституційної незалежності та участі громадянського суспільства. У дослідженні було зроблено висновок, що, хоча КПК відіграє важливу нормативну та консультативну роль, на практиці його вплив залишається обмеженим через необов'язковий характер. Зміцнення механізмів подальшого контролю КПК, посилення регіональної співпраці та інтеграція рекомендацій у національні правові та політичні програми є необхідними для подолання розриву між формальною ратифікацією та фактичним запобіганням катуванням.*

Ключові слова. *Комітет проти катувань, міжнародне право у сфері прав людини, міжнародні організації, заборона катувань, Конвенція ООН проти катувань, дотримання Конвенції державами.*

ABSTRACT IN ARABIC

مقال بحثي

تقييم فعالية لجنة مناهضة التعذيب (CAT) في تحقيق امتثال الدول دراسة الحالة في نيوزيلندا، وزامبيا، والمكسيك

زياد جفال، مايا خاطر*، زياد منهل العنزي، وروان اللوزي

الملخص

الخلفية: يُعد حظر التعذيب قاعدة آمرة في القانون الدولي، وقد تم تكريسه في العديد من الصكوك القانونية. ومع ذلك، لا تزال ممارسة التعذيب قائمة في أنظمة ومناطق مختلفة، مما يسلط الضوء على الفجوة بين الالتزامات القانونية والتطبيق العملي. تهدف هذه الدراسة إلى تقييم فعالية لجنة مناهضة التعذيب في تعزيز امتثال الدول الأطراف لاتفاقية مناهضة التعذيب، من خلال اعتماد منهج تحليلي مقارن لثلاث حالات في كل من نيوزيلندا، والمكسيك، وزامبيا.

المنهجية: تعتمد الدراسة على تحليل مستندات رسمية، وتقارير وطنية، وملاحظات اللجنة وتعليقاتها العامة، بالإضافة إلى تقارير صادرة عن منظمات غير حكومية ومصادر قانونية محلية. تكشف النتائج عن تباينات كبيرة في مستوى الامتثال. فرغم التقدم التشريعي الذي أحرزته نيوزيلندا، إلا أنها لا تزال تواجه تحديات في حماية الفئات الضعيفة. أما المكسيك، فلا تزال تعاني من فجوة بين الإصلاحات القانونية واستمرار ممارسات التعذيب الفعلية، في حين تُظهر زامبيا فشلاً هيكليًا في تنفيذ التزاماتها الدولية.

النتائج والاستنتاجات: توصلت الدراسة إلى أن فعالية اللجنة تعتمد على عدة عوامل، من بينها الإرادة السياسية، واستقلال المؤسسات الوطنية، ومشاركة المجتمع المدني. وتوصي الدراسة بتعزيز آليات المتابعة والتعاون الدولي لضمان التطبيق الفعّال للاتفاقية، مع التأكيد على أن الامتثال الشكلي وحده لا يكفي لضمان احترام كرامة الإنسان.

الكلمات المفتاحية: لجنة مناهضة التعذيب؛ القانون الدولي لحقوق الإنسان؛ المنظمات الدولية؛ حظر التعذيب؛ اتفاقية الأمم المتحدة

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Research Article

THE LEGALITY OF ESPIONAGE IN PEACETIME

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ABSTRACT

Background: *This research paper examines the legality of espionage during peacetime under the rules of international law. To address this issue, the paper focuses on several relevant international law rules, including the obligation to respect the sovereignty of other states and the prohibition on intervention. Although espionage is a longstanding instrument of statecraft essential for safeguarding national security, it occupies an uncertain legal position. International legal frameworks, including the UN Charter and customary international law, establish obligations such as the respect for state sovereignty and the prohibition of intervention, which espionage activities frequently challenge. The growth of modern surveillance capabilities, especially in the cyber domain, further complicates the legal and ethical boundaries of espionage.*

Methods: *The study draws upon relevant international rules, such as the UN Charter and customary international law, as well as recent rulings by the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), which can serve as a foundation for developing regulatory frameworks for espionage operations and surveillance activities. The study adopts a doctrinal legal research approach by systematically analysing primary sources of international law, including treaties, customary law principles, and jurisprudence from the ICJ and the ECtHR. It also incorporates a comparative review of state practice and relevant academic commentary to assess whether existing legal norms adequately regulate espionage activities during peacetime.*

Results and Conclusions: *The findings indicate that espionage occupies a legally ambiguous space, particularly concerning the applicability of core principles of non-intervention and state sovereignty—especially in the cyber domain. In parallel, privacy has become enshrined in emerging human rights law, and legal safeguards around state surveillance have been introduced, emphasising proportionality, accountability, and supervision. Still, espionage operates in a highly nuanced legal and ethical territory that is neither wholly abhorrent nor entirely permissible.*

This contradiction reflects the ongoing tension between the challenges of balancing national security and the protection of individual rights. While espionage is widely acknowledged as vital to state security, international law does not explicitly ban it despite its potential to violate sovereignty and the principle of non-intervention. However, international law—through its emphasis on territorial integrity and sovereign equality—does not impose certain restraints on espionage activities.

The study concludes that although espionage remains a multifaceted and indispensable component of state actions, it should not violate the principles and laws of sovereignty, human rights, or the broader framework of international law during peacetime. Legal and ethical ambiguity persists, necessitating the development of clearer regulatory frameworks that strike a balance between legitimate intelligence gathering and respect for sovereignty and individual rights. Ultimately, the research underscores that intelligence activities should not be permitted to undermine the stability of the international legal order or erode fundamental human rights protections.

1 INTRODUCTION

Spying is considered one of the oldest professions in the world, or at least the second oldest. From ancient Sumerians to contemporary digital hacking, acquiring secret information has been crucial for states seeking to safeguard or enhance their standing. From Mesopotamian times to the present, the origins of espionage date back over 6,000 years. Even governments from ancient times, such as those in Egypt, Greece, and Rome, are known to have had intelligence services from which modern espionage evolved. In Ancient Egypt, agents were used to spy on people deemed unfaithful to the Pharaohs and to gather information on potential targets of conquest. Similarly, while fighting other city-states, the Greeks would spy on the military might of their opponents.[1] The Romans especially valued spy work, employing many spies who contributed to the creation and sustenance of the most extensive empire in the ancient world.

Amidst the current world order, espionage has undergone a profound change, specifically with the inclusion of what can be considered modern technological enhancements. Modern global Intelligence has over a hundred worldwide intelligence organisations working in developed, developing, and least-developed countries.

States recognise intelligence activities of their own country as necessary for their national security, while denying such practices of other countries as interference in internal affairs. This new age brought new challenges to conventional espionage. Cyber technology has evolved intelligence collection, increasing the speed, visibility, and encapsulation of low-

1 Darien Pun, 'Rethinking Espionage in the Modern Era' (2024) 18(1) Chicago Journal of International Law 353.

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intensity operations. Recent releases from the NATO official site confirm that cyberspace is continuously contested, with cyber intrusion attempts on the organisation's premises and malicious cyber events occurring per day on United States military and civilian networks.[2] These intrusions come from more than one hundred countries, proving that intelligence activity nowadays is decentralised worldwide.

Espionage activities were previously limited to wartime intelligence gathering, but now states employ advanced methods during peaceful times to steal secret information from other countries, businesses, and private individuals.[3] Digital technology and increased world connectivity boost the amount and pace of spying operations. NSA surveillance programs of foreign and domestic targets emerged in 2013 through Edward Snowden and Chinese cyberespionage efforts, which were uncovered in 2015.[4] Russia used cyber tools to influence the U.S. presidential election in 2016, proving that espionage extends from general intelligence work to supporting political and economic interests.[5] Espionage operates as a standard tool for statecraft throughout modern international relations.[6] States frequently engage in espionage, yet there are no clear legal rules under international law that explicitly prohibit such activities, particularly in times of peace. This is largely due to the absence of a universal consensus within the international community to outlaw espionage.[7]

While it is often stated that espionage occupies a grey area in international law, allowing it to remain crucial for national security, even though every State publicly condemns spying by others.[8] The absence of a specific treaty prohibiting espionage does not automatically imply a legal void. In fact, international law is composed of various sources, including CIL, general principles of law, and relevant treaties that may implicitly shape the practice of espionage during peacetime.

2 '*Cyber Defence*' (NATO, 30 July 2024) <https://www.nato.int/cps/en/natohq/topics_78170.htm> accessed 15 July 2025.

3 Simon Chesterman, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis' (2006) 28(3) *Michigan Journal of International Law* 553.

4 Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the US Surveillance State* (Metropolitan Books, Henry Holt 2014).

5 Heather Stewart, Peter Walker and Julian Borger, 'Russia Spy Poisoning: 23 UK Diplomats Expelled from Moscow' (*BBC*, 17 March 2018) <https://www.bbc.com/news/uk-43440992> accessed 29 January 2025.

6 Jelena Vićić and Erik Gartzke, 'Cyber-Enabled Influence Operations as a "Center of Gravity" in Cyberconflict: The Example of Russian Foreign Interference in the 2016 US Federal Election' (2024) 61(1) Journal of Peace Research 10, doi:10.1177/00223433231225814.

7 Christian Schaller, '*Spies*', *Max Planck Encyclopedia of Public International Law* (2015) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e295> accessed 29 January 2025.

8 Simon Chesterman, '*Secret Intelligence*', *Max Planck Encyclopedia of Public International Law* (2009) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e992> accessed 29 January 2025.

On the other hand, espionage undermines the sovereignty of States and the principle of non-intervention. However, those States cannot raise the responsibility of States that spy, as espionage itself is not prohibited under International Law, but due to the sovereignty of the States and the principle of non-intervention in the UN Charter, it is possible to constitute the legal basis to raise the responsibility of the spying State.

However, the legality of espionage can be examined through other rules of International law. The legal status of espionage remains measurable, as reflected in international laws, including the United Nations Charter[9] and the Vienna Convention on Diplomatic Relations (1961).[10] State sovereignty principles establish a legal framework for arguments suggesting that espionage activities that violate territorial boundaries or undermine national domestic policy stand against international law. Under the Vienna Convention on Diplomatic Relations framework, diplomatic missions are subject to restrictions on the permissibility of espionage actions.[11] Under Article 41, diplomats must recognise the legal framework of their host state and consistently avoid interfering within its domestic sphere.[12] Many states have employed this principle to remove foreign diplomats suspected of espionage throughout the Cold War era and during recent Russian diplomatic expulsions from Western partners due to spy allegations.[13] States and international bodies utilise existing legal frameworks to assess individual espionage activities, thus determining their legitimacy regarding international law. Despite its acceptance in international relations, espionage exists within an intricate regulatory domain that international diplomacy, politics, and legal systems continually reshape. This study will analyse different legal instruments such as the UN Charter, UNCLOS, and the Chicago Convention to examine the nature of espionage during peacetime, in addition to the legality of espionage in the light of Human Rights and Customary International Law.

2 RESEARCH METHODOLOGY

The research uses the analytical method based on the textual and contextual analysis of legal rules. This method aligns with the present study through the interpretation and analysis of specific provisions of international treaties, such as the United Nations Charter, the United Nations Convention on the Law of the Sea, and the Vienna Convention on Diplomatic Relations, and their application to the issue of espionage. Analysis and interpretation of these legal sources may contribute to determining the legality of espionage. The research

9 *United Nations Charter* (effective 24 October 1945) art 2(7) <https://www.un.org/en/about-us/un-charter> accessed 29 January 2025.

10 *Vienna Convention on Diplomatic Relations (signed 18 April 1961) [1965] UNTS 500/95.*

11 Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013).

12 Geoffrey B Demarest, 'Espionage in International Law' (1996) 24(2) *Denver Journal of International Law and Policy* 321.

13 Chesterman *(n 8)*.

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context is also heavily influenced by the inductive method that will be employed to establish a legal framework for espionage by examining international practices that may constitute customary international law. The study will consider the opinions and writings of legal scholars as a subsidiary source of international law by examining jurisprudential trends that support or oppose the legitimacy of espionage in times of peace.

3 LEGALITY OF ESPIONAGE IN LIGHT OF THE PRINCIPLE OF STATE SOVEREIGNTY

The fundamental principle of state sovereignty is a significant defining component that shapes intergovernmental rules regarding espionage activities. According to international law, every state has the autonomy to manage its expenses and maintain control over its territory while being free from outside limitations. Espionage represents a breach of state sovereignty because outside parties perform activities within the exclusive territorial domain of states without their permission.[14] State practice in espionage demonstrates that nations do not always adhere to the established sovereign principles recognised by international law. Pursuing national security through espionage allows states to break the sovereign domain of other countries. The flexibility of sovereignty allows states to conduct espionage actions against each other in order to fulfil their strategic demands. Although espionage operations may destroy diplomatic connections, nations often respond with retaliatory actions. States usually respond to domestic espionage discoveries by forcing embassies to leave the territory while arresting suspected agents and condemning the other state through diplomatic channels.[15] The diplomatic actions demonstrate the struggle between espionage measures and state legal rights protecting national borders. Because international law provides no clear guidelines on espionage, states settle their espionage disputes through diplomatic channels.

According to central tenets of international law, states must never interfere with the internal matters of other nations. Article 2(7) of the United Nations Charter prohibits international intervention in the internal affairs of any state, except in situations where issues of peace or security threaten international stability. The international community generally views espionage activities as banned information-gathering operations. Under the non-interference principle, espionage becomes illegal when state entities steal official secrets or disrupt national domestic issues. Espionage actions targeting political, military, and economic frameworks within a state constitute violations of that state's sovereign position. The United Nations General Assembly repeatedly promotes state non-interference in

14 Christopher D Baker, 'Tolerance of International Espionage: A Functional Approach' (2004) 19(5) *American University International Law Review* 1091.

15 Yves Sandoz,·Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 561-70.

domestic matters while protecting nations' sovereignty and territorial independence.[16] States typically accept espionage operations that form part of a national security framework or an intelligence operation. The absence of exact legal mechanisms to address questions regarding espionage makes it hard to implement this principle in practice.

The United Kingdom brought a case against Albania at an international court because it believed Albania violated British rights through dangerous activities such as mining international waters that led to a British ship sinking. The ICJ's ruling, in this case, avoided espionage questions specifically, but their judgment stressed three fundamental principles that protected state sovereignty and blocked both unlawful action and hostility toward states.[17] The Corfu Channel case defines how international law addresses how states protect their sovereignty and security assets, including espionage operations.

The target state considers actions of espionage by another nation within its borders to represent a violation of its sovereign independence. The complex ties between state sovereignty and espionage exist in visible light through U.S. allegations against Cuban espionage targeting U.S. military and intelligence assets.[18] The absence of precise international legal standards leads states to resolve espionage incidents through diplomatic methods instead of trying cases at international courts, even when espionage violates territorial sovereignty.

Therefore, it is clearly important to demonstrate that espionage violates the principle of sovereignty, as a State gains sovereignty either through certain International Conventions or by customary practices as a sovereign state. This concept is also present in Article 1 of the Montevideo Convention (1933), which defines the elements of a state.[19] These elements are considered the basic legal criteria for a State. The text related to the principle of sovereignty was essentially a way to reinforce an already existing customary rule and other conventional rules. Therefore, one of the main consequences that arise from State sovereignty is the principle of non-intervention; thus, the legality of espionage in light of the principle of non-intervention will be discussed below.

16 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (adopted 21 December 1965 UNGA Res 2131 (XX)) <https://digitallibrary.un.org/record/203886> accessed 29 January 2025.

17 *Corfu Channel Case (United Kingdom v Albania)* (ICJ, 9 April 1949) <https://www.icj-cij.org/case/1> accessed 29 January 2025.

18 US House Hearing, 'The President's New Cuba Policy and US National Security, Serial No 114-26' (*US Government Publishing Office*, 26 February 2015) <https://www.govinfo.gov/content/pkg/CHRG-114hhrg93534/html/CHRG-114hhrg93534.htm> accessed 29 January 2025.

19 Convention on Rights and Duties of States (signed 26 December 1933) [1936] UNTS 165/19. Article 1: "The state as a person of international law should possess the following qualifications: a permanent population, a defined territory, government and capacity to enter into relations with the other states."

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3.1. Indirect Prohibition under the Principle of Non-intervention

The principle of non-interference is enshrined in Article 2(7) of the United Nations Charter, which restricts all forms of intervention within legal areas protected by state sovereignty.[20] Secret information collection from within another state's territory is a purposeful breach of legal ethics and international standards for maintaining state control over domestic territory.[21] Schaller establishes that espionage operates outside international law prohibitions but regularly clashes with the non-intervention principle.[22] A state's constant execution of intelligence collection activities violates the territorial sovereignty of other states when operating on their lands.

In international law, a contradiction persists since espionage acts as an essential national security tool while undermining established standards for diplomatic relations. Chesterman states that governments allow espionage because such activities are fundamental to diplomacy and military operations, even while developing their counterintelligence capability alongside legal frameworks for sovereignty protection.[23]

Under this principle of non-intervention, a state has the right to defend its sovereignty when espionage interferes with internal decision-making or external relations with other countries. The U-2 incident in the 1960s is a valuable case in this context, demonstrating that peacetime espionage is replete with analytical difficulties. The historical event, in which an American reconnaissance aircraft was shot down over Soviet territory, triggered substantial diplomatic fallout and demonstrated the challenges espionage poses to state sovereignty and international law.

By examining the events of the time, the reactions of diplomats from various countries around the world, and the subsequent legal postures, researchers acquire a modicum of understanding of the practicality of the rules of international law.[24]

This case study underscores the relevance and sensitivity of doctrinal legal research and how specific events can shed light on such overarching concepts as state sovereignty and non-intervention. Similarly, the 2001 EP-3 surveillance aircraft incident between China and the United States illustrates how intelligence operations test state relations through their dual need for airspace boundaries.

20 United Nations Charter (n 9) art 2(7).

21 Karol Ziolkowski, 'Cyber Espionage - New Tendencies in Public International Law' in Katharina Ziolkowski (ed), *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy* (NATO CCD COE Publications 2013) 425.

22 Schaller (n 7).

23 Chesterman *(n 8)*.

24 François Dubuisson and Agatha Verdebout, 'Espionage in International Law', *Oxford Bibliographies Online* (2018) 599, doi:10.1093/obo/9780199796953-0173.

Schaller argues that espionage violations of Article 2(7) of the UN Charter should include unauthorised foreign territory entry or cyber-intrusions, though no explicit prohibition remains.[25] Such an approach supports a broader and more contemporary understanding of what constitutes a breach of sovereignty under international law.

3.1.1. Limits of the Principle of Non-Intervention

Espionage exists without direct restrictions through international law, though multiple legal principles such as the Principle of Non-intervention. This principle is considered a core rule in international law that prohibits states from interfering in the internal or external affairs of other sovereign states unless there is a threat to international peace and security, which is also under the Security Council and not by States themselves. In addition, this principle is also a customary norm, meaning it is accepted as binding by states through consistent practice and with the belief that such practice is legally required.[26]

Espionage challenges the principle of non-intervention by involving a State secretly collecting information inside another state's territory or by gathering intelligence information from the outside using different methods without the other state's consent. Such acts raise legal questions on the extent to which intervention is considered an act of espionage during times of peace, particularly in the context of international affairs, military intelligence, strategic information, and matters concerning national security. Therefore, there is an indirect prohibition on espionage that exists under the principle of non-intervention, prompting the legal inquiry into the extent to which intervention is deemed unlawful, and under what circumstances it may be considered permissible. Determining the legality of espionage during peacetime depends not only on the nature and methods used but also on the degree of coercion, intent to influence, and resulting impact on a state's sovereign decision-making authority.

Therefore, states have created regulatory rules that moderate but do not eliminate espionage capabilities through UNCLOS, the UN Charter, the Chicago Convention, and the Vienna Convention on Diplomatic Relations. The instruments seek to establish unauthorised intelligence gathering as a violation of essential state sovereignty and non-intervention principles. Under the principles of state sovereignty and non-intervention, espionage activities often constitute violations of fundamental state rights. Through Article 2(7) of the United Nations Charter, governments establish a ban on intervening in the domestic affairs of independent states exercising their sovereignty.[27]

25 Michael Schaller, 'Espionage and its Legal Implications: A Comprehensive Analysis of Violations under International Law' (2015) 22(4) Journal of International Law and Diplomacy 152.

26 Niki Aloupi, 'The Right to Non-Intervention and Non-Interference' (2015) 4(3) *Cambridge Journal of International and Comparative Law* 570, doi:10.7574/cjicl.04.03.566.

27 United Nations Charter (n 9) art 2(7).

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Through Article 2(7), the United Nations Charter explicitly bans external states from intervening in the domestic matters of sovereign states. The provision is an essential restriction against espionage because it designates it as an illegal activity that disrupts a state's political sovereignty and territorial boundaries. State border operations conducted without consent violate the non-intervention principle because they try to influence domestic and foreign state policies.[28]

3.1.2. Impact of Espionage on the Principle of Non-Intervention

Since espionage often targets sensitive areas, it can be seen as interference. For example, if a state publishes an article disclosing the number of voters expected to participate in elections in another state, the question arises as to whether such an act constitutes interference in that state's internal affairs. If it is indeed considered an intervention, a further inquiry would follow investigating how the publishing state obtained this electoral information.= A similar example can be presented—if State A publishes an article stating that State B possesses three naval fleets, the legality of the act may depend on the source of the information. If such military details are publicly available on State B's official Ministry of Defence website, then under international law, this would not qualify as espionage or unlawful intervention. Publicly accessible data, even when concerning sensitive subjects, does not in itself constitute a violation of the principle of non-intervention.

Furthermore, if espionage is used to pressure a state to act against its will through cyberattacks, blackmail, or disruption, it may qualify as unlawful intervention. On the other hand, if espionage targets a key state function, such as influencing policymaking decisions or altering the outcome of an election, it can be considered a breach of international law. However, this remains a contested area in international law because espionage often occurs in the grey zone between what is legally prohibited and what is internationally tolerated.

In *Nicaragua v. United States*, the International Court of Justice (ICJ) ruled that the U.S. had breached customary international law by supporting the Contra rebels, thereby violating obligations to refrain from using force against another state and infringing on its sovereignty. The court clarified that prohibited intervention under international law does not inherently depend on the use of armed force; rather, interventions employing force represent a clear example of such violations.[29] This ruling established that even non-military interference could contravene the prohibition on intervention. The decision implies that espionage involving the theft of confidential information could itself constitute a prima facie act of intervention, potentially representing a more severe breach of sovereignty than the U.S. actions condemned in the Nicaragua case. Essentially, the

28 Aloupi (n 26) 576.

29 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (ICJ, 27 June 1986) para 147 <https://www.icj-cij.org/case/70> accessed 29 January 2025.

judgment broadened the scope of prohibited intervention to include covert or non-forceful acts that undermine a state's sovereign rights.[30]

Unauthorised surveillance inside a foreign country's borders violates this principle of sovereignty. Through its provisions in the Vienna Convention on Diplomatic Relations (1961), states receive safeguards against espionage that defend their sovereign rights.[31] Ziolkowski confirms that, although international law does not forbid it, espionage is restricted through diplomatic countermeasures, such as the persona non grata principle, which allows for the expulsion of spies.[32]

International law protects states from external interference, ensuring they retain full control over their internal affairs. According to the United Nations Charter under Article 2(7), the principle protects state sovereignty by prohibiting intervention from one state into another's domestic affairs.[33] Espionage legal practices are ambiguous because intelligence collection activities are conducted through covert actions within another state's territory without the consent of that state. As the boundary of legal intervention through espionage is unclear, there are complex technical distinctions to be made about what constitutes prohibited practices. National security institutions often develop traditional espionage operations to gather essential information about politics, military assets, and the economy. Espionage is also conducted through surveillance and wiretapping, as well as covert tasks to achieve state internal monitoring goals.[34] There is no formal prohibition against intelligence-gathering activities, which creates legal ambiguities under international law. However, these operations are actively violating fundamental rules about the independence of states and their right to remain uninvolved in the affairs of others. Spying, through its practice, disrupts the target nation's political stability and social norms, providing an indirect means to influence the way the state government operates. The choice of political information as an intelligence objective to change policies and political structures reduces a state's ability to make independent decisions. The International Court of Justice affirmed this view in its 1986 decision in the Nicaragua case, in which sovereign decision interference was classified as a violation of state independence.[35] The court ruled that nations have exclusive power over their political and domestic space and cannot be subjected to unauthorised intelligence activities.

The debate about espionage aimed at human rights defence reviews the subtle aspects of this practice. By exposing international human rights violations, these military operations place human dignity above traditional national security aims. Others argue that foreign

30 Jared Beim, 'Enforcing a Prohibition on International Espionage' (2018) 18(2) *Chicago Journal of International Law* 654.

31 *Vienna Convention on Diplomatic Relations* (n 10).

32 Ziolkowski (n 21) 464.

33 United Nations Charter (n 9) art 2(7).

34 Sandoz, Swinarski and Zimmermann (n 15) 561-70.

35 *Military and Paramilitary Activities in and against Nicaragua* (n 29).

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surveillance operations should be permitted if the International Covenant on Civil and Political Rights (ICCPR) allows for monitoring of fundamental human rights violations.[36]

However, this position is highly controversial. Critics contend that any collection of any Intelligence, even in humanitarian circumstances, violates the state's sovereignty. They argue that the point of interference maintained by the United Nations and the international community also covers human rights concerns. Their grounds for establishing a non-intervention doctrine, namely the excessive erosion of state sovereignty through espionage and human rights violations, should directly relate to the outcome.[37] It also shows how human rights under international law can be interpreted as not interfering with states' sovereign rights. It is also a question of broader questions about how much national sovereignty should be sacrificed to global humanitarian responsibility in the new millennium, as intelligence gathering nets become more sophisticated.

Espionage activities may be a potential justification for serving broad humanitarian goals that can prevent or stop the identification of human rights abuses. State approval is essential to conduct such operations since their implementation without consent breaks international law principles. Intelligence operations protecting human rights face criticism for their involuntary intrusion against international legal norms concerning states' right to remain independent.

Ultimately, the non-intervention principle, combined with the use of spies, remains a relatively legal affair and opportunistic. While the UN Charter and other state practices contain guidelines for state conduct in international relations, they lack precise and enforceable standards to evaluate intelligence-gathering activities. As the global landscape becomes increasingly interconnected through information sharing and cross-border surveillance, the boundaries of prohibited interference continue to shift—redefining sovereignty in the new complex manoeuvres of super-intelligence.

3.2. Indirect Prohibition in the light of the conventional rules

The analysis of espionage during peacetime requires examining relevant international conventions. While these conventions do not explicitly establish a legal basis for espionage, they may be interpreted in accordance with the means of treaty interpretation outlined in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which could provide significant legal limitations on such activities. This interpretive methodology is crucial for maintaining the international legal order and fostering peaceful international relations.

36 Michael N Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013) 192-5.

37 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (n 16).

Article 31 VCLT states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[38] Supplementary means of interpretation under Article 32 VCLT, including preparatory work (*travaux préparatoires*) and the circumstances of a treaty's conclusion, further clarify the meaning when interpretation under Article 31 leaves it ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.[39]

Based on these means, it is evident that espionage during peacetime, widely condemned by States for its potential to undermine international stability, is implicitly restricted by conventional rules. This section examines significant provisions in certain conventions, such as Article 19(2)(c) of the United Nations Convention on the Law of the Sea (UNCLOS), the 1944 Chicago Convention on International Civil Aviation, and Article 3(1)(d) of the Vienna Convention on Diplomatic Relations.

3.2.1. Impact of Espionage on the Maritime Sovereignty

State sovereignty receives protection under several international conventions that establish restrictions on espionage. Surveillance activities, as defined by UNCLOS standards, remain restricted to state territorial waters due to explicit permissions outlined in the United Nations Convention on the Law of the Sea (UNCLOS).[40] The ordinary meaning of Article 19(2)(c) UNCLOS explicitly prohibits foreign vessels exercising the right of innocent passage if they engage in "any act aimed at collecting information to the prejudice of the defence or security of the coastal State."[41] According to international law, these regulations prevent intelligence ships from monitoring territories through their states' 12-nautical-mile border unless proven otherwise. Thus, confirming that state sovereignty becomes jeopardised when espionage occurs.

Article 19(2)(c) of UNCLOS clearly prohibits vessels from passing through the territorial sea and engaging in any act aimed at collecting information of the coastal state; such an act is considered unlawful, and the vessel would be given direct orders to leave the territorial sea of a sovereign state.

Espionage during peacetime is often carried out under the guise of innocent passage, such as intelligence gathering, the acquisition of military data, or the interception of sensitive communication. It directly violates the principle of sovereignty over a State's maritime space, and furthermore, it represents an indirect breach of the principle of non-intervention. The fact that the right of innocent passage is subject to limitations clearly indicates that espionage falls into a grey area of international law.

38 Vienna Convention on the Law of Treaties (signed 23 May 1969) [1987] UNTS 1155/331, art 31.

39 ibid, art 32.

40 Chesterman *(n 8)*.

41 United Nations Convention on the Law of the Sea (signed 10 December1982) [1998] UNTS 1833/3, art 19(2)(c).

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For instance, if a surveillance or naval intelligence vessel passes through the territorial sea of another state and actively gathers strategic military information, such as surveillance of coastal defence systems, this would constitute a violation of Article 19(2)(c), even if no weapons are used. The pretence of innocent passage becomes irrelevant if the underlying activity compromises the coastal state's national defence. A hypothetical example would be a ship from State A sailing through State B's territorial waters while collecting encrypted military transmissions from coastal installations. Even if the data were passively gathered without entering restricted zones, the activity would still breach Article 19(2)(c) due to its adverse impact on State B's security.

However, a key question arises when information gathering occurs outside a state's territorial sea, particularly within its Exclusive Economic Zone (EZZ). This issue is exemplified by the 2009 USNS Impeccable incident, in which a U.S. military surveillance vessel operating near China's southern coast in the EEZ was accused of conducting unlawful intelligence operations.[42] Although the EEZ lies beyond the territorial sea and does not confer full sovereignty to the coastal state, the diplomatic fallout that followed between China and the USA illustrates the seriousness with which maritime espionage is viewed by coastal states as an act of intervention.

The United States maintained that its actions were consistent with the freedoms of navigation and overflight guaranteed under the United Nations Convention on the Law of the Sea (UNCLOS), particularly Articles 58 and 87. However, China objected on the basis that such activities violated its sovereign rights and constituted a threat to its national security.[43]

Although the EEZ is not subject to full sovereignty in the same manner as the territorial sea, coastal states retain sovereign rights for the purposes of exploring and exploiting natural resources and may also regulate certain economic and environmental activities. The ambiguity lies in whether foreign military intelligence operations, while not explicitly prohibited under UNCLOS, can be interpreted as infringing on these sovereign rights or amounting to intervention in internal affairs. To answer this uncertainty, the UNCLOS does not regulate the legality of peacetime maritime espionage in these zones. However, in an indirect way, such actions are a violation of the principle of sovereignty, especially when national security interests are implicated.

42 Carlyle A Thayer, 'The United States and Chinese Assertiveness in the South China Sea' (2010) 6(2) Security Challenges 69.

43 Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 13-7.

3.2.2. Impact of Espionage on the Aerial Sovereignty

According to Article 1 of the Chicago Convention on International Civil Aviation (1944), states possess "complete and exclusive sovereignty over the airspace above its territory." [44] This foundational principle affirms that every State enjoys complete and exclusive sovereignty over the airspace above its territory. As such, no foreign aircraft can enter the airspace of another country without its permission. If any contracting state violates an article of this convention during peacetime, this act may constitute a breach of the principle of sovereignty and the terms of the agreement.

This article thus establishes a clear legal framework requiring prior authorisation for entry into a sovereign state's airspace. Acts of aerial espionage—such as unauthorised surveillance, intelligence collection by aircraft, even if flying at high altitudes—are considered an indirect prohibition of the principle of sovereignty.

This principle is often cited in legal challenges involving unauthorised aerial espionage. Two events illustrate the methods states employ in response to perceived violations of this principle: the 1960 U-2 incident and the 2023 Chinese spy balloon incident.

The U-2 incident stands as a landmark case in interpreting the impact of espionage on aerial sovereignty. In 1960, a United States aircraft was shot down by the Soviet forces while flying above the Soviet Union on a high altitude conducting aerial surveillance.[45] Legally, the U-2 incident constituted a clear violation of the Soviet Union's airspace under Article 1 of the Chicago Convention and under customary international law, even if it was conducted at high altitudes. Although the Chicago Convention does not directly address military aircraft,[46] however, the principle of sovereignty over national airspace is internationally recognised and binding on all aircraft, whether civil or state.[47]

This incident illustrates the consequences of unauthorised aerial surveillance and reinforces the principle that even non-aggressive flights conducted for intelligence purposes can constitute unlawful intervention under international law.[48] While the International Court of Justice (ICJ) has not directly ruled on aerial espionage, the logic applied in cases such as Nicaragua v United States supports the view that covert surveillance which violates a state's territorial sovereignty may also infringe the non-intervention principle.[49]

44 Convention on International Civil Aviation (signed 7 December 1944) [1948] UNTS 15/295, art 1.

45 Raymond L Garthoff, *Reflections on the Cuban Missile Crisis* (2nd edn, Brookings Institution Press 1989) 4. See also: Gregory W Pedlow and Donald E Welzenbach, *The CIA and the U-2 Program, 1954-1974* (History Staff Center for the Study of Intelligence CIA 1998).

46 Convention on International Civil Aviation (n 44) art 3(a).

47 Bin Cheng, *The Law of International Air Transport* (Stevens & Sons Ltd; Oceana Publications Inc 1962) 131; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 289.

48 Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (CUP 2006) 108.

49 *Military and Paramilitary Activities in and against Nicaragua (n 29)* para 205.

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Similarly, the 2023 Chinese spy balloon incident raised significant political concerns. The United States alleged that a high-altitude balloon operated by the Chinese government entered its airspace, hovering over several states, including sensitive military areas, without prior permission.[50] The Chinese spy balloon incident indicates a violation of the Chicago Convention and the aerial sovereignty of a State, regardless of whether a spy balloon qualifies as an aircraft or not.[51] The international legal ambiguities surrounding the legal status of aerial objects highlight the Convention's limitations, particularly in addressing emerging technologies and distinguishing between national airspace and outer space.[52]

Technology has led Chesterman to observe that international intelligence operations routinely use aerial and space-based reconnaissance even though these practices remain without a legal framework.[53] In analysing the two incidents, there is no clear treaty that can regulate espionage during peacetime in light of aerial sovereignty incidents. Without clear legal regulation, aerial espionage remains a grey area in international law—widely regarded as a breach of state rights when conducted without consent and to the prejudice of national security.

3.2.3. Impact of Espionage on Diplomatic Relations

The legal framework established by the Vienna Convention on Diplomatic Relations (1961) raises special issues related to diplomatic espionage operations. Foreign embassies must fulfil their mission by employing legal methods to assess the conditions of the receiving state and then report their findings to their respective home governments, as per Article 3(1)(d) of the agreement. This diplomatic function requires lawful actions to conduct intelligence activities in accordance with current legal provisions. The difficulty arises from identifying proper boundaries in intelligence operations, as representatives traditionally use their official roles for hidden collection activities.[54]

Under the Vienna Convention, procedural actions exist to respond to diplomatic privilege exploitation that can validate espionage activities. The convention allows states to identify foreign diplomats who conduct intelligence operations outside acceptable limits and then issue a declaration of persona non grata.[55] Observations from

50 Kevin Fang, Priyanka Shah and Benjamin Rosen, 'A Right to Spy? The Legality and Morality of Espionage' (*Just Security*, 15 March 2023) <https://www.justsecurity.org/85486/a-right-to-spy-the-legality-and-morality-of-espionage/> accessed 29 January 2025.

51 Look up article: Batuhan Betin, 'Skies, Spies, and Scientific Surveys – The Legal Aspects of Chinese Unmanned Balloon Flight Over American Territory' (*EJIL:Talk!*, 6 March 2023) <https://www.ejiltalk.org/skies-spies-and-scientific-surveys-the-legal-aspects-of-chinese-unmanned-balloon-flight-over-american-territory/> accessed 29 January 2025.

52 Dean N Reinhardt, '*The Vertical Limit of State Sovereignty*' (LLM thesis, McGill University Montreal (Quebec) 2005).

53 Chesterman *(n 8)*.

54 *Vienna Convention on Diplomatic Relations* (n 10) art 3(1)(d).

55 ibid, art 9(1).

the Tehran Hostages Case (1980) exposed an embattled relationship between the diplomatic shield and espionage activities because Iran accused the U.S. embassy in Tehran of carrying out intelligence actions against its government.[56] Despite refraining from addressing espionage charges, the International Court of Justice declared that states facing suspicions of foreign diplomats' illegal activities still benefit from Vienna Convention protections.[57] Military attachés carry out intelligence tasks that require them to operate under terms defined by the accepting nation's legal framework.[58] International law remains uncertain about the status of diplomatic espionage because states traditionally handle violations through diplomatic methods rather than legal court systems, following many Cold War-era expulsions of diplomats.[59]

Furthermore, analysing espionage under international law requires special attention to recognising diplomatic immunity. Under Articles 41 and 42 of the Vienna Convention on Diplomatic Relations (1961), diplomatic agents are granted protection from criminal prosecution by their host country in relation to their official duties. The Vienna Convention does not provide diplomatic protection regarding espionage activities, which are considered beyond the scope of legitimate diplomacy.[60]

This distinction was notably illustrated in the 2018 expulsion of Russian diplomats from the United Kingdom, following the attempted assassination of a former Russian intelligence officer.[61] British authorities invoked the diplomatic expulsion mechanism to respond to what they characterised as a violation of their sovereignty.

International relations gain their legal framework from state practices that evaluate espionage conduct versus diplomatic immunity while resolving their inherent tensions. International legal systems provide no definitive rules on the prohibition of espionage, so states must decide independently whether espionage activities are in accordance with their laws. Such a complex paradox of the international community's approach to espionage is reflected in the fact that states tend to conduct intelligence operations while simultaneously condemning the same activity within their borders.

This duality manifests in a range of diplomatic responses, including the expulsion of ambassadors, surveillance of foreign diplomats, and the management of incidents involving the capture of spies. It also extends to the routine practice of clandestine intelligence gathering carried out under the cover of diplomatic missions. By definition, intelligence gathering involves violating domestic law or territorial sovereignty by agents engaging in

56 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (*ICJ, *24 May 1980*) <https://www.icj-cij.org/en/case/64> accessed 29 January 2025.

57 ibid, para 86.

58 Chesterman *(n 8)*.

59 Demarest (n 12).

60 Vienna Convention on Diplomatic Relations (n 10) arts 41, 42.

61 Stewart, Walker and Borger (n 5).

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the clandestine acquisition and collection of information that falls within the domains of domestic law or territorial sovereignty across borders.

Despite this, states continue to guard against their legal status to espionage, while also knowing its critical importance to national defence and foreign policy advancement—an issue that remains ambiguously unclarified.[62] In practice, nations typically resolve espionage incidents diplomatically through diplomatic expulsions and formal protests. The international community condones espionage not only through a legal lack of enforcement or even a refusal to punish it as a war crime but, in fact, through its tacit acknowledgement of espionage as a prerequisite to the state's functioning. As a result, espionage operations persist even when they contravene fundamental principles of international law, sustained by a form of global tolerance grounded in practical necessity.

This gap between legal norms and state practice underscores the divergence between the formal legal framework and the reality of national security operations. While the Vienna Convention on Diplomatic Relations (1961) regulates diplomatic privileges and immunity, it does not legitimise espionage. Diplomatic missions maintain reporting duties within host states, yet the Vienna Convention defines their intelligence-gathering activities as lawful procedures.[63]

Historically, diplomatic missions served as convenient cover for covert intelligence activities while performing duty-related functions. The practice of states conducting espionage through diplomatic missions remains limited by international legal provisions that allow host states to eject undercover spies using the persona non grata principle. The diplomatic community has established a solid international standard that prohibits the improper exploitation of diplomatic immunity for intelligence operations.

4 LEGALITY OF ESPIONAGE IN LIGHT OF THE HUMAN RIGHTS LAW

Human rights, including privacy protection, face growing threats as states intensify their oversight of citizens. Intelligence agencies conduct bulk data intercepts of communications to watch persons, yet typically lack a sufficient legal basis for their activities. The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) established that surveillance programs reduced freedom of speech and organisational contact while intensifying privacy dangers.[64]

The practice of state surveillance has evolved to include bulk data collection from telecommunication networks, which has become one of the main espionage developments in recent times. Worldwide national security operations now heavily rely on state

62 Aloupi (n 26) 575.

63 Vienna Convention on Diplomatic Relations (n 10).

64 Ashley Deeks, 'An International Legal Framework for Surveillance' (2015) 55(2) *Virginia Journal of International Law* 310.

surveillance, which governments deploy to combat terrorism, cyber threats, and various other national security threats. The expansion of surveillance technology creates substantial privacy protection violations in opposition to global human rights law protections.[65] Under international human rights law, the right to privacy is a fundamental human right, according to both ECtHR and ICCPR. Article 17 of the ICCPR states that, "No one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, nor unlawful attacks on their honour and reputation". Article 8 of the ECHR safeguards individuals from arbitrary interference with their private life, family, home, and correspondence.[66] The rising practice of population-wide bulk communications data collection makes it harder to uphold privacy protections established by law.

Digital technology advances have enabled intelligence agencies to process unprecedented volumes of data with maximum efficiency. However, state power today faces additional concerns through bulk data collection—facilitated by artificial intelligence and cyber surveillance tools—has made espionage operations far broader than before.[67]

According to judicial decisions, mass data retention tactics have faced outsized privacy implications, including multiple rulings such as *Big Brother Watch and Others v. U.K.* (ECtHR, 2021) and *Schrems II* (CJEU, 2020).[68] Stricter oversight mechanisms coupled with activity constraints represent essential measures that courts have identified to stop the abuse of intelligence operations.

While technology remains vital to national security—particularly in addressing threats and terrorism—the upcoming challenge requires regulatory bodies to establish procedures that safeguard intelligence collection from exceeding its necessity and human rights boundaries.

Prior judicial decisions established that courts provide better protection to content data than metadata. Therefore, the line separating content data from metadata has become increasingly difficult to distinguish.[69] The CJEU, in *Digital Rights Ireland* (2014) and *Tele2 Sverige* (2016), determined that metadata can reveal information comparable in sensitivity to content data, and thus must be subject to strong safeguards during investigation procedures.[70] This position reaffirmed by the ECtHR in *Big Brother Watch and Others v. U.K.*,

65 ibid 295.

66 ibid.

67 Schaller (n 7).

68 *Big Brother Watch and Others v United Kingdom* App nos 58170/13, 62322/14, 24960/15 (ECtHR, 25 May 2021) para 314 <https://hudoc.echr.coe.int/fre?i=001-210077> accessed 29 January 2025; *Facebook Ireland and Schrems* C-311/18 (CJEU, 16 July 2020) <https://curia.europa.eu/juris/liste.jsf?num=C-311/18> accessed 29 January 2025.

69 Deeks (n 64) 311.

70 *Digital Rights Ireland and Seitlinger and Others* C-293/12, C-594/12 (CJEU, 8 April 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62012CJ0293> accessed 29 January 2025; *Tele2 Sverige* C-203/15, C-698/15 (CJEU, 21 December 2016) <https://curia.europa.eu/juris/liste.jsf?num=C-203/15> accessed 29 January 2025.

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where the Court stressed that the bulk interception of communications data needs detailed oversight measures.[71]

At times, states engage in data collection in a random and unselective manner, leading to an apparent overlap between information gathering and the act of espionage. This raises a fundamental question: to what extent does data collection infringe upon the right to privacy under human rights law? The following sections will aim to clarify and analyse how mass surveillance and bulk data collection can result in interference with human rights law. In addition to focusing on the growing use of surveillance technologies, which can come with conflict with the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). A key legal standard used by international bodies and courts—the necessity and proportionality test—will then be analysed to evaluate whether restraints on privacy can be justified as espionage practices or protection of national security.

4.1. Mass Surveillance and Bulk Data Collection and Privacy Interference

The surveillance techniques employed in bulk data collection pose significant consequences for privacy rights through their ability to process extensive records from surveillance. International human rights law dictates that bulk surveillance must meet both the requirement standards and the proportionality requirements, yet this approach often lacks specificity in practice.[72]

In *Carpenter v United States* (2018), the Supreme Court of the United States decided that warrantless collection of location data constituted a serious intrusion on privacy[73] and required judicial authorisation.[74] Similarly, in *Zakharov v. Russia* (2015), the ECtHR determined that Russian surveillance legislation was insufficient to protect against misuse and failed to ensure effective judicial oversight.[75] These rulings underscore a broader concern: big data analytics and artificial intelligence technology have enabled intelligence agencies to create sophisticated individual profiles, thus expanding privacy violation concerns.[76]

The extent to which surveillance tracks movements and behaviours, combined with a lack of regulatory boundaries, raises worries about its compatibility with fundamental human rights. Public judicial powers require basic legal rules for surveillance activities and independent control mechanisms to protect the rights of victims who have suffered violations of their rights.

71 *Big Brother Watch and Others v United Kingdom* (n 68) para 314.
72 Deeks (n 64) 311.
73 *Carpenter v United States* [2018] 585 US 296; 138 S Ct 2206, 2219.
74 ibid.
75 *Zakharov v Russia App no 47143/06* (ECtHR, 4 December 2015) <https://hudoc.echr.coe.int/fre?i=001-159324> accessed 29 January 2025.
76 Deeks (n 64) 308.

A key example of this legal tension is the invalidation of the EU-U.S. Privacy Shield 2020 by the CJEU. The decision was based on the findings that U.S. intelligence agencies conducted excessive surveillance that denied EU citizens adequate legal protections.[77]

Building a framework of what constitutes or does not constitute a legal precedent through court rulings has been established to balance national security needs with individual privacy protections. Through the cooperation of international organisations and the work of judicial bodies, new legal standards for surveillance practices have evolved. As states pursue legitimate security interests, they continue to set the standards by which they wish state-sponsored intelligence operations to operate in accordance with the rule of international human rights legislation. This is an area in the legal landscape where surveillance practices can be regulated in a way that balances collective security interests with individual interests. These principles strike a balance between the various needs, enabling states to protect health information in a manner that maintains security while respecting privacy rights. While surveillance is an inherently indispensable shield when it comes to safeguarding national defence, it must be carried out in a way that also protects fundamental human rights.

4.2. Balancing Espionage and Privacy Rights: The Necessity and Proportionality Test

International human rights laws require that restrictions on fundamental rights demonstrate necessity and proportionality for authorised aims, including national security. States frequently justify espionage or surveillance as essential to safeguarding national security; however, such activities impact the right to privacy. To reconcile this tension or conflict, human rights frameworks require restrictions on privacy to satisfy the necessity and proportionality test, ensuring espionage activities remain lawful only when strictly aligned with legitimate security aims and accompanied by robust safeguards.

The necessity criterion requires that surveillance measures be essential to achieving an important objective—such as countering terrorism—and that no less intrusive alternatives exist. The proportionality test refers to a surveillance program that does not disproportionately harm individual privacy compared to the public benefit. Submerged surveillance remains subject to precise court supervision to fulfil necessary principles according to court decisions.

This was affirmed in *Schrems II* (CJEU, 2020) where the Court invalidated the EU-U.S. Privacy Shield agreement on the grounds that U.S. intelligence agencies improperly collected EU citizens' data without adequate available remedies.[78] The decision established that effective intelligence acquisition needs to maintain proper equilibrium with personal privacy safeguarding methods.[79]

77 *Facebook Ireland and Schrems* (n 68) .

78 *ibid*.

79 Deeks (n 64) 311.

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Similarly, in *Big Brother Watch*, the ECtHR required bulk surveillance programs to implement specific legal frameworks with autonomous authorisation systems and effective remedy procedures.[80] The absence of such safeguards constituted a violation of Article 8 of the European Convention on Human Rights, which protects the right to privacy.

Therefore, there must be a proportionate relationship between the act of espionage and its consequences. If the harm to privacy is minimal and the benefit to public security is substantial, the proportionality test may be fulfilled under international legal standards. For example, it may be necessary to conduct surveillance in a specific area if there is credible information indicating that a bomb has been planted in a school—this would constitute a legitimate security objective. However, conducting surveillance merely because there is a possibility of data theft from an agricultural institution in a certain region would not meet the threshold of necessity. In such a case, the activity would more accurately be characterised as espionage rather than lawful surveillance, and it would not be legal under human rights law.

5 LEGALITY OF ESPIONAGE IN LIGHT OF CUSTOMARY INTERNATIONAL LAW

When examined through the principles of international customary law, the unauthorised collection of secrets for political or military gain—defined as espionage—sparks multiple legal uncertainties. These concerns centre around the legality of espionage under international customary law (CIL). States establish international customary law through consistent and widespread global practices that derive legal obligations from those practices. The principal issue regarding espionage during peacetime under international law is determining what constitutes prohibited conduct under legal standards and whether such acts receive worldwide condemnation.

Customary International Law (CIL) is a fundamental source of international law that emerges through key elements: consistent, systematic, and concurrent state practice, with the belief that states are obligated to adhere to such practice by legal norms. Unlike treaties, CIL is not written and emerges gradually through the state's actions and opinions.[81] Contrary to the view that CIL is outdated or a legal technique of the past, it is not a stagnant legal regime, as some people perceive it. Although the formation of the CIL rule calls for robust evidence of continued State practice, the law remains flexible. Indeed, CIL has not been relegated to the periphery of international law; it remains one of its essential components, capable of further refinement and clarification.

80 *Big Brother Watch and Others v United Kingdom* (n 68).

81 Panos Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (The Rules of Interpretation of Customary International Law, CUP 2022) 347, doi:10.1017/9781009025416.017.

Determining whether espionage is permissible under CIL requires a nuanced analysis of the frequency of state intelligence activities, coupled with states' official and military responses to espionage cases. Opinio juris regarding the permissibility of such activities may evolve alongside emerging international legal standards.[82] As legal opinions constantly evolve, the legal status of espionage under CIL can also change in response to contemporary state practices and legal perceptions. Therefore, the interpretation is never static but remains open to ongoing reassessment.

This section examines espionage law based on international customary principles, utilising analysis from state practice, domestic legislation and judicial proceedings. For centuries, states have employed intelligence gathering as a key component of their national security strategy to gain strategic advantages. Despite widespread state engagement in this practice, international law continues to grapple with its legal implications. At the core of the debate lies the question of whether espionage constitutes a violation of international law, and whether a customary international rule prohibiting it exists.

CIL is derived from two primary criteria: state practice and opinio juris. State practice refers to the regular standard activities performed by states, while opinio juris represents the legal belief states hold towards particular acts. Although the prevalence of espionage supports the existence of a widespread practice,[83] there remains uncertainty over the status of its actual prohibition.

Many states criminalise espionage under domestic law, while others have not adopted any legislative restrictions. This raises the question: to what extent can espionage be considered unlawful under customary international law (CIL)? As is well established, CIL has two core elements: state practice and the belief that such state practice is legally obligatory.

If a substantial majority of states—say, 150—criminalise espionage within their domestic legal systems, this may be interpreted as strong evidence of consistent and general state practice, suggesting that espionage is widely regarded as legally impermissible under customary international law.[84] However, the situation is complicated by the fact that a significant number of other states—such as 50 or more—remain silent or acquiescent in formally objecting to espionage activities, despite taking preventive measures against the act of espionage.[85] Therefore, the legality of espionage remains ambiguous, falling into a grey area under customary international law.

Espionage is often considered an indispensable instrument for states to achieve their objectives in national security and international foreign relations activities. The common occurrence of state espionage practices and the uncertain status under international law

82 ibid.

83 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 2002).

84 Malcolm N Shaw, *International Law* (9th edn, CUP 2021) 74-7.

85 Ashley Deeks, 'The Legal Framework for Intelligence Collection' (2016) 38(2) *Harvard National Security Journal* 357.

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present analytical challenges for determining their acceptability under CIL. Despite being criminalised in many domestic legal systems, espionage is neither explicitly prohibited nor expressly permitted under international law. As such, it occupies a legal grey area—widely practised, yet not formally codified as legal or illegal at the international level. Consequently, while espionage is tolerated as a matter of state practice, its acceptability as a legal norm under customary international law remains unresolved, largely due to the lack of consistent opinio juris among states.

Under national laws, many states impose criminal sanctions on espionage to protect vital state information and national security. For example, the U.S. official statutes for espionage date back to 1917 and originate from the Espionage Act of 1917, which prohibits unauthorised access to or sharing of national defence information.[86] Under the UK's Official Secrets Act of 1989, individuals are punished for sharing information without authorisation related to national security topics, sensitive activities, and international relations matters.[87] Execution of espionage and collection of Intelligence remains essential through state laws establishing national sovereignty regulations. Although espionage is subject to criminal penalties under national laws, this legal fact does not establish the existence of an international rule against espionage in customary international law.[88] Legislation under national law typically defines laws specific to national state legal systems, yet fails to represent established standards within international law frameworks. Each state may engage in espionage without facing international consequences, particularly when national security or foreign policy interests are at stake.

International treaties also offer little clarity. No specific treaty prohibits espionage during peacetime. International humanitarian law, as established through the Geneva Conventions and their Additional Protocols, addresses espionage primarily in the context of armed conflict. During peacetime, the United Nations Charter prohibits interference in the internal affairs of states, but it does not explicitly outlaw espionage.[89] A specialised international framework to govern espionage remains absent, further complicating customary international law analysis regarding their prohibition.

Nevertheless, certain judicial rulings and legal instruments offer indirect constraints. While no international convention expressly bans espionage, its legality is often assessed through generalised concepts, such as state independence, protection for diplomatic representatives, and restrictions on harmful state-to-state behaviours.

86 *18 US Code, ch 37, pt 1 Espionage and Censorship, § 792–799.*

87 *Official Secrets Act* 1989, c 6 (UK).

88 Asaf Lubin, 'Espionage as a Sovereign Right under International Law and Its Limits' (2016) 24(3) ILSA Quarterly 24.

89 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (n 16); United Nations Charter (n 9).

The legal framework for espionage under international customary law exists without explicit prohibition but is subject to indirect restrictions through legal instruments that protect state sovereignty and territorial integrity. These indirect limitations can be found in instruments such as the UN Charter, the Vienna Convention on Diplomatic Relations (1961), and the United Nations Convention on the Law of the Sea (UNCLOS). However, none of these treaties explicitly prohibit espionage.

Customary international law is further shaped by judicial decisions of the International Court of Justice. For example, in *Nicaragua v. United States* (1986), the ICJ held that America's secret operations against Nicaragua were deemed a breach of customary international law, which protects the principle of non-intervention. This case illustrates how espionage, when it constitutes interference in another state's domestic affairs, can breach international norms, even though espionage is not formally outlawed.

Under the United Nations Convention on the Law of the Sea (UNCLOS), Article 19(2)(c) prohibits foreign vessels from engaging in intelligence gathering within the territorial waters (12 nautical miles) of a coastal state. This provision reinforces the protection of the sovereignty of coastal states.[90] The application of espionage laws to the maritime sphere reaffirms the more general principle that sovereignty over borders remains with states and that such intelligence gathering, even at sea, is not to invade the sovereignty of a state.

Thus, while espionage is not categorically prohibited under customary international law, it is indirectly constrained through various legal instruments and norms that prioritise states' sovereignty. Its legality often hinges on how states perceive and apply international legal principles in their jurisdiction.

In parallel, courts such as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have emphasised that mass surveillance requires detailed protections for individual privacy, even when used for national defence. The Court of Justice of the European Union ruled that gathering bulk communications data infringed upon privacy rights as minimal legal protection could not adequately safeguard such data collection.[91] In *Big Brother Watch and Others v. U.K.* (2021), the ECtHR ruled that surveillance programs require effective oversight to protect against misuse and uphold necessity constraints.[92] Governments require the necessity criterion alongside proportionality principles to regulate their surveillance practices. Under IHL, any restriction of privacy must have a valid purpose, be necessary for achieving that aim, and be proportionate to the objective pursued.

90 United Nations Convention on the Law of the Sea (n 41).

91 Deeks (n 64) 308.

92 *Big Brother Watch and Others v United Kingdom* (n 68).

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Any data collection approach that fails to establish legal grounds for specific purposes will not align with these essential requirements. This case contains an essential principle of necessity and proportionality. In *Carpenter v. United States* (2018), the U.S. Supreme Court expanded privacy protections by holding that location data deserved similar constitutional protections as communication content. Intelligence agencies have enhanced privacy violations through Artificial Intelligence and big data analytics by developing comprehensive profiles of individuals through their communication and activity patterns.[93] These observational tools that process entire datasets allow governments to perform surveillance that might result in extreme privacy invasions. A greater volume of collected data combined with improvements in data complexity leads to higher threats against users' privacy rights.

6 CONCLUSIONS

Espionage remains a grey area within international law. While states categorically consider intelligence collection necessary for security, many of these operations are contrary to the most basic notions of sovereignty, privacy rights and territorial integrity. Although surveillance activities occur with equal frequency in states, such as the abuse of state sovereignty and borders, this tension in international relations arises from the ambiguous legal status of surveillance activities. Nevertheless, states argue that these operations are required to fulfil security needs and, as a result, these operations almost always violate non-intervention standards and territorial integrity. These breaches of international law cannot be justified on their own by justifications of national security.

The current international legal regime neither adequately prohibits nor explicitly permits espionage, revealing a critical gap in governance. This regulator vacuum underscores the urgent need for a more coherent and normative legal approach—whether through clearer treaty-based regulation or the development of customary norms—to address the evolving complexities of modern intelligence operations.

This research contributes to the understanding of espionage by highlighting the fluidity of international legal order and the pragmatism of state behaviour. It offers a complex model for understanding information gathering beyond the legal and ethical binary oppositions and emphasises the importance of adapting legal and diplomatic strategies in response to global integration. As technological capabilities continue to evolve and global interconnectedness intensifies, future research must create more refined legal definitions for cyber intelligence and discuss the ethical implications of new forms of surveillance, in addition to examining the effects of intelligence practices on diplomatic relations in the long run.

93 *Carpenter v United States* (n 73).

This paper has examined the interplay between espionage and the principle of state sovereignty, particularly through the lens of Article 2(7) of the UN Charter, which prohibits intervention in matters essentially within the domestic jurisdiction of any state. Ultimately, the evolving nature of espionage demands that international law adapt through flexible yet principled frameworks. These must uphold the core values of sovereignty and human rights, while providing legal clarity to govern intelligence activities in a way that promotes transparency, accountability, and peaceful coexistence in the international system. States typically accept espionage operations that form part of a national security framework or an intelligence operation. However, the absence of exact legal mechanisms to address questions regarding espionage makes it hard to implement this principle in practice. The world of espionage remains dynamic and complex, compelling a reassessment of conventional understanding of sovereignty, security, and cooperation within the international system.

With the world constantly evolving, intelligence practices must be analysed with the sophistication and flexibility required in the contemporary world. Espionage is an activity in evolution, and the modernisation of this reality demands an adequate new legal system that reconciles essential security requirements with fundamental freedoms at the national and individual levels. Civilised or not, espionage will still be a natural means of statecraft. However, it must be controlled by setting clear legal boundaries to protect the territorial integrity and critical infrastructure.

Espionage should therefore not be left entirely unregulated. Instead, a dual regulatory approach at both the national and international levels is necessary. Such an approach must establish clear legal boundaries while remaining adaptable to technological advancement. Regulatory frameworks must prioritise the protection of territorial integrity, privacy, and fundamental human rights, ensuring intelligence practices are conducted within ethical and legal constraints.

In conclusion, while the complete regulation of espionage may be unrealistic given its covert nature and strategic importance, international collaboration can facilitate the development of shared norms and minimum international standards. These should aim to reconcile state interests with the core principles of sovereignty, non-intervention, and human rights. As technological capabilities advance, legal systems must evolve in tandem to continue providing sufficient international protection of national sovereignty, privacy, and human rights—particularly in times of peace.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАКОННІСТЬ ШПИГУНСТВА В МИРНИЙ ЧАС

Фаваз Наджем* та Абдельнасер Альджахані

АНОТАЦІЯ

Вступ. *У цій дослідницькій роботі розглядається законність шпигунства в мирний час згідно з нормами міжнародного права. Для вирішення цього питання в статті увага зосереджується на низці відповідних норм міжнародного права, включно з зобов'язанням поважати суверенітет інших держав та дотриманням принципу невтручання. Хоча шпигунство є давнім інструментом державного управління, необхідним для гарантування національної безпеки, воно займає невизначене правове становище. Міжнародно-правові норми, зокрема Статут ООН та звичаєве міжнародне право, встановлюють такі зобов'язання, як повага до державного суверенітету та дотримання принципу невтручання, які часто ставить під сумнів шпигунська діяльність. Зростання сучасних можливостей спостереження, особливо в кіберсфері, ще більше ускладнюють правові та етичні межі шпигунства.*

Методи. *Дослідження ґрунтується на відповідних міжнародних нормах, таких як Статут ООН та норми звичаєвого права, а також на нещодавніх рішеннях Міжнародного Суду ООН (МС ООН) та Європейського суду з прав людини (ЄСПЛ), які можуть слугувати основою для розробки нормативно-правової бази для шпигунських операцій та діяльності зі спостереження. У статті застосовано доктринальний підхід до правового дослідження за допомогою системного аналізу первинних джерел міжнародного права, зокрема договорів, принципів звичаєвого права та судової практики Міжнародного Суду ООН (МС ООН) та Європейського суду з прав людини (ЄСПЛ). У роботі також було здійснено порівняльний огляд державної практики та відповідних академічних коментарів для оцінки того, чи адекватно чинні правові норми регулюють шпигунську діяльність у мирний час.*

Результати та висновки. *Результати роботи свідчать про те, що шпигунство займає юридично неоднозначне місце, особливо щодо застосування основних принципів невтручання та державного суверенітету в сучасному шпигунстві, особливо в кіберсфері. Окрім того, конфіденційність дедалі більше закріплюється у сфері прав людини, а також запроваджено правові гарантії контролю за державним спостереженням із наголосом на принципах пропорційності, підзвітності та нагляду. Тим не менш, шпигунство діє в дуже тонкій правовій та етичній площині, яка не є ні повністю забороненою, ні повністю дозволеною.*

Ця суперечність відображає постійну напругу між викликами балансування національної безпеки та захисту прав окремої людини. Хоча шпигунство широко визнається життєво важливим для безпеки держави, міжнародне право прямо його не забороняє, незважаючи на потенціал порушення суверенітету та принципу невтручання. Однак міжнародне право, акцентуючи увагу на принципах невтручання, територіальної цілісності та суверенної рівності, не накладає чітких обмежень на шпигунську діяльність.

У дослідженні було зроблено висновок, що хоча шпигунство розглядається як багатогранний та невід'ємний компонент дій держави, воно не повинно порушувати принципи та закони суверенітету, прав людини та/або ширші засади міжнародного права в мирний час. Правова та етична неоднозначність досі існує, тож це вимагає розробки більш чіткої нормативно-правової бази, яка б забезпечувала баланс між законним збором розвідувальних даних та повагою до суверенітету та прав людини. Зрештою, у дослідженні наголошено на тому, що розвідувальна діяльність не повинна підривати стабільність міжнародного правопорядку або руйнувати захист основних прав людини.

Ключові слова: *шпигунство, державний суверенітет, невтручання, кібершпигунство, права на конфіденційність, спостереження.*

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Research Article

PUBLIC PERCEPTIONS OF THE ROLE OF PARLIAMENTS IN MODERN DEMOCRACIES: ACCOUNTABILITY AND TRUST IN PARLIAMENT IN KAZAKHSTAN

Arnat Ultanbayev, Mukhtar Tolegen, Indira Smailova, Aizhan Kozhakhmetova, Arai Abilmazhina and Askar Sharapatov*

ABSTRACT

Background: *In democratic societies governed by the rule of law, parliament plays a crucial role by passing laws, holding the government accountable, expressing the will of the people, and cooperating with local communities. However, the role of the legislative branch may vary significantly depending on the political system of individual countries. Kazakhstan serves as a case study of how the presidency and executive branch control the country's political life, and the role of parliament is not yet fully defined, undergoing a process of transformation. Therefore, it is crucial to understand people's perceptions of the role of parliament in the context of reforms aimed at deepening the democratisation of society.*

Methods: *This study employs a quantitative research approach to examine public attitudes towards Parliament, focusing on accountability and public trust. A survey conducted among 598 respondents resulted in an accurate representation of public opinion. The study aims to assess trust in governmental entities, including Parliament; the perception of the authorities' responsibility for Kazakhstan's socio-economic situation; and satisfaction with the current Parliament's performance and the laws it has passed. The data were analysed using descriptive statistics.*

Results and conclusion: *The findings indicate that public trust in the legislative body in Kazakhstan is significantly lower than in the executive branch. According to the findings, Parliament is perceived as having limited autonomy and influence in socio-economic governance. Most respondents believe that the President and the government shape important national decisions. The study further revealed that most respondents believe that parliamentarians tend to represent the interests of the government or their political parties rather than those of the voters. The findings also highlighted a substantial gap between*

lawmakers and the public, with many respondents not even knowing who their parliamentary representatives are. These findings underscore the urgent need for reforms that improve parliamentary oversight, legislative independence, and public communication. The study is especially important in light of the government's broader commitment to the "Listening State" initiative, which aims to increase public involvement in governance and decision-making.

1 INTRODUCTION

Parliaments are essential in modern democratic societies, serving as the foundation for representation, legislation, and executive oversight.[1] They represent the people's will and ensure that varied interests are considered in the governance process. The Parliament of Kazakhstan, shaped by a history of constitutional reforms, presents a unique case in the study of legislative institutions within transitioning democracies. Over time, it has undergone substantial constitutional transformations intended to balance executive and legislative powers. However, its precise role within the state power structure remains an evolving issue.

One of the most pressing concerns in Kazakhstan's parliamentary development is the practical application of the separation of powers. Throughout its history, the country's parliament has undergone six constitutional reforms, each altering its authority and legislative role.[2] The first Constitution, adopted in 1993, established the Supreme Soviet as the highest representative and legislative body, reflecting a parliamentary model of governance. The 1995 Constitution replaced it with a strong presidential system, positioning Parliament as a secondary governing body. Subsequent constitutional reforms—particularly in 2007 and 2017—sought to strengthen Parliament's authority; however, the president and executive branch have continued to dominate the political system. The 2022 constitutional amendments also aimed to enhance parliamentary independence and foster citizen engagement in governance.

Despite these reforms, the distribution of state power remains asymmetrical, with presidential and executive dominance continuing to heavily influence legislative processes. The system of checks and balances in Kazakhstan is weak due to the President's dominance, even though the principle of separation of powers is formally recognised. Parliament, despite being constitutionally defined as the highest legislative body,

1 Tonye Clinton Jaja and Zaka Firma Aditya, 'Promoting the Good Governance by Advancing the Role of Parliamentarians and the Term Offices Limitation (Comparing Nigeria and Indonesia)' (2022) 7(1) Journal of Indonesian Legal Studies 265, doi:10.15294/jils.v7i1.54776; Awal Hossain, 'Role of Parliament and Governance in Bangladesh: Problems and Prospects' (2023) 8(1) Journal of Public Policy and Administration 31, doi:10.47604/jppa.1791.

2 Zhenis Kembayev, 'Recent Constitutional Reforms in Kazakhstan: A Move towards Democratic Transition?' (2017) 42(4) Review of Central and East European Law 294, doi:10.1163/15730352-04204002.

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delegates too much power to the executive, preventing it from functioning independently.[3] This imbalance raises critical questions about Parliament's role in oversight and the representation of public interests.

The urgency of reassessing the role of parliament in Kazakhstan intensified following the "Tragic January" events of 2022. The nationwide protests and the subsequent government response exposed systemic governance inefficiencies, including the weakness of state institutions and a growing disconnect between the executive branch and citizens.[4] As President Kassym-Jomart Tokayev stated in his 11 January 2022 address to the Mazhilis: "The detachment of certain executive bodies from the harsh realities and needs of citizens… a distorted perception of people's lives, their aspirations, and demands."[5] This crisis accelerated discussions on constitutional and political reforms, emphasising the need for stronger parliamentary authority, enhanced oversight mechanisms, and increased governmental accountability.

This study is particularly relevant in the context of Kazakhstan's Concept of Legal Policy until 2030, which outlines long-term strategies for improving governance efficiency and strengthening legal institutions, as well as the country's "Listening State" initiative. Kazakhstan launched its Open Government initiative in 2015 as part of broader efforts to encourage transparency, digital governance, and citizen involvement. Initially introduced under President Nursultan Nazarbayev as part of the "100 Concrete Steps" reform programme, the initiative was renamed the "Listening State" under President Kassym-Jomart Tokayev's administration in 2019 to emphasise government responsiveness. Despite these efforts, the reform has largely remained a tool for regime legitimacy rather than meaningful citizen engagement.[6] Given the rapid pace of political and constitutional changes, it is crucial to evaluate whether recent reforms have genuinely enhanced parliament's role or if additional institutional adjustments are required.

The primary aim of this study is to analyse public perceptions of the Parliament of Kazakhstan, focusing on levels of public trust and accountability. It seeks to assess how citizens view the Parliament's role in governance, its autonomy in decision-making, and its accessibility to the population. By addressing these critical issues, the study contributes

3 Timur Kanapyanov, 'Role and Place of the Parliament of Kazakhstan in the System of Checks and Balances' (2018) 51(1) Communist and Post-Communist Studies 81, doi:10.1016/j.postcomstud.2018.01.007.

4 Gaziz Abishev, Bakhytzhan Kurmanov and Zhaxylyk Sabitov, 'Authoritarian Succession, Rules, and Conflicts: Tokayev's Gambit and Kazakhstan's Bloody January of 2022 (*Qandy Qantar*)' (2024) 40(6) Post-Soviet Affairs 429, doi:10.1080/1060586X.2024.2377929.

5 Kassym-Jomart Tokayev, 'Lessons of "Tragic January": National Unity as a Guarantee of Independence : Speech at the Mazhilis of the Parliament of the Republic of Kazakhstan, 11 January 2022' (*Әділет*, 2022) <https://adilet.zan.kz/kaz/docs/K2200002022> accessed 5 February 2025.

6 Bakhytzhan Kurmanov, Urazgali Selteyev and Anuar Almaganbetov, '"Listening State?": Exploring Citizens' Perceptions of Open Government in Tokayev's Kazakhstan' (2024) 43(2) Central Asian Survey 235, doi:10.1080/02634937.2023.2268652.

to Kazakhstan's broader discourse on constitutional reform and governance modernisation, offering insights into how legislative institutions can evolve to foster a more transparent, balanced, and democratic governance system.

2 THE DEVELOPMENT OF PARLIAMENTARISM IN KAZAKHSTAN

The evolution of parliamentary governance in Kazakhstan has proceeded through clearly defined historical stages, each characterised by significant constitutional and institutional changes. The foundation was laid by the Declaration of State Sovereignty, which introduced the principle of separation of legislative, executive, and judicial powers.[7] This was subsequently reinforced by the Law on State Independence, officially marking Kazakhstan's sovereignty and institutional autonomy.[8] Initially, Kazakhstan utilised a unicameral Supreme Soviet that held substantial legislative authority but lacked clear checks and balances, creating tensions within the emerging governance structure.

The first Constitution of independent Kazakhstan, adopted on 28 January 1993, defined the Supreme Soviet as the country's highest representative and legislative organ.[9] Under this Constitution, Kazakhstan was structured as a parliamentary republic headed by three bodies of power: the Supreme Soviet, the Constitutional Court and the executive power, represented by the president.[10] However, the broad and often ambiguous distribution of powers under this Constitution generated significant governance challenges, highlighting an urgent need for clearer institutional boundaries.[11] This period was also marked by power struggles between legislative and executive authorities, prompting further constitutional adjustments aimed at stabilising governance and clarifying institutional responsibilities.[12]

As a result, the first 1993 Constitution remained in force for only two years. In March 1995, Kazakhstan's first president, Nursultan Nazarbayev, dissolved the Supreme Soviet and initiated a national referendum. A new Constitution was adopted on 30 August 1995, marking a significant shift from a parliamentary republic to a presidential, and eventually a super-presidential republic system. This new framework concentrated extensive powers in

7 Resolution of the Supreme Council of the Kazakh SSR no 307-XII of 25 October 1990 'On the Declaration of State Sovereignty of the Kazakh SSR' [1990] Bulletin of the Supreme Council of the Kazakh SSR 44/408.

8 Constitutional Law of the Republic of Kazakhstan of 16 December 1991 'On the State Independence of the Republic of Kazakhstan' [1991] Bulletin of the Supreme Council of the Kazakh SSR 51/622.

9 Constitution of the Republic of Kazakhstan of 28 January 1993 (repealing 1995) <https://adilet.zan.kz/kaz/docs/K930001000_> accessed 5 February 2025.

10 Kembayev (n 2).

11 Ayan Toleubekov, 'Constitutional and Legal Status of the Parliament of the Republic of Kazakhstan' (PhD (Law) thesis, National Research University Higher School of Economics 2015).

12 Helene Thibault and Sabina Insebayeva, 'The Political System of Kazakhstan' in Jakob Lempp and Sebastian Mayer (eds), *Central Asia in a Multipolar World: Internal Change, External Actors, Regional Cooperation* (Springer Nature 2024) 39, doi:10.1007/978-3-031-63727-8_3.

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the hands of the president and marked the beginning of Nazarbayev's consolidation of power and 30-year authoritarian rule.[13]

A major transformation of Parliament occurred with the adoption of the 1995 Constitution, which established Kazakhstan's current bicameral legislature, composed of the Senate and the Mazhilis.[14] This restructuring aimed to improve legislative efficiency, reinforce executive-legislative relationships, and address institutional weaknesses inherited from earlier constitutional frameworks. Essential legislative documents—most notably the Constitutional Laws on Parliament and the Status of Deputies and the Law on the Government of the Republic of Kazakhstan—provided the institutional groundwork by clearly defining the competencies, responsibilities, and procedures for each parliamentary chamber.[15]

The constitutional reforms of 2007 marked a significant shift towards a presidential-parliamentary system, expanding Parliament's oversight functions while maintaining a strong executive authority. Further constitutional amendments in 2017 introduced mechanisms intended to increase parliamentary influence and accountability over governmental policies, although they did not substantially diminish the strong presidential leadership within Kazakhstan's governance model.[16]

Kazakhstan's parliamentary experience also reflects broader regional challenges inherent to post-Soviet governance systems. Countries such as Kazakhstan, Uzbekistan, and Kyrgyzstan face common structural and political obstacles, including weak political opposition, dominant elite-driven politics, and limited party competition. While Kyrgyzstan has experimented with a parliamentary republic model, Kazakhstan and Uzbekistan have maintained strong presidential systems. Nevertheless, Kazakhstan's recent constitutional reforms demonstrate incremental movements towards a more balanced relationship between the executive and legislative branches, emphasising a growing role for parliamentary oversight and democratic accountability.[17]

13 Gerrit Krol, 'The Legislative Role of the Russian Duma and the Kazakh Mazhilis: Authoritarianism and Power Sharing in Post-Soviet Eurasia' (2021) 37(6) Post-Soviet Affairs 559, doi:10.1080/1060586X.2021.1970956; Kanapyanov (n 3); Kembayev (n 2).

14 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 1 January 2023) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 5 February 2025.

15 Constitutional Law of the Republic of Kazakhstan no 2529 of 16 October 1995 'On the Parliament of the Republic of Kazakhstan and the Status of its Deputies' [1995] Gazette of the Supreme Council of the Republic of Kazakhstan 21/124; Constitutional Law of the Republic of Kazakhstan no 2688 of 18 December 1995 'On the Government of the Republic of Kazakhstan' [1995] Gazette of the Supreme Council of the Republic of Kazakhstan 23/145.

16 Kembayev (n 2).

17 Scott Newton, 'The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis' (2018) 16(2) International Journal of Constitutional Law 686, doi:10.1093/icon/moy023.

The historical analysis of Kazakhstan's parliamentary evolution highlights several critical insights. The development of Kazakhstan's parliamentary system can be delineated into six distinct stages:

- 1990-1993: Transition from the Soviet system to an independent parliamentary structure
- 1993-1995: Establishment and strengthening of a professional parliamentary body
- 1995-1998: Consolidation of Parliament's governance role
- 1998-2007: Transition from a purely presidential towards a presidential-parliamentary republic
- 2007-2017: Further modernisation of the presidential system, enhancing parliamentary authority and oversight
- 2017-2022: Redistribution of authority among government branches, emphasising parliamentary accountability and oversight.[18]

Despite persistent political challenges, including weak political parties and limited opposition representation, Kazakhstan's parliamentary institutions have gradually strengthened.

The effectiveness of governance in Kazakhstan significantly depends on the interaction between parliament and other state institutions. This became especially evident during the events of January 2022, when mass protests escalated into violent confrontations, revealing substantial governance weaknesses at multiple institutional levels.[19] Public dissatisfaction was notably fueled by Parliament's perceived inability to effectively address critical socio-economic issues and its endorsement of controversial legislation. In response, significant constitutional reforms were implemented in 2022, resulting in 56 amendments across 33 constitutional articles.[20] While some experts argue these reforms were largely focused on institutional wording without fundamentally altering governance dynamics, others believe they represent crucial steps towards rebalancing power distribution among state institutions.[21]

Formally, Kazakhstan operates under a system of checks and balances among the executive, legislative, and judicial branches. However, in practice, the President remains the dominant constitutional figure, possessing extensive powers over both legislative and executive institutions.[22] Although Parliament formally holds legislative authority, its influence is frequently overshadowed by expansive presidential prerogatives. Unlike classical

18 Kembayev (n 2); Thibault and Insebayeva (n 12).

19 Abishev, Kurmanov and Sabitov (n 4).

20 Law of the Republic of Kazakhstan no 142-VII 3PK of 17 September 2022 'On Amendments and Supplements to the Constitution of the Republic of Kazakhstan' [2022] Gazette of the Parliament of the Republic of Kazakhstan 15-18/65.

21 Thibault and Insebayeva (n 12).

22 Kanapyanov (n 3).

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presidential models, which maintain a clearer separation between legislative and executive powers, Kazakhstan's constitutional framework grants the President significant legislative influence, including the authority to propose, veto, and shape legislation. Article 40(3) of the Constitution explicitly establishes the President's role in ensuring coordination among branches, reinforcing the centrality of the executive in national governance.[23]

A critical challenge facing Kazakhstan's parliamentary system is the delegation of legislative authority to the executive branch. The constitutional amendments introduced in 2022 expanded governmental powers by permitting the government to issue legally binding acts without prior parliamentary approval.[24] Such practices conflict with Article 3(4) of the Constitution, which mandates a clear separation of powers, undermining parliamentary oversight and reinforcing executive predominance.[25]

Moreover, parliamentary oversight mechanisms remain underdeveloped. Although deputies formally possess the right to question governmental actions, Parliament lacks robust investigative authority, significantly restricting its capacity to hold the executive accountable. In practice, the President continues to exercise substantial influence over Parliament through multiple methods: the dominance of pro-presidential parties, limited political pluralism, and the President's constitutional authority to appoint key officials, including members of the Senate. Furthermore, despite the constitutional principle of checks and balances, the President still has significant power over the legislative agenda and can dissolve the Mazhilis (lower house), further constraining parliamentary independence.[26] Thus, Parliament's ability to become a fully independent and authoritative body is inhibited by the concentration of power in the executive branch and limited political competition.

3 LITERATURE REVIEW

Parliaments are a fundamental component of democratic systems, playing a crucial role in maintaining a system of checks and balances, representing citizens' interests, passing laws, and overseeing the executive branch.[27] An effective parliament advocates transparency in government accountability and protects citizens' rights. However, in post-Soviet countries, parliaments often struggle to build independence and legitimacy.[28]

23 Constitution of the Republic of Kazakhstan (n 14).
24 Law of the Republic of Kazakhstan no 142-VII ЗРК (n 20).
25 Constitution of the Republic of Kazakhstan (n 14).
26 Kanapyanov (n 3).
27 Jaja and Aditya (n 1).
28 Newton (n 17); Sarah Whitmore, 'Performing Protest and Representation? Exploring Citizens' Perceptions of Parliament in Ukraine' (2020) 36(1) East European Politics 86, doi:10.1080/21599165.2019.1683543.

In Kazakhstan, existing studies indicate that Parliament is subject to the executive branch, raising doubts about democratic accountability and its efficiency in preserving public trust.[29] Comparative research on post-Soviet countries reveals varying levels of parliamentary empowerment. For instance, constitutional reforms, political competition, and parliamentary protests have increased parliamentary activism in Georgia and Ukraine.[30] By contrast, even in long-established European democracies, parliaments often struggle to foster strong engagement with citizens. The European Parliament, for instance, assumes varying roles depending on the governance system within the European Union.[31] In Finland, despite efforts to increase transparency, parliamentary processes—particularly committee work—remain largely closed, limiting public participation. The Finnish legislature's preference for government oversight over citizen engagement reflects its opposition to democratic innovations.[32]

Public trust in parliaments is widely regarded as a key indicator of democratic legitimacy. Yet, legislative studies have historically neglected the relationship between parliaments and citizens. Research on this topic remains fragmented due to the diversity of parliamentary systems, difficulties in accessing data, and the diverse set of indicators involved.[33] Studies have shown that trust in parliaments worldwide is determined by their perceived effectiveness, responsiveness, macroeconomic performance, regime type, electoral system, and ability to represent diverse interests.[34]

In Kazakhstan and other post-Soviet states, public perceptions of legislative ineffectiveness are rooted in a historical legacy of centralised governance and weak parliamentary autonomy.[35] After gaining independence, many of these countries, including Kazakhstan, retained strong presidential systems with parliaments that held limited authority over key

29 Kanapyanov (n 3); Kembayev (n 2); Newton (n 17).

30 Whitmore (n 28).

31 Sergio Fabbrini, 'Between Power and Influence: The European Parliament in a Dual Constitutional Regime' (2019) 41(3) Journal of European Integration 417, doi:10.1080/07036337.2019.1599370.

32 Hyeon Su Seo and Tapio Raunio, 'Reaching out to the People? Assessing the Relationship between Parliament and Citizens in Finland' (2017) 23(4) Journal of Legislative Studies 614, doi:10.1080/13572334.2017.1396694.

33 Cristina Leston-Bandeira, 'Studying the Relationship between Parliament and Citizens' (2012) 18(3-4) Journal of Legislative Studies 265, doi:10.1080/13572334.2012.706044.

34 Tom van der Meer, 'In What We Trust? A Multi-Level Study into Trust in Parliament as an Evaluation of State Characteristics' (2010) 76(3) International Review of Administrative Sciences 517, doi:10.1177/0020852310372450; Anna Ruelens, Bart Meuleman and Ides Nicaise, 'Examining Macroeconomic Determinants of Trust in Parliament: A Dynamic Multilevel Framework' (2018) 75 Social Science Research 142, doi:10.1016/j.ssresearch.2018.05.004.

35 Gerrit Krol, 'Legislative Performance of the Russian State Duma: The Role of Parliament in an Authoritarian Regime' (2017) 33(4) East European Politics 450, doi:10.1080/21599165.2017.1346504; Krol (n 13); Anton Shirikov, 'Who Gets Ahead in Authoritarian Parliaments? The Case of the Russian State Duma' (2022) 28(4) Journal of Legislative Studies 554, doi:10.1080/13572334.2021.1940435.

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political and economic decisions.[36] This situation, coupled with weak political party competition and constrained civil society engagement, has contributed to the perception that parliaments are largely ineffective.

Kazakhstan is frequently cited as a "superpresidential" system, in which parliamentary institutions exist but operate within executive constraints.[37] Furthermore, the effectiveness of the Parliament is further limited by restrictions on media freedom and civil society, which limit open public discourse and suppress opposition voices.[38] Nonetheless, strengthening Kazakhstan's parliamentary institutions is crucial for its long-term sustainable development and political stability. An empowered and credible legislature can help manage political transitions, increase civic engagement, and ensure long-term stability in the country.[39]

Accordingly, this study builds upon existing literature by providing empirical insights into the public perceptions of Kazakhstan's Parliament and contributing to a broader understanding of the structural challenges it faces in achieving democratic legitimacy.

4 METHODOLOGY

This study aims to examine public perceptions of the Parliament of Kazakhstan through a quantitative research approach. Employing survey methodology allowed for the systematic collection and analysis of primary data concerning accountability and public trust in Parliament. Surveys are a well-established tool for collecting and analysing public opinion in a systematic manner, resulting in quantifiable insights.[40]

The survey questionnaire included items on parliamentary trust and public engagement with parliamentary activities. Respondents were asked multiple-choice and Likert-scale questions focusing on trust in governmental institutions, including the Parliament, perceptions of authorities' responsibility for Kazakhstan's socio-economic situation, satisfaction with the current Parliament's performance and the laws it has passed, and perceptions of whose interests members of Parliament represent.

A total of 598 respondents participated in the study, representing a diverse demographic group in terms of age, gender, and professional background. Respondents ranged in age

36 Kanapyanov (n 3); Kembayev (n 2); Krol (n 13).
37 Kembayev (n 2).
38 Human Rights Watch, 'Kazakhstan: Events of 2023' in *World Report 2024* (Human Rights Watch 2024) 354.
39 Aliya Kassymbek and others, 'The Role of Parliament in the Sustainable Development of the Country: Agenda for Kazakhstan' (2019) 2 Rivista di Studi sulla Sostenibilita 28, doi:10.3280/RISS2019-002005.
40 Floyd J Fowler, *Survey Research Methods* (5th edn, SAGE Publications Inc 2014).

from 18 to 65 years old, ensuring perspectives from both younger and older citizens. Gender distribution was 54.7% female and 45.3% male, ensuring balanced representation.

The study utilised an online survey distributed through Google Forms and distributed to a range of platforms, including social media networks (e.g., Facebook, Telegram), professional forums, and university mailing lists. The study employed a mixed sampling strategy combining purposive and snowball sampling techniques to capture perspectives from various social groups nationwide. Importantly, the sample was not limited to a specific region, allowing for a broader understanding of nationwide perceptions. The collected data was analysed using descriptive statistics to evaluate public attitudes toward the Parliament and identify key trends and patterns in public opinion.

While the online survey method allowed for broad accessibility, it lacks depth in exploring underlying reasons for public perceptions, which could be addressed through follow-up qualitative research. Despite these limitations, the study offers a valuable glimpse into public trust and perceptions towards the Parliament of Kazakhstan. The findings provide crucial insights for policymakers and scholars examining governance and institutional trust in post-Soviet states.

5 FINDINGS AND DISCUSSION

Understanding the role of Kazakhstan's Parliament within the system of state power involves examining public trust in political institutions. Political trust is fundamental to democratic legitimacy, significantly influencing citizen engagement and perceptions of governmental effectiveness.[41] To explore this issue, a survey was conducted to measure the perceived role and importance of Parliament among Kazakhstan's population. Conducted via Google Forms using an interactive questionnaire, the data was analysed through systematisation, comparative analysis, and ranking methods. A total of 598 respondents aged between 18 and 65 participated, with 54.7% female and 45.3% male, ensuring broad demographic representation. Contemporary studies note that public perceptions of legislative bodies typically depend on transparency, effectiveness, and historical political structures.[42] Therefore, these results offer critical insights into how the Kazakhstani Parliament is perceived in relation to other branches of state power and provide broader context on issues of political accountability and governance.

41 Leston-Bandeira (n 33); van der Meer (n 34).

42 van der Meer (n 34).

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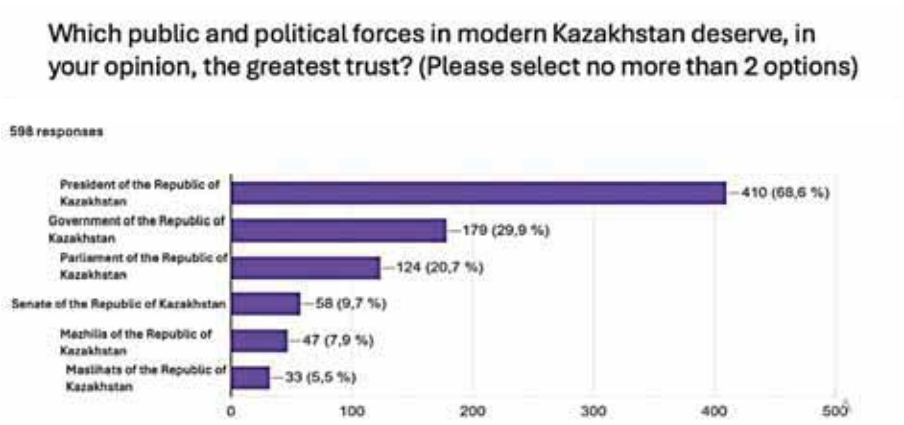

Figure 1. Which public and political forces in modern Kazakhstan deserve, in your opinion, the greatest trust?

To gauge trust levels toward governmental institutions, respondents were asked: "Which public and political institutions in modern Kazakhstan deserve the greatest trust?" (Figure 1). Results indicated a substantial trust concentration within the executive branch, with 68.6% expressing trust in the President, 29.9% in the Government, and only 20.7% in Parliament. A minimal 5.5% expressed trust in local representative bodies. This distribution highlights a political culture heavily oriented towards executive dominance, with representative institutions perceived as secondary. High trust in the President aligns with patterns observed in post-Soviet states, where executive authority traditionally plays a pivotal role in governance.[43] Conversely, lower trust in Parliament suggests perceptions of limited legislative autonomy and effectiveness. Thus, Kazakhstan's Parliament appears to be viewed more as a formal entity than a truly influential institution, reflecting historical institutional legacies and structural constraints on legislative power.

Another important question sought to identify the institutions perceived as primarily responsible for Kazakhstan's socio-economic situation (Figure 2). The majority (63.4%) attributed this responsibility to the President, with 26.9% naming the Government, and only 23.7% identifying Parliament. The strong attribution of socio-economic accountability to the President reinforces the executive-centric governance model. In democratic states, parliaments often hold significant roles through legislative oversight.[44] However, in Kazakhstan, the Parliament is not widely perceived as a leading actor in socio-economic governance, potentially due to constitutional limits on its powers or a public tendency to associate national outcomes predominantly with the President.[45] This limited parliamentary

43 Kembayev (n 2); Newton (n 17).

44 Alan Convery and others, 'Questioning Scrutiny: The Effect of Prime Minister's Questions on Citizen Efficacy and Trust in Parliament' (2021) 27(2) Journal of Legislative Studies 207, doi:10.1080/13572334.2020.1850010.

45 Kanapyanov (n 3); Kembayev (n 2).

influence also raises concerns about its effectiveness in addressing critical societal issues, such as human rights violations and gender-based violence.[46] These responses also highlight a possible public misunderstanding of formal governmental roles, suggesting Parliament's position is viewed as more symbolic than substantive in policy formulation.

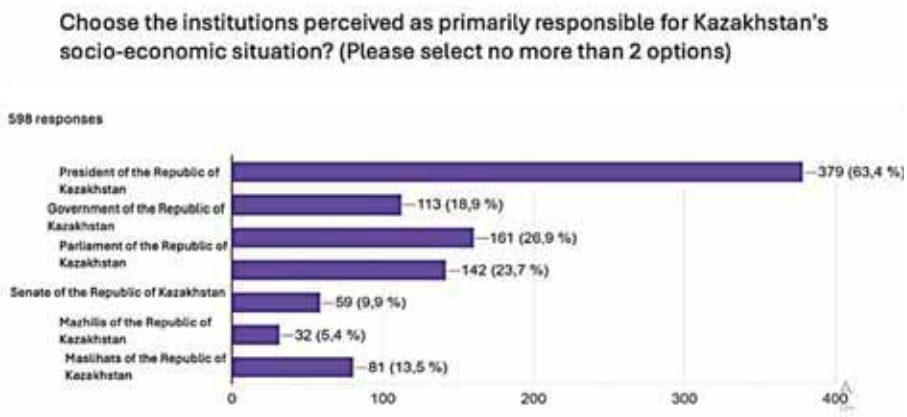

Figure 2. Choose the institutions perceived as primarily responsible for Kazakhstan's socio-economic situation.

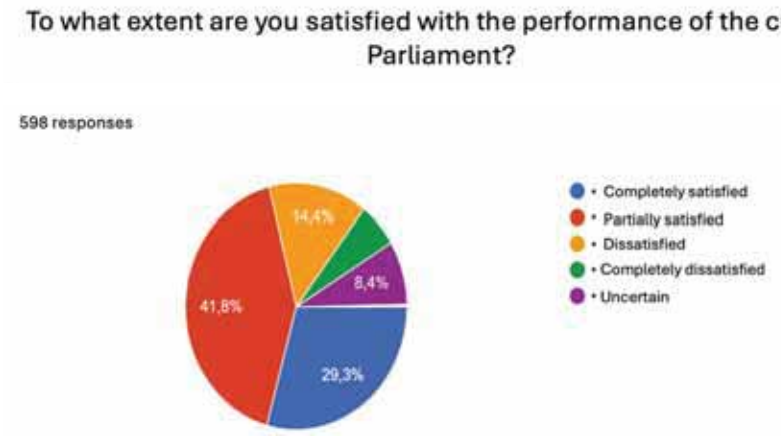

Figure 3. Performance of the current Parliament

46 Kanatay Dalmatov and others, 'Addressing Human Rights Violations in the Criminal Justice System of Kazakhstan: The Role of the Prosecutor's Office and a Call for Legislative Reforms' (2024) 7(3) Access to Justice in Eastern Europe 63, doi:10.33327/AJEE-18-7.3-a000323; Akmaral Turarbekova and others, 'Legal Frameworks for Combating Violence Against Women in Kazakhstan: Analyzing Effectiveness and Implementation Gaps' (2025) 8(1) Access to Justice in Eastern Europe 264, doi:10.33327/AJEE-18-8.1-a000119.

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Respondents also evaluated the performance of the current Parliament (Figure 3). Results indicated that 41.8% were partially satisfied, 29.3% were completely satisfied, 14.4% were dissatisfied, and 8.4% were uncertain. These responses indicate a generally moderate, indifferent public attitude toward Parliament, lacking strong approval or disapproval. Such patterns mirror broader trends observed in emerging democracies, where legislative bodies frequently struggle to attain broad public approval due to perceived inefficiencies, limited independence, or weak enforcement capacities.[47] Additionally, uncertainty among 8.4% of respondents suggests potential transparency and communication issues. When parliamentary activities lack public visibility, they are commonly perceived as ineffective, regardless of their actual contributions to governance.

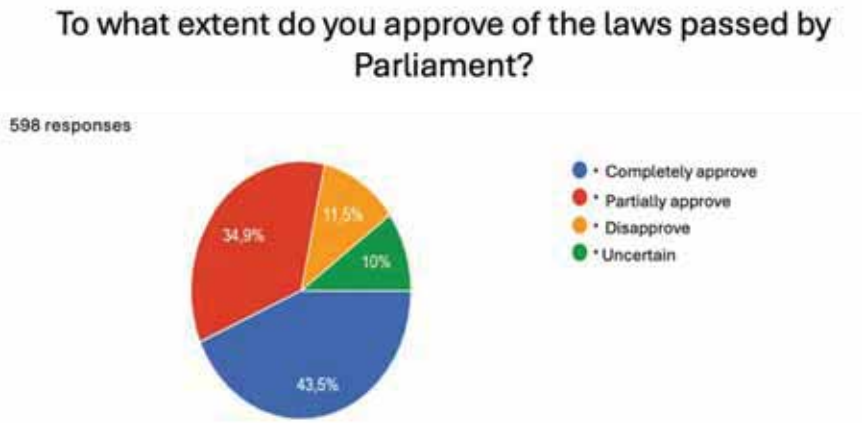

Figure 4. To what extent do you approve of the laws passed by Parliament?

To determine public satisfaction with parliamentary legislation, respondents were asked: "To what extent do you approve of the laws passed by Parliament?" (Figure 4). Results indicated that 43.5% fully approved, while 34.9% partially approved. However, 11.5% expressed complete disapproval, and 10% were uncertain. These findings indicate moderate approval levels alongside significant uncertainty or dissatisfaction, pointing to potential gaps in parliamentary transparency and communication. High levels of uncertainty (10%) emphasise limited public awareness and suggest shortcomings in parliamentary outreach. Comparative studies have shown that citizens support laws when Parliament is viewed as an independent and effective institution addressing societal needs.[48] Conversely, low confidence often arises in contexts where Parliament is perceived primarily as endorsing executive decisions without substantial input or scrutiny. Kazakhstan's executive-

47 Newton (n 17).
48 Whitmore (n 28).

dominated political context likely contributes to public perceptions of Parliament lacking genuine policymaking influence.

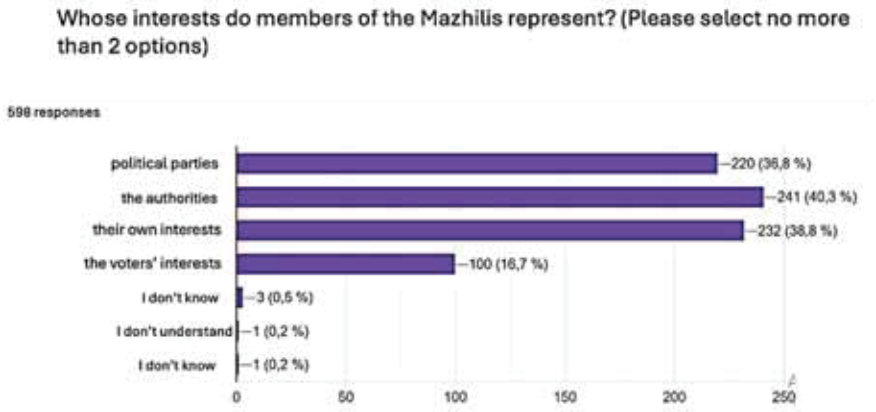

Figure 5. Whose interests do members of the Mazhilis represent?

To gain insight into how the population of Kazakhstan perceives the representational role of the Mazhilis, respondents were asked: "Whose interests do members of the Mazhilis represent?" (Figure 5). The most common response was "the authorities" (40.3%), followed by "political parties" (38.8%), and "their own interests" (36.8%). Alarmingly, only 16.7% of respondents believed that members of the Mazhilis represent "the voters' interests."

These responses indicate a significant lack of public trust in Parliament and its members. The data even calls into question the independence of parliament. It demonstrates the dependence of the Mazhilis on the executive or elite interests, rather than as a credible democratic institution.

Addressing these concerns requires deep institutional reforms aimed at restoring and strengthening public trust. Reforms should primarily focus on strengthening the expanded powers of parliamentary oversight to enhance checks and balances and address problems associated with executive dominance. In addition, public consultation procedures, such as public hearings and digital feedback platforms, can increase citizen participation in lawmaking, help align parliamentary activities with public interest, and increase public trust in the lawmaking process. Such reforms would enhance the authority of parliament and promote democratic accountability.

To understand how effectively Kazakhstan's Parliament interacts with citizens, respondents were asked to identify the political parties currently represented in the Mazhilis. The majority of respondents demonstrated a good level of awareness regarding the parliamentary composition, largely due to the significant administrative and media influence previously held by the Amanat Party (formerly Nur Otan). This recognition

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highlights how dominant political parties with strong administrative backing can shape public awareness (Figure 6).

It is worth noting that the question allowed for multiple selections, which explains why the total number of responses (962) exceeds the number of individual respondents (598).

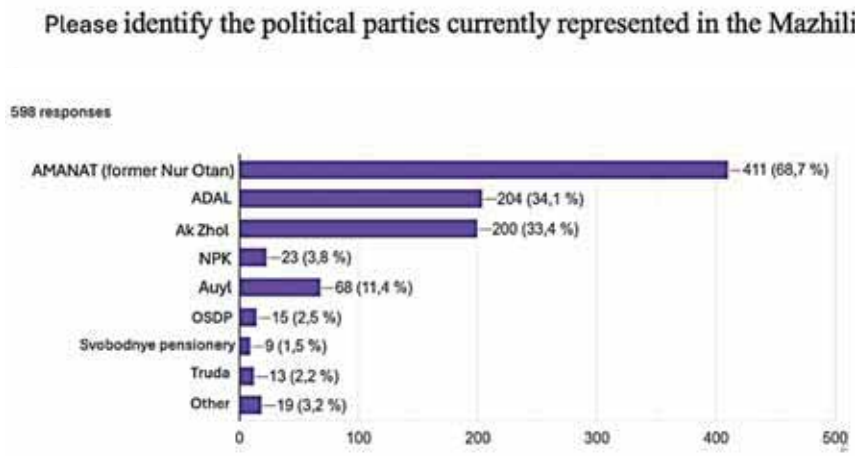

Figure 6. Political parties currently represented in the Mazhilis

The survey also evaluated the extent to which citizens are informed about their parliamentary representatives. Findings indicated that a substantial majority (58.2%) responded not knowing who their representatives in Parliament were, while an additional 11.7% were unsure. Only 30% of respondents indicated familiarity with their Senate representatives. These figures underline a concerning gap between parliamentarians and their constituents, pointing to insufficient direct interaction, transparency, and proactive engagement by parliamentary members.[49]

Accessibility is another crucial factor in assessing public engagement with parliamentary institutions. When questioned about Parliament's accessibility for public interaction, respondents presented varied perspectives (Figure 7): 25.3% viewed Parliament as accessible; 41.5% considered it partially accessible; 19.9% found it completely inaccessible; and 13.4% were uncertain.

49 Sarah Moulds, 'A Toolkit for Evaluating the Effectiveness of Parliamentary Public Engagement' (2023) 5 University of South Australia Law Review 1, doi:10.21913/uslrunisalr.v5.1661.

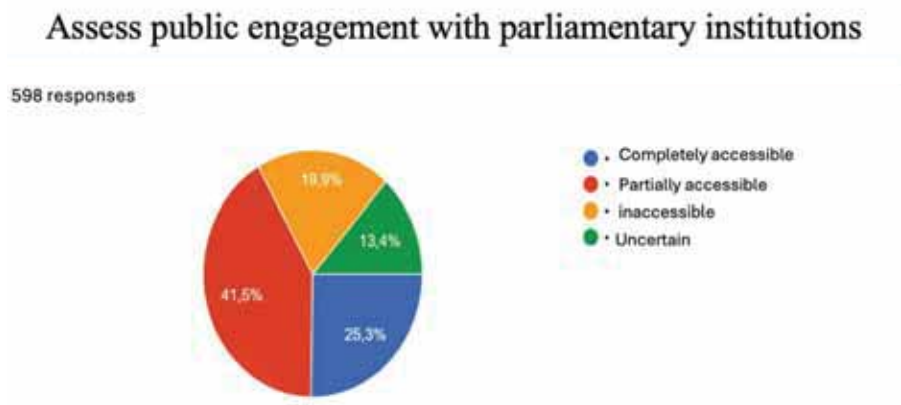

Figure 7. Assessing public engagement with parliamentary institutions

These results suggest significant barriers exist, limiting citizen participation in legislative processes and creating perceptions of distance between lawmakers and their constituents. Additionally, the survey explored the public's interest in Parliament's activities. Most respondents indicated relatively low engagement levels (Figure 8): 47.7% reported occasional interest; 20.7% expressed no interest; 9.2% were unsure; only 22.4% actively monitored parliamentary developments.

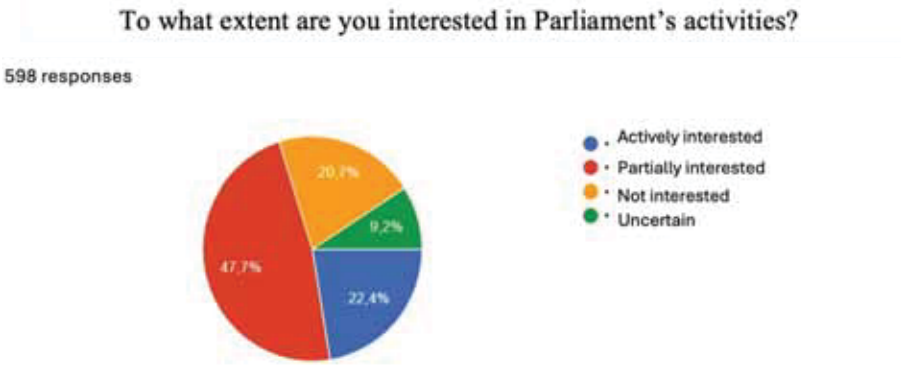

Figure 8. Public interest in Parliament activities

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Such low engagement suggests a critical need for improved parliamentary communication strategies that foster transparency and actively involve citizens in the legislative process.[50] Furthermore, identifying citizens' primary sources of information regarding governmental activities can help inform strategies for increasing transparency. Survey responses revealed that 49.2% predominantly rely on internet sources and social media, 25.9% depend on international and regional media outlets, and 21.4% use central state media channels. The significant dependence on online and social media platforms indicates their central role in shaping public perceptions. However, the comparatively low reliance on official state media underscores a credibility challenge for government sources and indicates public preference for independent or alternative information channels.

These findings are consistent with broader international trends. For example, the European Commission's Spring 2024 Standard Eurobarometer revealed an overall decline in trust in national parliaments across the European Union. The most significant decreases were recorded in the Netherlands (-9 percentage points), Germany, and Ireland (both -8 percentage points).[51] This pattern highlights a global challenge in maintaining public trust in legislative institutions, as trust in parliaments is increasingly influenced by factors such as political transparency, socioeconomic disparities, and public perceptions of corruption.[52] The decline in trust reflects broader concerns about the ability of legislative bodies to represent citizens' interests, ensure government accountability, and effectively address pressing social and economic issues.

To better understand Kazakhstan's governance landscape, a comparison between trust in Parliament and trust in the judiciary is illuminating. A survey conducted by the Bureau of National Statistics in Kazakhstan in April-May 2024 found that 61.8% of respondents expressed trust in the judicial system[53]—a figure substantially higher than the levels of trust reported for Parliament in this study. In this context, it is important to note that the Parliament of Kazakhstan was actively involved in the approval of legislative amendments intended to protect judicial independence. These amendments focused on improving the

50 Carolyn M Hendriks and Adrian Kay, 'From "Opening Up" to Democratic Renewal: Deepening Public Engagement in Legislative Committees' (2019) 54(1) Government and Opposition 25, doi:10.1017/gov.2017.20; Nadine S Gibson and Aaron S King, 'The Promise and Peril of Constituent Interactions: The Determinants of Town Hall Participation Among Members of Congress' (2024) 49(4) Legislative Studies Quarterly 745, doi:10.1111/lsq.12454.

51 European Union, *Standard Eurobarometer 101 – Spring 2024: Public Opinion in the European Union* (EU 2024) <https://www.europa.eu/eurobarometer> accessed 5 February 2025.

52 van der Meer (n 34).

53 Department of Population Statistics, 'On the Level of Public Confidence in Law Enforcement Agencies and the Judicial System (April-May 2024)' (*Bureau of National statistics of Agency for Strategic planning and reforms of the Republic of Kazakhstan*, 17 July 2024) <https://stat.gov.kz/en/industries/social-statistics/stat-crime/publications/183425/> accessed 5 February 2025.

independence of judges and improving the work of judicial bodies, including the exclusion of the preliminary consideration of cassation petitions in criminal and civil cases.[54]

Strong democratic governance relies on effective communication and open dialogue between parliamentary institutions and citizens. In established democracies, mechanisms such as consistent public debates, transparency, and interactive participation are fundamental.[55] The survey results reveal that Kazakhstan's Parliament must significantly enhance its transparency, outreach efforts, and mechanisms for citizen participation to bridge the existing trust gap between the legislature and the population. Potential solutions to address these identified challenges include increasing public consultations, enhancing media and communication strategies, improving accessibility and responsiveness, and expanding civic education campaigns.

6 CONCLUSIONS

This study aimed to examine public perceptions of Parliament in Kazakhstan, focusing on public trust and accountability. The findings indicate that trust in Parliament remains significantly lower than in the President and the executive branch, with the institution often perceived as lacking autonomy and substantive influence in national administration. The President and the government's strong role in shaping socioeconomic policy strengthens this impression, positioning Parliament as a secondary actor in the political system.

The study also highlights a wide gap between parliamentarians and their constituents, as evidenced by low public awareness of parliamentary members, limited participation in legislative activities, and perceptions of inaccessibility. The reliance on social media and independent news sources for information about parliamentary matters indicates a credibility deficit for state media, hindering efforts to strengthen public trust in Parliament. Addressing the identified challenges requires multiple reforms. First, constitutional amendments should be considered to rebalance the power between the executive and legislative branches. To guarantee true legislative autonomy, the Parliament's role in initiating and approving legislation, particularly in budgetary and social policy matters, should be strengthened. Second, changes to the Law on political parties are required to foster political pluralism, promote fair competition, and encourage diverse voices to be represented in Parliament.

Equally crucial is strategic outreach and civic engagement. Parliament should prioritise direct communication with constituents through regular public briefings, interactive online

54 'Government of Kazakhstan Supported Second Block of Legislative Amendments on Judicial Reforms' (*Official Information Source of the Prime Minister of the Republic of Kazakhstan*, 13 December 2023) <https://primeminister.kz/en/news/government-of-kazakhstan-supported-second-block-of-legislative-amendments-on-judicial-reforms-26639?utm_source> accessed 5 February 2025.

55 Hendriks and Kay (n 50).

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platforms, and constituency offices. Furthermore, long-term civic awareness can be facilitated through educational initiatives on the role and functions of Parliament, particularly in schools and universities. These reforms must aim to strengthen formal legislative powers and cultivate a participatory political environment that aligns with democratic principles and the aspirations of Kazakhstan's citizens.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СПРИЙНЯТТЯ ГРОМАДСЬКІСТЮ РОЛІ ПАРЛАМЕНТІВ У СУЧАСНИХ ДЕМОКРАТІЯХ: ПІДЗВІТНІСТЬ ТА ДОВІРА ДО ПАРЛАМЕНТУ В КАЗАХСТАНІ

Арнат Ултанбаєв, Мухтар Толеген, Індіра Смайлова, Айжан Кожахметова, Арай Абільмажина та Аскар Шарапатов*

АНОТАЦІЯ

Вступ. *У демократичних суспільствах, що керуються верховенством права, парламент відіграє вирішальну роль, адже парламент приймає закони, забезпечує підзвітність уряду, виражає волю народу та співпрацює з місцевими громадами. Однак роль законодавчої гілки влади може суттєво відрізнятися залежно від політичної системи окремих країн. Казахстан є прикладом того, як президент і виконавча влада контролюють політичне життя країни, а роль парламенту ще не до кінця визначена і перебуває в процесі трансформації. Тому вкрай важливо зрозуміти сприйняття людьми ролі парламенту в контексті реформ, спрямованих на поглиблення демократизації суспільства.*

Методи. *У цьому дослідженні було застосовано кількісний підхід для того, щоб вивчити ставлення громадськості до парламенту, увагу було зосереджено на підзвітності та довірі. Опитування, проведене серед 598 респондентів, дало точне відображення громадської думки. Мета статті – оцінити довіру до державних органів, зокрема до парламенту, сприйняття відповідальності влади за соціально-економічну ситуацію в Казахстані, а також визначити чи задоволена громадськість роботою нинішнього парламенту та прийнятими ним законами. Дані були проаналізовані за допомогою методів описової статистики.*

Результати та висновки. *Результати дослідження свідчать про те, що довіра громадськості до законодавчого органу в Казахстані значно нижча, ніж до виконавчої гілки влади. Згідно з результатами, парламент сприймається як такий, що має обмежену автономію та вплив у соціально-економічному управлінні. Більшість респондентів вважають, що президент та уряд формують важливі державні рішення. У роботі було також показано, що більшість респондентів вважають, що парламентарі схильні представляти інтереси уряду або своїх політичних партій, а не виборців. Результати дослідження також висвітлили суттєвий розрив між законодавцями та громадськістю, оскільки багато респондентів навіть не знають, хто є їхніми представниками в парламенті. Ці результати підкреслюють нагальну потребу в реформах, які покращують парламентський нагляд, законодавчу незалежність та комунікації з громадськістю. Ця стаття є особливо важливою з огляду на ширші зобов'язання уряду щодо ініціативи «Держава, що слухає», метою якої є розширення участі громадськості в управлінні та прийнятті рішень.*

Ключові слова: *парламент, Казахстан, громадська довіра, політична підзвітність, реформа управління.*

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Research Article

ARBITRATION WITHOUT AGREEMENT UNDER THE ICSID RULES: A COMPARATIVE STUDY WITH EGYPTIAN AND QATARI LEGAL SYSTEMS

Tarek Gomaa EL-Sayed Rashed*, Ahmed Youssef Al-Emadi and Samir Shaaban Saleh

ABSTRACT

Background: *A state's offer to resort to arbitration is one of the most significant topics that raises numerous issues, as such an offer serves as the legal basis for the arbitration agreement, which is later completed upon the investor's acceptance. The state's expression of consent to arbitration is no longer limited to cases where it concludes a contract with the investor containing an arbitration clause. Rather, the state's consent is now inferred through legislative offers and international agreements to which the state is a party.*

Methods: *In some cases, arbitration is based on specific international legal obligations, such as bilateral investment treaties, which may bind states to arbitration in disputes with foreign investors. As a result, states have become parties to arbitration claims initiated by investors with whom they have no contractual relationship. This has led to a fundamental shift in the landscape of international arbitration, as investment disputes have moved from the realm of diplomatic protection to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). ICSID has, in turn, expanded its jurisdiction to encompass investment disputes even in the absence of an agreement between the disputing parties to resort to arbitration.*

Results and conclusions: *The study has demonstrated that a state's consent to ICSID arbitration may, in certain cases, be inferred from domestic legislation or bilateral investment treaties, thereby establishing a valid legal basis for ICSID jurisdiction even where no directly concluded arbitration agreement exists between the state and the investor.*

1 INTRODUCTION

Arbitration, as a whole, seeks to achieve justice based on principles distinct from those underlying the traditional concept of justice before state courts. It is a legal system founded on two fundamental pillars: the will of the parties and the state's recognition of that will.[1]

The basis of arbitration as a dispute resolution mechanism lies in legal provisions that permit parties to opt for it over the ordinary judicial process. It is based on the parties' consent and their acceptance of arbitration as a means to resolve disputes arising from their legal relationship. Accordingly, the parties have the right to agree on the procedures the arbitral tribunal will follow. They must also define the subject matter of the dispute in a manner that determines the tribunal's jurisdiction and delineates the boundaries within which the arbitrators must operate.

Despite the fundamental importance of the existence of an arbitration agreement, which serves as the basis of an arbitrator's competence to resolve disputes, some legal systems permit arbitration without a prior agreement in specific cases—particularly in matters of an international or investment nature. In such instances, arbitration may be conducted even in the absence of an agreement between the parties, provided that the dispute pertains to an investment between a state and a foreign investor, pursuant to rules such as those of the International Centre for Settlement of Investment Disputes (ICSID), hereinafter referred to as ICSID.

This development is better understood in light of recent developments in international investment relations. The increasing involvement of states in commercial transactions, along with the expansion of activities carried out by individuals and private companies in foreign countries, has led to disputes between these entities and host states. This, in turn, has necessitated the establishment of mechanisms offering judicial guarantees to investors or foreign parties contracting with states—mechanisms distinct from national courts, which investors often view with suspicion.

The availability of consent in investment arbitration under the ICSID Convention has been the subject of extensive debate since the 1990s. Numerous questions have been raised regarding the forms through which consent is expressed and whether such expressions are sufficient to establish the Centre's arbitral jurisdiction. Although a substantial body of literature has addressed this issue, many aspects still require further analysis, particularly in light of arbitral practice. This is especially true concerning the sufficiency of Most-

1 Ahmed Abou El-Wafa, *Optional and Compulsory Arbitration* (5th edn, Monshaat Al-Maaref 1987) para 3, 19-20; Osama Ahmed Shawky El-Meligy, *The Formation of the Arbitral Tribunal in Optional Arbitration: A Comparative Analytical Study of Its Legal Nature and the Nature of Its Function* (Dar Al-Nahda Al-Arabia 2004) para 2, 4 et seq; Mahmoud Mostafa Younis, *The Reference on Egyptian and Comparative Arbitration Law* (Dar Al-Nahda Al-Arabia 2016) 16-7.

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Favoured-Nation (MFN) clauses as a basis for establishing the Centre's jurisdiction—an area in which no consistent arbitral approach has yet been settled.

As a result, a state's expression of consent to arbitration is no longer limited to instances where it enters into a contract with a foreign investor that explicitly includes an arbitration clause. Instead, state consent to arbitration may, in certain circumstances, be inferred from relevant domestic laws and international treaties to which the state is a party. Consequently, states have become parties to arbitration proceedings initiated by investors with whom they share no contractual relationship.

1.1. Research Problem

This research examines the mechanisms employed by ICSID arbitral tribunals to assert jurisdiction in the absence of a prior arbitration agreement between the parties. It also explores the appropriateness of these mechanisms in light of the requirements for written consent and the arbitrability of the dispute's subject matter, particularly considering the conflicting decisions issued by ICSID tribunals on this issue.

1.2. Research Objectives

The primary objective of this research is to shed light on how the effectiveness of arbitration can be ensured, regardless of the extent of the parties' consent to this dispute resolution mechanism. It further explores the extent to which this outcome aligns with the contractual foundation of arbitration, which has traditionally been regarded as a form of adjudication that depends entirely on the consent of the involved parties.

1.3. Research Methodology

The study adopts a comparative analytical methodology to analyse the legal provisions governing arbitration agreements and their validity requirements in Egyptian and Qatari legislation, comparing them to the framework established by Article 25 of the Washington Convention.[2] It further explores the evolving jurisdiction of ICSID in handling certain investment disputes where no direct contractual relationship exists between the parties regarding arbitration. The study aims to assess the extent of ICSID's jurisdiction over such disputes, particularly in light of the divergent rulings issued by arbitral tribunals operating under ICSID's framework on this matter.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) (adopted 18 March 1965, entered into force 14 October 1966) <https://icsid.worldbank.org/node/87246> accessed 10 March 2025.

1.4. Research Plan

To thoroughly examine this topic, the study will be structured into three main sections. The first section will discuss the nature of arbitration agreements and the requirements for their validity. The second section will analyse arbitration agreements within the framework of the ICSID Convention. The third section will explore the new forms of ICSID jurisdiction that operate without a prior agreement between the parties.

Accordingly, the first section will address the conditions required for the conclusion of an arbitration agreement under Egyptian and Qatari law. The second section will examine the manifestation of state consent to arbitration under the Washington Convention by analysing key arbitral cases decided by tribunals established under the ICSID framework, in which state consent was inferred—whether through domestic legislation, bilateral investment treaties, or the application of the Most-Favoured-Nation (MFN) clauses.

2 THE NATURE OF ARBITRATION AGREEMENTS AND THEIR VALIDITY REQUIREMENTS

The arbitration agreement is the cornerstone that determines the validity of the arbitration process as a whole. Thus, the arbitration agreement, whether in the form of an arbitration clause or a submission agreement, must be valid and must satisfy all formal and substantive requirements to produce its legal effects. This necessitates addressing the definition of the arbitration agreement, its various forms, and the conditions required for its validity.

2.1. Definition and Forms of the Arbitration Agreement

Given the legal implications arising from the arbitrators' decisions, which invariably entail the transfer of rights, the exchange of legal positions, or their establishment and stabilisation for their respective holders, it is imperative to address the definition of the arbitration agreement and its various forms.

2.1.1. The Definition of the Arbitration Agreement

National laws and international conventions have placed great emphasis on establishing rules governing arbitration agreements.[3] In fact, most legal systems have gone further by

3 Leonardo Graffi, 'The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt Verlagskontor 2010) 19-20, doi:10.1515/9783866539297.19.

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explicitly defining arbitration agreements.[4] The Qatari Arbitration Law defines an arbitration agreement as:

> "An agreement between the parties, whether legal or natural persons possessing the legal capacity to contract, to resort to arbitration for the resolution of all or some of the disputes that have arisen or may arise between them concerning a specific legal relationship, whether contractual or non-contractual."[5]

Similarly, the Egyptian Arbitration Law defines an arbitration agreement as "an agreement between the parties to resort to arbitration for the resolution of all or some of the disputes that have arisen or may arise between them in relation to a specific legal relationship, whether contractual or non-contractual."[6]

By virtue of the arbitration agreement, arbitrators are entrusted with resolving disputes arising from a legal relationship between the parties. This relationship may be contractual, where the parties are bound by a contract (Article 2(1) of the New York Convention), or non-contractual concerning matters that may be settled through arbitration (also under Article 2(1) of the New York Convention), such as cases of tort liability, where the tortfeasor and the injured party may agree to settle their dispute through arbitration.[7] The arbitration agreement may extend to all disputes arising from the legal relationship or be limited to certain specific matters.

2.1.2. Forms of the Arbitration Agreement

An arbitration agreement is referred to as an "arbitration clause" when it is concluded before any dispute arises between the parties. This clause may be included in the original contract establishing the legal relationship, regardless of the nature and subject matter of that contract; it may also take the form of a subsequent agreement between the parties or even a reference to an institutional arbitration framework.[8] In addition, the parties to an arbitration agreement may agree to subject their legal relationship to the provisions of a

4 See, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958, entered into force 7 June 1959) art 2(1) <https://www.newyorkconvention.org/english> accessed 10 March 2025; *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (UN 2008) art 7(1); Arbitration Act 1996 (UK) s 6 <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 10 March 2025.

5 Law of the State of Qatar No 2 of 2017 'Promulgating the Civil and Commercial Arbitration Law', art 7(1) <https://www.qicdrc.gov.qa/law-no2-2017-issuing-arbitration-law-civil-and-commercial> accessed 10 March 2025.

6 Law of the Arab Republic of Egypt No 27/1994 'Promulgating the Law Concerning Arbitration in Civil and Commercial Matters', art 10(1) <https://www.newyorkconvention.org/contracting-states/contracting-states/egypt> accessed 10 March 2025.

7 Mohamed Selim El-Awa, *Arbitration Law in Egypt and Arab States: Annotated with Scholarly Opinions and Judicial Rulings*, vol 1 (Dar Makkah for Printing and Publishing 2014) 245.

8 Graffi (n 3) 21.

standard contract, an international convention, or any other document. In such cases, the provisions of that document—including its arbitration-related provisions—shall apply.[9]

A reference to an arbitration clause in a document or a prior contract may be explicit, in which case such a reference is sufficient, as the parties' intention to resort to arbitration is clear.[10] However, if the reference is general and vague, it is insufficient and does not constitute a valid arbitration agreement.[11]

The arbitration clause constitutes a prior agreement to arbitrate any future disputes that may arise between the parties, with its implementation being contingent on the occurrence of such disputes.[12] In contrast, a submission agreement signifies an agreement concluded after a dispute has already arisen, whereby the parties agree to resolve their existing dispute through arbitration. Consequently, an arbitration agreement may be concluded after the dispute has arisen, even if a lawsuit has already been filed before a judicial body regarding the matter. This type of agreement is specific to the particular dispute at hand and is referred to as a submission agreement.[13]

The Egyptian Court of Cassation has ruled that a submission agreement must specify the subject matter of the dispute to determine the jurisdiction of the arbitrators and enable judicial oversight of their compliance with the limits of their jurisdiction.[14]

This stands in contrast to the arbitration clause, where it is often difficult to determine, at the time of contracting, the exact nature and scope of any potential future dispute.

9 Law of the Arab Republic of Egypt No 27/1994 (n 6) art 6.

10 Fathi Wali, *Arbitration in National and International Commercial Disputes: Theory and Practice* (Monshaat Al-Maaref 2014) para 55, 111; Ahmed Sawy, *The Concise Guide to Arbitration* (3rd edn, Dar Al-Nahda Al-Arabia 2010) para 8, 18-9.

11 Sawy (n 10) para 9, 19; Mostafa El-Gamal and Okasha Abdel Aal, *Arbitration in Private International and Domestic Relations (Egyptian Commercial Arbitration Law No 27 of 1994, in Light of Comparative Law and International Trade Law, with Reference to Arab Arbitration Laws)*, vol 1 (Al-Halabi Legal Publications 1998) para 234, 349.

The Egyptian Court of Cassation has consistently ruled that a merely general reference in a bill of lading to the charterparty does not incorporate the arbitration clause contained therein into the bill of lading. See, Appeal No 376 of Judicial Year 41 (Egyptian Court of Cassation (Civil), 30 April 1975) [1982] 1 Collection of Cassation Judgments over Fifty Years, para 26, 1674.

12 Case No 83 of Judicial Year 118 (Cairo Court of Appeal, Commercial Circuit (62), 5 June 2002).

13 Law of the Arab Republic of Egypt No 27/1994 (n 6) art 10 (2). For clarification on the distinction between an arbitration clause and an arbitration agreement. See, Abou El-Wafa (n 1) para 7, 22; El-Awa (n 7) 246; Wali (n 10) para 56, 113; Case No 49 of Judicial Year 122 (Cairo Court of Appeal, Commercial Circuit (91), 26 April 2006).

14 Appeal No 275 of Judicial Year 36 (Egyptian Court of Cassation, 16 February 1971); Appeal No 489 of Judicial Year 37 (Egyptian Court of Cassation, 24 March 1973).

'Once the arbitration agreement has been concluded, it may not be modified except by mutual agreement of the parties.' See, Appeal No 586 of Judicial Year 25 (Egyptian Court of Cassation, 30 January 1961) [1982] 1 Collection of Cassation Judgments over Fifty Years 730.

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Therefore, parties who opt for an arbitration clause often prefer to refer their disputes to an arbitration institution and its rules. This ensures that the absence of an agreement on specific procedural aspects does not impede the effectiveness of the arbitration agreement.[15]

It is noteworthy that the parties' express or implied agreement to apply the procedural rules of a specific law or a designated arbitration centre constitutes an integral part of the arbitration agreement itself. Thus, if the parties expressly adopt the rules of an arbitration center to conduct arbitration under its auspices and regulations, the selected arbitration institution shall undertake all procedures related to the arbitration process, from the request for arbitration to the issuance of the final arbitral award (Article 3 of the Qatari Arbitration Law; Articles 5 and 6 of the Egyptian Arbitration Law).[16]

The 1958 New York Convention on Arbitration affirms the right of the parties to agree on the law governing the arbitration procedures, even if it differs from the law of the seat of arbitration. Moreover, the parties may leave the determination of all procedural rules and conditions to the institutional arbitration framework they have chosen to refer to.[17]

Furthermore, under the principle of separability of the arbitration agreement, the fate of the arbitration clause is not necessarily tied to the fate of the main contract. If the main contract is declared void, rescinded, or terminated for any reason, the arbitration clause remains in effect between the parties. It continues to govern the resolution of disputes, including those concerning the validity, rescission, or termination of the contract, through arbitration.

The same principle applies when arbitration is agreed upon through a submission agreement: if the main contract is annulled or terminated, the submission agreement remains valid and binding on the parties. It precludes the parties from resorting to state courts for disputes related to the contract's annulment, rescission, or any other associated matters.[18]

15 Samir Saleh, *The Arbitral Award: An Analytical Study in Light of Egyptian and Comparative Law* (Dar Al-Nahda Al-Arabia 2020) 290.

16 Appeals Nos 20 and 64 of Judicial Year 128, and Nos 128, 16, 20, and 47 of Judicial Year 129 (Cairo Court of Appeal, Commercial Circuit (7), 7 April 2013) [2013] Arab Arbitration Journal 20/189.

17 Graffi (n 3) 21. See also. Law of the State of Qatar No 2 of 2017 (n 5) art 19; Law of the Arab Republic of Egypt No 27/1994 (n 6) art 25.

18 The Sudanese Supreme Court ruled that: 'The arbitration clause is considered an independent agreement separate from the terms of the contract. The annulment, rescission, or expiration of the contract has no effect on the arbitration clause contained therein.' See, Appeal No 1903 of 2006 (Sudanese Supreme Court, Civil Circuit, 27 February 2007) [2010] Global Arbitration Journal 5/280. See also, El-Awa (n 7) 785; Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 68.

2.2. Requirements for The Validity of the Arbitration Agreement

For an arbitration agreement—whether in the form of a clause or a submission agreement—to be valid, it must satisfy the essential elements of any contract: consent, subject matter, and cause. Additionally, the parties' intention to submit the dispute to arbitration for resolution by a final and binding decision must be clear and definitive.[19]

At this stage, it is important to address some conditions that specifically ensure the validity of an arbitration agreement: first, the requirement of written consent, and second, the arbitrability of the subject matter of the dispute.

2.2.1. Written Consent to The Arbitration Agreement

It is well established that an arbitration agreement, whether in the form of an arbitration clause or a submission agreement, constitutes a genuine contract and must meet all the general conditions and essential elements of contracts. Among these, consent stands as a fundamental pillar without which an arbitration agreement cannot exist. At its core, consent requires the concurrence of two matching wills of the parties who wish to settle their disputes through arbitration rather than resorting to state courts, which by default have general jurisdiction over all disputes, regardless of their nature or the identity of the parties involved.[20]

Consent to an arbitration clause is typically achieved during negotiations over the terms of the main contract, where the arbitration clause is regarded as an independent agreement embedded within the broader contract. Importantly, the parties' mutual consent must be documented in writing and duly signed.

The Qatari Court of Appeal has ruled that if the power of a person designated by the parties is limited to proposing amicable solutions or reconciling differing viewpoints, such an arrangement does not constitute an arbitration agreement within the legal meaning of the term.[21] Therefore, for an arbitration agreement to produce its legal effects, two matching wills must be present: a valid offer and acceptance to resort to arbitration.[22] The offer and acceptance must not be tainted by any defect in consent, such as mistake, fraud, coercion,

19 For further details on the requirements for the validity of the arbitration agreement. See, Dalia Abdel-Moati, 'Consent as the Basis of an Arbitration Agreement' (PhD thesis, Cairo University 2007) para 103, 45 et seq; Mahmoud Mokhtar Al-Berairi, *International Commercial Arbitration: Revised Edition with Arbitration-Related Rulings and Regulations of International Arbitral Institutions* (4th edn, Dar Al-Nahda Al-Arabia 2010) para 22, 45 et seq; El-Meligy (n 1) para 24, 26 et seq; Wali (n 10) para 59, 119 et seq.

20 See, Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Transnational Publishers, Kluwer Law International 2001) 155.

21 Case No 348 of 2002 (Qatar Court of Appeal, 29 October 2002). See, El-Awa (n 7) 254.

22 See on the issue of party consent: Graffi (n 3) 36; Loukas A Mistelis, Concise International Arbitration (Kluwer Law International 2010) 6.

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exploitation, or gross disparity. Furthermore, the parties' consent to arbitration must be expressed in writing; otherwise, the agreement is deemed void.[23]

An arbitration agreement is considered to be in writing if it is contained in a document signed by the parties, or if it is recorded in letters, whether in paper or electronic form, or in any other format that allows for proof of receipt in writing (Article 7(3) of the Qatari Arbitration Law; Article 12 of the Egyptian Arbitration Law; Article 2(2) of the New York Convention). Additionally, an arbitration agreement satisfies the writing requirement if one party asserts its existence in a statement of claim or a statement of defence, and the other party does not deny it in their defence (Article 7(4) of the Qatari Arbitration Law).

Various legal systems allow both natural and legal persons, regardless of their nationality or domicile, to be parties to an arbitration agreement, whether the arbitration is domestic or international, and irrespective of the nature of the legal relationship underlying the dispute (Article 2(1) of the Qatari Arbitration Law; Article 1(1) of the Egyptian Arbitration Law). This approach aligns with the 1958 New York Convention, which states in Article 1(1) that the Convention applies to "differences between persons, whether physical or legal."

It is to be noted that for a person to be a party to an arbitration agreement, it is not sufficient that they merely have the legal capacity to dispose of the rights subject to the dispute or that their consent to arbitration is free from defects such as mistake, fraud, coercion, exploitation, or gross disparity. The person must also have legal authority to enter into an arbitration agreement for a specific dispute. If an arbitration agreement is concluded on behalf of a principal, the representative must have the legal authority to do so. If this authority is absent, the arbitration agreement concluded by such a person shall be deemed invalid.

2.2.2. Arbitrability of the Subject Matter of Dispute

While state courts have general jurisdiction over all disputes regardless of their nature, arbitral tribunals may only adjudicate the disputes that the law allows them to hear and that the parties agree to submit to arbitration. However, national legislators cannot directly control the range of issues that parties may agree to arbitrate, except by explicitly prohibiting arbitration in specific matters.

23 Law of the State of Qatar No 2 of 2017 (n 5) art 7(3); Law of the Arab Republic of Egypt No 27/1994 (n 6) art 12.
It should be noted that the validity of the arbitration agreement may be subject to challenge before different judicial systems, whether before state courts or the arbitral tribunal, as applicable. Such challenges may arise at various stages of the proceedings, either during the arbitration itself or at the stage of seeking recognition or enforcement of the arbitral award. See, Graffi (n 3) 34.

Article 5(2) of the New York Convention reinforces this principle, stating that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.[24]

Thus, for an arbitration agreement to be valid, it is not sufficient for its subject matter to be determined, clear, and free of defects. In addition, the agreement must relate to a matter capable of being resolved through arbitration. Both Qatari and Egyptian legislators have explicitly stated that: "Arbitration is not permitted in matters that cannot be subject to compromise." (Article 7(2) of the Qatari Arbitration Law; Article 11 of the Egyptian Arbitration Law).

Consequently, national courts retain jurisdiction over all matters that cannot be subject to compromise. Both the Qatari and Egyptian Civil Codes address such matters, stating that: "Compromise is not permitted in matters relating to personal status or public policy. However, it is permissible to compromise financial interests arising out of personal status or from the commission of a criminal offence." (Article 575 of the Qatari Civil Code; Article 551 of the Egyptian Civil Code).

Some national legal systems, such as Swiss Private International Law and Anglo-American legal systems, permit the state to resort to arbitration without restrictions. However, some other jurisdictions impose certain restrictions on state arbitration, including Qatar and Egypt. Under Qatari law, arbitration agreements concerning administrative contracts require the approval of the Prime Minister or their delegate (Article 2(2) of the Qatari Arbitration Law). Similarly, under Egyptian law, such agreements require the approval of the competent minister or their equivalent in the case of public legal entities, but such approval cannot be delegated (Article 1(2) of the Egyptian Arbitration Law).

These provisions act as a restriction on the state's and public entities' ability to resort to arbitration in administrative contracts, without distinction between domestic administrative contracts and state contracts concluded with foreign private entities. Failure to comply with this requirement results in the nullity of the arbitration agreement. However, it is arguable that such nullity may be remedied by subsequent ratification if arbitration was agreed upon without obtaining the required approval.

24 Some scholars hold that the concept of public policy should be interpreted narrowly, in accordance with Article 5(2)(b) of the New York Convention. See, Loukas A Mistelis, 'Arbitrability – International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 2.

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The issue, however, is more complex in practice. A state may include an arbitration clause in the contract concluded with private entities and later, when a dispute arises, invoke the nullity of the agreement to evade arbitration. It may claim that its domestic law's requirements for arbitration in administrative contracts were not met when the contract was executed, raising the question of whether the state has the legal right to invoke such nullity.

In this regard, the prevailing view in Egyptian legal jurisprudence[25] holds that this restriction does not apply to international commercial arbitrations. This argument is based on the fact that although the New York Convention does not explicitly address this issue, it does not impose any restrictions on a party's capacity to enter into an arbitration agreement, whether that party is a natural or legal person.

As a result, the restrictions imposed by national laws apply only to domestic arbitration, not to international arbitration. Additionally, judicial practice has established an international norm derived from customary commercial practices, which holds that international arbitration is not subject to such restrictions.

This principle was affirmed in an ICC arbitration award in Case No. 5103 of 1988, where the tribunal ruled that public sector companies cannot invoke a restriction in their national law after having entered into an arbitration agreement.[26] Similarly, in the *Malicorp* case against the Arab Republic of Egypt and others, issued on 27 February 2006, the tribunal held that a concession contract of an international nature, being an international contract, does not fall within the scope of the Egyptian domestic legal system, and therefore may be subject to rules beyond it.[27]

3 THE ARBITRATION AGREEMENT WITHIN THE FRAMEWORK OF THE ICSID CONVENTION

While the general principle is that a state agrees to arbitration with a specific investor concerning a defined legal relationship through an arbitration agreement, whether in the form of an arbitration clause or a submission agreement, the Washington Convention, reinforced by ICSID jurisprudence, has introduced alternative forms of expressing a state's

25 See, El-Gamal and Abdel Aal (n 11) para 214, 319; Ahmed Abdel-Karim Salama, *International and Domestic Commercial Arbitration Law* (Dar Al-Nahda Al-Arabia 2004) para 109, 370 et seq; Wali (n 10) para 68, 139 et seq; Ahmed Awad Hindi, *Enforcement of Arbitral Awards (The Order for the Enforcement of National and Foreign Arbitral Awards in Light of the Code of Civil Procedure, the Arbitration Law, and the New York Convention)* (Dar Al-Jami'a Al-Jadida 2009) 17 et seq; Samia Rashid, *Arbitration in Private International Relations*, vol 1 (Dar Al-Nahda Al-Arabia 1984) para 181, 328 et seq.

26 See, ICC Case No 5103 of 1988 [1991] 2(2) ICC Bull 20; Wali (n 10) para 68, 140.

27 Case No 382/2004 *Malicorp Ltd v the Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyption Airports Company* (CRCICA, 27 February 2006) <https://www.italaw.com/cases/4400> accessed 10 March 2025.

consent to arbitration, whether through domestic legislation, bilateral investment treaties, or multilateral investment treaties.

This necessitates addressing the requirement of party consent to ICSID arbitration and the newly developed forms of ICSID jurisdiction in the absence of a prior agreement.

3.1. The Importance of Resorting to ICSID Arbitration in Investment Disputes

Arbitration under the auspices of ICSID is one of the most suitable arbitration forms for resolving disputes arising from international trade contracts between host states and foreign investors, whether individuals or private companies. The national judiciary of the host state may not be the optimal forum for resolving such disputes, as foreign investors often perceive national courts with suspicion, fearing bias in favour of the host state, which is a party to the dispute.[28]

As a result of the absence of a specialised judicial system for resolving investment disputes between states and foreign investors, the International Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States, signed in Washington on March 18, 1965, established an international framework for resolving such disputes under the auspices of the 'International Centre for Settlement of Investment Disputes (ICSID)', which is virtually the only entity specialised in settling disputes arising between contracting states and foreign investors, whether individuals or private companies.[29]

ICSID administers arbitration proceedings in accordance with the provisions of the Washington Convention, under which the Centre was established. Arbitration proceedings are conducted under ICSID's supervision, with specialised arbitrators appointed for this purpose, following the provisions of the Convention.[30]

As of 31 December 2024, there were 1022 arbitration and conciliation cases registered under the ICSID Convention and Additional Facility Rules. A majority of ICSID cases (58%) are based on Bilateral Investment Treaties (BITs), reflecting the widespread use

28 See in detail: Henry P de Vries, 'The Enforcement of Economic Development Agreements with Foreign States' (1984) 62 University of Detroit Law Review 6-7; Ricardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States* (Collected Courses of The Hague Academy of International Law - Recueil des cours, vol 157, Brill Nijhoff 1977) 87, doi:10.1163/18758096_pplrdc_A9789028610309_01; Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 14.

29 Galal Wafaa Mohamedin, *Arbitration Between Foreign Investors and Host States Before the International Centre for Settlement of Investment Disputes* (Dar Al-Jami'a Al-Jadida 2001) 13.

30 The Washington Convention has the advantage of allowing private investors to directly resort to ICSID against the host state in the event of an investment-related dispute, without the need to obtain the consent of the investor's home state and without the investor fearing their state's intervention in the dispute to replace them in the dispute. See, Abdel-Moati (n 19) para 771, 315.

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of these agreements as a foundation for consent in arbitration. investment laws of host-states account for 7%.[31]

For the ICSID to have jurisdiction over a dispute, three elements must be present: first, the dispute must be legal in nature and arise directly from an investment, such that there is a direct relationship between the dispute and the investment, and the dispute must possess characteristics relating it to the investment and distinguishing it from other disputes that arise from traditional commercial relationships; second, the dispute must be between a contracting state and a national of another contracting state; and third, the parties must have consented to arbitration before the Centre.

It is clear from the above elements that "investment" constitutes a fundamental requirement for the Centre's jurisdiction, as stipulated in Article 25. However, the Convention does not explicitly define the term, despite multiple attempts during the preparatory negotiations to establish specific criteria, such as a minimum value or duration of commitment, which were ultimately set aside in favour of a more flexible, party-driven approach. This approach is reinforced by Article 25(4), which allows contracting states to declare classes of disputes they do not consider eligible for submission to the Centre. As a result, the task of defining "investment" has largely been left to arbitral jurisprudence and judicial practice.[32]

In this context, the Salini test, formulated by the arbitral tribunal in *Salini v. Morocco*, has attained broad recognition and application in arbitral practice. It is based on four objective criteria: a substantial financial or non-financial contribution, a certain duration, the assumption of risk, and a contribution to the economic development of the host state. Although these criteria are not expressly adopted in the Convention, they have gained widespread acceptance in arbitral practice and have significantly contributed to shaping a definition of "investment".[33]

In this regard, it is important to distinguish between investment arbitration and commercial arbitration. The fundamental difference between the two lies in the nature of the disputing parties and the source of the obligation to arbitrate. Commercial arbitration typically involves private entities and is based on a contractual agreement that includes an arbitration clause, frequently within the context of international commercial contracts.

Investment arbitration, conversely, arises between a foreign investor and a host state based on a Bilateral Investment Treaty (BIT) or a national investment law which contains

31 'The ICSID Caseload – Statistics: (iss 2025-1)' (*ICSID International Centre for Settlement of Investment Disputes*, 14 February 2025) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 9 March 2025.

32 Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 90. For more details on the concept of "investment" see: Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review - Foreign Investment Law Journal 236, doi:10.1093/icsidreview/10.2.232.

33 Dolzer, Kriebaum and Schreuer (n 32) 91.

a standing offer of arbitration. In the latter scenario, the investor has the right to accept this offer, thereby establishing the arbitral relationship in the absence of a direct contractual relationship with the state. These forms were described by Jan Paulsson as "arbitration without privity."[34]

Regarding legal protection, commercial arbitration is concerned with the enforcement of contractual obligations and compensation for their breach. In contrast, investment arbitration safeguards a broader spectrum of investor rights, including the principle of fair and equitable treatment, protection against expropriation without compensation, and the right to transfer profits.[35]

3.2. Consent to ICSID Arbitration Through an Arbitration Agreement

Consent is the fundamental basis for ICSID's jurisdiction and the source of the arbitrator's authority to resolve disputes between the state and the foreign investor, as there must, as a rule, be an arbitration agreement between the parties. Accordingly, it is important to address the importance of resorting to ICSID arbitration, and then to address the consent to ICSID arbitration through an arbitration agreement.

A state expresses its consent to arbitration either by concluding a submission agreement with the investor or the relevant party after a dispute has arisen, or by incorporating an arbitration clause in the contract concluded with them. This scenario ensures that the state is fully aware of the potential parties in an arbitration proceeding, as well as the specific legal relationship from which the dispute has arisen or may arise. Consequently, there is no issue regarding the state's consent to arbitration in such cases, as its willingness to arbitrate is explicitly reflected in the arbitration agreement concluded with the investor.

The Washington Convention does not impose any specific formal requirements for consent to arbitration, except that such consent must be in writing. Accordingly, an arbitration agreement may be concluded in a separate written document, distinct from the contract between the state and the foreign investor. The written consent requirement is also satisfied if the arbitration agreement is formed through exchanging letters, faxes, or any other written means. Additionally, the parties may, through their agreement, define the scope of arbitration by specifying certain disputes that may be submitted to ICSID arbitration while excluding others from its jurisdiction.[36]

Article 25(1) of the Washington Convention states that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by

34 See, Paulsson (n 32).

35 See for the protections usually provided for in bilateral investment treaties: Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 8.78, 470.

36 ibid, para 806, 336.

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that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[37]

It is clear from the wording cited above that ICSID's jurisdiction is determined in both a substantive and personal scope.[38] In both cases, written consent from both parties, i.e., the host state and the foreign investor, is required for a dispute to be submitted to an ICSID tribunal. The basis of ICSID's jurisdiction over a dispute is the parties' mutual consent to arbitration before the Centre. This mutual consent exists when the arbitration agreement is in the form of an arbitration clause or a submission agreement. Consequently, resorting to ICSID arbitration remains a voluntary choice by the parties.[39]

It is worth noting that the Washington Convention refers to the form of consent to arbitration using the phrase "which the parties to the dispute consent in writing to submit to the Centre", without specifying additional details. This implies that once both parties provide their written consent to arbitration, neither may withdraw it unilaterally without the other party's approval (Article 25(1) of the Convention). Even if one of the disputing parties withdraws from the Convention itself, such withdrawal does not affect the validity of their consent to ICSID arbitration. Likewise, the withdrawal of the host state from the Convention or the withdrawal of the investor's home state does not impact the validity of consent to arbitration under the auspices of ICSID. [40]

Accordingly, the final consent, which is recognised for the Centre's jurisdiction over the dispute, is issued by both parties together, and not by one party alone. Furthermore, the consent or acceptance of arbitration by the Centre precludes the parties from submitting their disputes before any other jurisdictional body, such as another dispute resolution centre, a local judiciary, or an administrative committee.[41] This is confirmed by Article 26 of the Washington Convention.[42]

37 Washington Convention (n 2) art 25(1).

38 For further details, see: Rajaa Jinah, 'ICSID Arbitration Between the Provisions of the Washington Convention and Arbitral Jurisprudence' (2023) 3 Mediation and Arbitration Journal 9.

39 Hassan Al-Nimr, *Foreign Investments Between Incentives and Protection in Arab and International Agreements* (Al-Wafaa Legal Library 2025) 362.
The parties' consent to arbitration under the auspices of ICSID and in accordance with its rules may be given either before or after the dispute arises. However, such consent must be established prior to submitting the request for arbitration before the Centre. See, PF Sutherland, 'The World Bank Convention on the Settlement of Investment Disputes' (1979) 28(3) The International and Comparative Law Quarterly 382.

40 Mohamedin (n 29) 36. See also: Aron Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Columbia Journal of Transnational Law 352.

41 Fatima Mahmoudi Al-Zahra, 'The Scope of Jurisdiction of the International Centre for Settlement of Investment Disputes' (Master's thesis, Mu'tah University 2011) 98; Mohamedin (n 29) 36.

42 Washington Convention (n 2) art 26. Article provides that: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'

4 NEW FORMS OF ICSID JURISDICTION WITHOUT A PRIOR AGREEMENT

The possibility of resorting to international arbitration without privity enables the actual claimant to bring a case directly against the responsible state, rather than relying on diplomatic protection, where the claimant's home state confronts the host state on their behalf. This direct engagement promotes clarity and realism.[43]

The Washington Convention has introduced alternative forms through which a state's offer to arbitrate may be inferred. This necessitates examining the forms of state consent listed by the Convention to oblige the state to submit disputes to arbitration without a direct agreement between it and the investor.

4.1. Consent to ICSID Arbitration Through Domestic Legislative Provisions

One of the most common ways a state expresses its consent to ICSID jurisdiction is by enacting domestic legislation that explicitly provides for submission to ICSID arbitration. Under this mechanism, the state's consent becomes legally binding once the investor accepts it. A key feature of this form of consent is that the state extends its offer to all foreign investors without knowing in advance—that is, at the time the legislation, containing the state's acceptance to resolve disputes through arbitration, is enacted—who the potential counterparty will be.[44]

Another key feature of this type of consent is that the state's offer is separate from the investor's acceptance. The state expresses its consent within its domestic legislation, while the investor may accept it at a later stage. This acceptance may even occur after a dispute has arisen.[45]

An investor may express acceptance of a state's arbitration offer through various means, provided that the acceptance is in writing, as required under Article 25 of the Washington Convention. The investor may indicate consent to ICSID jurisdiction by including it in a contract concluded with the state, by issuing a written declaration, or by sending a formal letter to the state, whether before or after the dispute arises. Therefore, for mutual consent

43 Paulsson (n 32) 255-6.

44 Jinah (n 38) 15-6.

45 Some developing countries adopt this approach in the hope of encouraging foreign investors and attracting foreign capital. Domestic law may require that the investor's expression of consent to arbitration before ICSID be made in the form of an application for a business license submitted to the relevant authorities in the host state. In such cases, the investor must express their consent in the manner prescribed by law. See, Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 38.

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to be perfected and produce its legal effects, the state's offer in its domestic legislation must be met with the investor's acceptance.[46]

The host state's consent to arbitration may also be expressed through domestic legislation that directly refers disputes to ICSID arbitration as one of the available mechanisms for settling investment disputes with foreign investors. In such cases, the foreign investor may express their consent in writing. This form of state consent does not preclude the state from resorting to other dispute resolution mechanisms provided for in its domestic legislation.[47]

ICSID case law has consistently affirmed that a foreign investor may accept a state's unilateral offer by submitting a request for arbitration directly to the Centre. Such a request is deemed a written acceptance in accordance with Article 25 of the Washington Convention. This principle has been upheld in several arbitral awards, most notably in the case of *Tradex Hellas S.A. v. Albania*.[48]

In *SPP v Egypt*,[49] the SPP company filed a request for ICSID arbitration against the Arab Republic of Egypt, seeking compensation for the unilateral termination of their contract. The claim was based on Article 8 of Egyptian Investment Law No. 43 of 1974.[50]

46 An example of this is the case of Al-Ahram, in which the two claimant companies sent a letter to the Minister of Tourism of the Arab Republic of Egypt approximately one year before initiating arbitration proceedings before ICSID, expressing their acceptance of the Centre's jurisdiction to settle the dispute between the parties. This acceptance was based on the mechanism provided under Article 8 of Law No. 42 of 1974 on Arab and Foreign Investment. See, ibid.

47 Mohamedin (n 29) 42.
National legislators may grant the parties the freedom to choose the arbitral forum, whether domestic or international. An example of this is Article 11 of Qatari Law No. 13 of 2000 on the Regulation of Foreign Capital Investment in Economic Activity, which provides that: 'It shall be permissible to agree to resolve any dispute arising between a foreign investor and any other party through a domestic or international arbitral tribunal.' See, Law of the State of Qatar No 13 of 2000 'On the Regulation of the Investment of Non-Qatari Capital in the Economic Activity', art 11 <https://www.lexismiddleeast.com/law/Qatar/Law_13_2000> accessed 10 March 2025.

48 Case No ARB/94/2 *Tradex Hellas SA v Republic of Albania* (ICSID, 24 December 1996) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/94/2> accessed 10 March 2025; Reed, Paulsson and Blackaby (n 45) 38.

49 Case No ARB/84/3 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID, 20 May 1992) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/84/3> accessed 10 March 2025.

50 Article 8 of Egyptian Investment Law No 43 of 1974 stated: "Investment disputes related to the implementation of this law shall be settled in the manner agreed upon with the investor, or under the agreements in force between the Arab Republic of Egypt and the investor's home state, or under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, to which the Arab Republic of Egypt acceded by virtue of Law No. 90 of 1971, where applicable. The parties may also agree to settle disputes through arbitration." See, Arab Republic of Egypt, *Law No 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zones, as Amended by Law No 32 of 1977* (General Authority for Investment and Free Zones 1977) art 8.

Egypt challenged ICSID's jurisdiction, arguing that no written agreement had been concluded between the parties for arbitration, as required under Article 25(1) of the Washington Convention. Additionally, Egypt contended that Law No. 43 of 1974 did not apply to the dispute because it required the investor to obtain a license from the state to operate, which had been revoked from the foreign company. Furthermore, Egypt argued that Article 8 of the Investment Law merely provided a list of possible dispute resolution mechanisms, without obligating the government to submit disputes to ICSID arbitration, as it could choose from other options listed in the said article.[51]

However, the arbitral tribunal rejected Egypt's objections and upheld its jurisdiction over the dispute by a majority award on 14 April 1988. The tribunal reasoned that Article 8 of Law No. 43 of 1974 established a sequential relationship between the dispute resolution mechanisms it provided: an agreement between the parties on the method of dispute resolution, settlement of disputes under a bilateral investment treaty (BIT) between Egypt and the investor's home state, or resolution through ICSID arbitration under the Washington Convention.

Since no agreement existed between Egypt and the foreign investor on a dispute resolution method and in the absence of a BIT between Egypt and the investor's home state, the tribunal found that the wording of the law constituted Egypt's explicit and written consent to ICSID's jurisdiction, as required by Article 25(1) of the Washington Convention.

The tribunal ultimately concluded that Article 8 of Egyptian Investment Law No. 43 of 1974 did not require a separate arbitration agreement to confirm the state's consent. Instead, a reference to ICSID arbitration as a possible dispute resolution mechanism was sufficient to establish ICSID's jurisdiction over the dispute.[52]

Accordingly, the investor may rely on legislative consent to the Centre's jurisdiction as a legal basis for its authority to adjudicate the dispute. This was the position taken by the claimant in the case of *Gaith Pharaon v. Republic of Tunisia*, where reliance was on a provision of the Tunisian Investment Code of 1969 as the legal foundation for the Centre's jurisdiction. However, as the dispute between the parties was ultimately resolved through an amicable settlement, the arbitral tribunal did not rule on the objections raised by the State in the course of the proceedings.[53]

51 See, Paulsson (n 32) 235.

52 See, Abdel-Moati (n 19) paras 844 et seq, 358 et seq; Mohamedin (n 29) 42; Case No ARB/84/3 (n 49).

53 See, Order of Discontinuance dated 21 November 1988, cited in ICSID Cases, Doc ICSID/16/Rev. 4 (July 31, 1995) 26; Paulsson (n 32) 235.

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4.2. Consent to ICSID Arbitration Through a Bilateral Treaty

Arbitration without a prior agreement is one of the key mechanisms in bilateral investment treaties (BITs), as it allows foreign investors to sue states before ICSID in case of an investment dispute, without the need for a specific prior arbitration agreement.[54]

Article 26 of the Washington Convention states: "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[55] This means that bilateral investment treaties (BITs) may stipulate that disputes between the host state and investors must first be submitted to the national courts of the host country before resorting to international arbitration, i.e., the necessity to exhaust domestic judicial means before resorting to international arbitration. Some other treaties may allow for direct recourse to arbitration.[56]

The requirement of state consent to ICSID jurisdiction is deemed fulfilled under the bilateral treaty, regardless of whether there is a direct contractual relationship between the host state and the foreign investor. This opens the door for bilateral treaties to serve as a legal basis for ICSID jurisdiction over investment disputes, even though such a basis is not explicitly mentioned in the Washington Convention. This principle was upheld by ICSID in establishing its jurisdiction in the *AAPL v. Sri Lanka* case.[57]

The facts of the AAPL case revolved around a dispute in which the claimant, Asian Agricultural Products Ltd. (AAPL), had entered into a joint venture agreement with the Sri Lankan government. However, during military operations, the Sri Lankan armed forces destroyed certain facilities of the project. As a result, AAPL filed a request for arbitration before ICSID on 20 July 1987, seeking compensation for the damage incurred. Although the contract between AAPL and Sri Lanka did not contain an arbitration clause, the claimant based its request on the bilateral investment treaty (BIT) signed between the Government of Sri Lanka and the United Kingdom in 1980.[58]

The ICSID tribunal considered the parties' consent to arbitration as completed by the state's offer expressed in the bilateral investment treaty (BIT) and the investor's acceptance demonstrated by the submission of the request for arbitration. This principle later became well established in ICSID jurisprudence, where the Centre accepted jurisdiction based on the state's consent in investment treaties, even in the absence of a direct contractual

54 Born (n 20) 194-5.

55 Washington Convention (n 2) art 26.

56 Reed, Paulsson and Blackaby (n 45) 57.

57 Christoph Schreuer, 'Commentary on the ICSID Convention: Article 42' (1997) 12(2) ICSID Review - Foreign Investment Law Journal 443, doi:10.1093/icsidreview/12.2.398.

58 Salah El-Din Gamal El-Din, *Perspectives on the Applicable Law under Article 42(1) of the ICSID Convention* (Dar Al-Nahda Al-Arabia 1996) 80; Qebaili Tayeb, 'Arbitration in Investment Contracts Between States and Nationals of Other States in Light of the Washington Convention' (PhD thesis, Mouloud Mammeri University 2012) 146; Abdel-Moati (n 19) para 886, 376 et seq; Jinah (n 38) 19.

relationship between the state and the investor. A notable example of this approach is the award in the case *of AMT v. Zaire* (now the Democratic Republic of the Congo), issued on 21 February 1997.[59]

4.3. ICSID Jurisdiction Under the Most-Favoured-Nation (MFN) Clause

For ICSID jurisdiction to be established, one party to the dispute must be a contracting state and the other must be a national of another contracting state. If the state is not a contracting party to the Washington Convention, it cannot be a party to ICSID arbitration proceedings. The same applies to investors, as a foreign investor from a non-contracting state cannot be a party to ICSID arbitration.

Although Article 25 of the Washington Convention bases ICSID's jurisdiction on the principle of "written consent", ICSID has, in some cases, expanded its jurisdiction even in the absence of a traditional bilateral arbitration agreement. The Centre has allowed itself to infer state consent to arbitration, even when there was no direct contractual relationship between the state and the investor, by invoking the Most-Favoured-Nation (MFN) clause.

The purpose of the MFN clause is to allow investors from the beneficiary state to receive the best treatment that the host state has provided or may provide to investors from another foreign state. This clause applies not only to substantive provisions concerning the treatment and protection of investments but also to procedural provisions governing investment dispute resolution. ICSID jurisprudence has further recognised this principle in the *Maffezini v. Spain* case, where the tribunal accepted the investor's invocation of the MFN clause to infer the host state's consent to ICSID arbitration.[60]

59 Walid Ben Hamida, 'L'arbitrage transnational unilatéral : réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique' (Thèse de doctorat, Université Panthéon-Assas Paris II 2003) 35-7; Schreuer (n 57) 445-6.

The ICSID tribunal in case *Impregilo v Pakistan* upheld its jurisdiction (Decision on Jurisdiction, 22 April 2005), stating: 'it is clear that the coincidence of these two forms of consent can constitute "consent in writing" within the meaning of Article 25(1) of the ICSID Convention.' See, Case No ARB/03/3 *Impregilo SpA v Islamic Republic of Pakistan* (ICSID, 22 April 2005) para 108 <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/3> accessed 10 March 2025. The two forms of consent refer to the state's consent in the investment treaty and the investor's submission of a request for arbitration.

According to ICSID case law, a state cannot invoke its domestic law to evade its international obligations arising from a treaty or general international law. Additionally, an arbitration clause in a bilateral treaty is, in itself, considered an investment. See, Case No ARB/08/2 *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (ICSID, 7 March 2011) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/08/2> accessed 10 March 2025.

60 This case serves as an authority on the interpretation of Bilateral Investment Treaties (BITs) regarding investors' rights and the available avenues for resorting to international arbitration. See, Case No ARB/97/7 *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID, 25 January 2000) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/97/7> accessed 10 March 2025.

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It is noteworthy that the arbitral tribunal imposed a restriction on the application of the Most-Favoured-Nation (MFN) clause concerning dispute resolution provisions. This restriction is that the application of the MFN clause must not undermine the host state's public policy considerations, meaning its application must not override provisions that the contracting states deem fundamental when consenting to the treaty.[61]

Unlike the award in *Maffezini*, the arbitral tribunal in *Plama Consortium Limited v. Bulgaria* ruled that the MFN clause could only apply if there were explicit consent from both parties to the dispute.[62] The Cypriot consortium sought to establish Bulgaria's consent to ICSID arbitration by selecting the most favourable provision available to it through "treaty shopping", invoking the MFN clause contained in the bilateral investment treaty (BIT) between Cyprus and Bulgaria as the legal basis for submitting the dispute to ICSID arbitration.

Although the BIT in question stipulated in Article 4: "If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international 'Ad Hoc1' Arbitration Court," the investor attempted to invoke Bulgaria's consent to ICSID arbitration based on Article 26 of the Energy Charter Treaty (ECT) between Bulgaria and Finland (1997), which allowed nationals of contracting states to submit their disputes to ICSID arbitration.

The arbitral tribunal rightfully concluded that a state's consent to arbitration could not be inferred from its consent expressed in a different treaty by invoking the MFN clause contained in the treaty that formed the basis of the dispute.

The same principle was upheld by the arbitral tribunal in *Salini v. Kingdom of Jordan*, which ruled in its award, dated 29 November 2004, that it lacked jurisdiction due to the absence of an explicit expression of the contracting states' intent to extend the MFN clause to dispute resolution provisions.[63]

61 ibid, para 62.
The arbitral tribunal constituted in case *Siemens AG v Argentina* (ICSID Case No ARB/02/8, Award, 3 August 2004) applied the same reasoning as the decision in *Maffezini*. The tribunal relied on the Most-Favored-Nation (MFN) clause in the Germany-Argentina BIT to establish its jurisdiction over the dispute. See, Case No ARB/02/8 *Siemens AG v Argentine Republic* (ICSID, 3 August 2004) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/8> accessed 10 March 2025.

62 Case No ARB/03/24 *Plama Consortium Limited v Republic of Bulgaria* (ICSID, 8 February 2005) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/24> accessed 10 March 2025; Abdel-Moati (n 19) para 1020, 433 et seq; Tayeb (n 58) 191 et seq; Jinah (n 38) 21 et seq.

63 Case No ARB/02/13 *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* (ICSID, 29 November 2004) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/13> accessed 10 March 2025.

This latter ruling is more persuasive, as it aligns with contract law principles. Consent to ICSID arbitration must be based on the mutual agreement of the parties to the dispute, reflecting their shared intention to confer jurisdiction on ICSID, in accordance with Article 25 of the Washington Convention.

5 CONCLUSIONS

Arbitration without privity is a sensitive system. A single case in which an arbitrator oversteps their authority in a sensitive case could cause a strong negative reaction. However, if used with care and fairness, this form of arbitration has the potential to address the current gap left by the lack of compulsory jurisdiction and, in doing so, enhance the legal security of international economic relations.[64]

Having concluded the examination of the research topic, the study presents the following findings and recommendations:

Research Findings:

1. The default rule is that an arbitration agreement produces its legal effects only when it is in writing and signed by the parties. Additionally, it must relate to matters that are legally capable of being subject to compromise; otherwise, it is null and void under Egyptian and Qatari law.
2. The jurisdiction of ICSID over a dispute between the state and a foreign investor does not require the existence of a direct arbitration agreement between them, where the host state's domestic legislation refers to the possibility of resolving the dispute in accordance with the ICSID Convention.
3. Bilateral investment treaties (BITs) constitute the legal basis for ICSID's jurisdiction over investment disputes between the host state and the foreign investor, provided that the treaty includes a clause stipulating that such disputes are to be resolved in accordance with the Washington Convention. This applies even in the absence of a prior arbitration agreement between the parties.
4. In the authors' opinion, a state's consent to arbitration cannot be inferred from its acceptance of arbitration in a treaty to which the investor's home state is not a party. In such a case, it is not permissible to invoke the Most-Favoured-Nation (MFN) clause as a legal basis for establishing ICSID's jurisdiction over the investment dispute.

Research Recommendations:

1. It is recommended that ICSID refrain from expanding its jurisdiction over investment disputes by relying on the Most-Favoured-Nation (MFN) clause unless the treaty expressly and unequivocally provides that the MFN clause applies to investment dispute settlement.

64 Paulsson (n 32) 257.

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2. It is recommended that both Egyptian and Qatari legislators develop a model for bilateral investment treaties (BITs) that includes a detailed provision on investment dispute resolution through arbitration.
3. It is recommended that national legislators should carefully draft the scope of application of the MFN clause, tailoring it to serve national interests on a case-by-case basis.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АРБІТРАЖ БЕЗ УГОДИ ЗА ПРАВИЛАМИ ICSID: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ З ЄГИПЕТСЬКОЮ ТА КАТАРСЬКОЮ ПРАВОВИМИ СИСТЕМАМИ

Тарек Гомаа Ель-Саєд Рашед*, Ахмед Юссеф Аль-Емаді та Самір Шаабан Салех

АНОТАЦІЯ

Вступ. *Пропозиція держави звернутися до арбітражу є однією з найважливіших тем, яка викликає численні питання, оскільки така пропозиція є правовою основою для арбітражної угоди, яка згодом укладається після її прийняття інвестором. Вираження згоди держави на арбітраж більше не обмежується випадками, коли вона укладає договір з інвестором, що містить арбітражне застереження. Натомість, згода держави тепер випливає з законодавчих пропозицій та міжнародних угод, стороною яких є держава.*

Методи. *У деяких випадках арбітраж ґрунтується на конкретних міжнародно-правових зобов'язаннях, таких як двосторонні інвестиційні договори, які можуть зобов'язувати держави до арбітражу у спорах з іноземними інвесторами. У результаті держави стали сторонами арбітражних позовів, ініційованих інвесторами, з якими вони не мають договірних відносин. Це призвело до фундаментальних змін у сфері міжнародного*

арбітражу, оскільки інвестиційні спори перейшли з області дипломатичного захисту до юрисдикції Міжнародного центру з врегулювання інвестиційних спорів (надалі – Міжнародний центр). Міжнародний центр, у свою чергу, розширив свою юрисдикцію, охопивши інвестиційні спори навіть за відсутності угоди між сторонами спору про звернення до арбітражу.

Результати та висновки. *Дослідження продемонструвало, що згода держави на арбітраж у певних випадках може випливати з внутрішнього законодавства або двосторонніх інвестиційних договорів, тим самим створюючи дійсну правову основу для юрисдикції Міжнародного центру навіть за відсутності безпосередньо укладеної арбітражної угоди між державою та інвестором.*

Ключові слова: *арбітражна угода, згода, Міжнародний центр, сторони, юрисдикція, Вашингтонська конвенція, BIT.*

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Research Article

THE BEST INTERESTS OF JUVENILES: EVALUATING JORDANIAN JUVENILE LAW AGAINST THE CONVENTION ON THE RIGHTS OF THE CHILD

Mouaid Al Qudah, Ibrahim Al-Shawabkeh*, Mohammad Alkrisheh, Mamoun Abu-Zeitoun and Ahmad Zaqibh

ABSTRACT

Background: *The principle of the "best interest of juveniles" is a cornerstone of Jordanian law, reflecting the country's commitment to safeguarding the rights and welfare of children. Anchored in the Juvenile Law No. 32 of 2014 and international obligations under the United Nations Convention on the Rights of the Child (UNCRC), this principle ensures that the rights, development, and protection of juveniles are prioritised in judicial, social, and administrative decisions. Jordanian law emphasises rehabilitation over punishment, focusing on the social reintegration of juvenile offenders while considering their psychological and developmental needs.*

Methods: *This paper examines how the best interest of juveniles is operationalised in Jordanian law, analysing its strengths, challenges, and alignment with international standards. It highlights the importance of a multidisciplinary approach involving legal, social, and psychological perspectives to ensure that juveniles' rights are upheld in all phases of criminal proceedings. Given the nature of the study, multiple research approaches were employed, including an analytical approach to examine all legislative Articles related to the subject, aiming to identify their content, implications, and objectives. Additionally, a comparative approach was used to analyse relevant domestic laws and international conventions concerning juvenile offenders, providing critical analysis and commentary.*

Results and Conclusions: *The paper's findings indicate that the principle of the child's best interest functions as a fundamental right, a key interpretative legal standard, and a procedural framework. Yet, its application varies across the stages of criminal proceedings under Jordanian law, with the trial stage exhibiting the strongest adherence to this principle compared to earlier stages of the criminal process. It is recommended that the Jordanian Juvenile Law be*

revised to include explicit provisions ensuring legal representation for juveniles at all stages of criminal proceedings, covering all types of offences, rather than limiting it to felonies during the trial phase. The law should also restrict the authority of public prosecutors to extend juvenile detention, expand the jurisdiction of juvenile conciliation courts to include all misdemeanours not only those punishable by up to two years of imprisonment—and exempt juveniles from the application of flagrante delicto rules.

1 INTRODUCTION

The juvenile's right to protection is an intrinsic right, safeguarded by natural instincts and the very essence of existence. It is upheld by divine teachings, reinforced by international conventions and treaties, and supported by protective laws. Juveniles are the cornerstone of a nation's future, and it is essential to equip them to live fulfilling lives in society, fostering their development with strong moral values. Addressing juvenile delinquency should not focus on punishment and suffering; rather, it should aim to rehabilitate and reintegrate offenders into society by offering educational and employment opportunities.

From this perspective, Jordanian lawmakers have demonstrated a commitment to prioritising juveniles' welfare in accordance with the principle of their best interests. This study explores the extent to which the Jordanian Juvenile Law aligns with international standards in safeguarding the best interests of juvenile offenders, focusing on its application throughout all phases of the criminal justice process.

This is crucial as it emphasises the need to examine the legal and procedural aspects of handling delinquent juveniles while addressing the vital issue of safeguarding and promoting their rights. Understanding the theoretical and practical dimensions of the juvenile's best interests will aid those responsible for their protection, including legal professionals and other stakeholders. The central focus, therefore, is to define the components and scope of the juvenile's best interests and evaluate how these are reflected in Jordanian Juvenile Law. This includes analysing their application across all stages of the criminal process: police investigations, public prosecution inquiries, court proceedings, and the post-proceeding phase, which ensures ongoing care and support for the juvenile's reintegration into society.

1.1. Methodology

To achieve this purpose, descriptive, analytical, and comparative approaches are utilised. The descriptive and analytical methods are applied to examine relevant domestic laws and international conventions related to juvenile offenders. This involves analysing the internal mechanisms through which the principle of the best interests of juveniles is reflected in Jordanian Juvenile Law. Meanwhile, the comparative approach is employed to assess the extent to which Jordanian legislation aligns with international conventions on this crucial matter.

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2 THE ESSENCE OF THE BEST INTERESTS PRINCIPLE

2.1. The Concept of the Best Interests Principle

Defining the principle of a juvenile's best interests is challenging because it depends on the specific circumstances of each case, as well as variations in social culture and upbringing. These variations include factors such as the juvenile's age, level of maturity, environment, personal experiences, need for protection from abuse, exploitation, and neglect, the importance of physical development, and the role of the family, society, and law in providing necessary protection and care.[1]

There is no single, universally accepted definition of the juvenile's best interests in international conventions governing children's rights, including the Convention on the Rights of the Child (UNCRC) of 1989.[2] However, the United Nations High Commissioner for Refugees[3] (UNHCR) guidelines on determining the best interests of the child interpret the term[4] as referring to the child's overall well-being. This well-being is determined by various factors, such as the child's age, level of maturity, environment, and personal experiences. Furthermore, General Comment No. 14 of 2013 from the Committee on the Rights of the Child defines the best interests of the child as a "right, a principle, and a procedural rule."[5] The European Union (EU) upholds this principle as a core value across its policies, legislation, and practices. It is firmly rooted in several international and EU legal frameworks—most notably the UNCRC, to which both the EU and all its member states are parties. Additionally, EU Directive 2016/800[6] lays down specific procedural safeguards to protect children involved in criminal proceedings, ensuring that their rights and well-being are prioritised.[7]

1 Razan Salhub, 'The Best Interests of the Child' (master's thesis, An-Najah National University, Faculty of Law 2018) 2; Mostafa Owiyish, 'The Best Interests of the Child and the Expected Outcomes of Reforming the Moroccan Family Code' (2024) 5(2) Humanities & Natural Sciences Journal 173-4, doi:10.53796/hnsj52/11.

2 Convention on the Rights of the Child (UNCRC) (UNGA Res 44/25, adopted 20 November 1989) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 15 March 2025.

3 UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR 2008) 14 <https://www.unhcr.org/media/unhcr-guidelines-determining-best-interests-child> accessed 15 March 2025.

4 UNCRC (n 2) art 3, para 1.

5 UN Committee on the Rights of the Child, *General Comment no 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)* (UN 2013) <https://digitallibrary.un.org/record/778523?ln=en&v> accessed 15 March 2025.

6 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who are Suspects or Accused Persons in Criminal Proceedings [2016] OJ L 132/1.

7 The UNCRC is not directly part of EU law but influences it significantly. The EU and all member states are bound by the UNCRC, and its principles are reflected in the EU Charter of Fundamental Rights 2009, and laws like Directive (EU) 2016/800. See: Charter of Fundamental Rights of the European Union (CFR) [2012] OJ C 326/391; Directive (EU) 2016/800 (n 6).

The full implementation of the concept of the best interests of the child requires adopting a rights-based approach and involving all relevant stakeholders to ensure the comprehensive physical, psychological, moral, and spiritual well-being of the child, regardless of gender, while promoting their human dignity.[8] According to Article 3(1) of the UNCRC, the child's best interests must be a primary consideration in all actions or decisions affecting them, whether in public or private contexts.[9] The Committee on the Rights of the Child has emphasised that the concept of the child's best interests is three-dimensional.[10] That is, this principle is multi-dimensional and covers several aspects, including: [11]

A **Fundamental Right**: The best interest of the child is a fundamental right, ensuring that a child's well-being is assessed and prioritised when making decisions that affect them. This right must be upheld for any identified child or group of children, whether specifically named or not, and extends to all children in general. Article 3(1) of the UNCRC imposes a substantive obligation on States, making it directly applicable and enforceable in courts. This means that the child's best interests must be given primary consideration in all actions concerning the child, providing a legal basis for ensuring that this principle is respected throughout all phases of criminal proceedings.

B **Basic Legal Interpretative Principle**: When a legal provision allows for multiple interpretations, the interpretation that most effectively serves the child's best interests should be prioritised. This principle guides the application of laws to ensure the child's well-being is at the forefront of legal decision-making. The rights outlined in the UNCRC and its Optional Protocols provide the essential framework for this interpretation, ensuring that legal decisions align with the overarching goal of promoting and protecting the rights and interests of the child.

C **Procedural Rule**: Whenever a decision impacts an identified child, a group of identified children, or children in general, the decision-making process must include assessing the potential positive or negative effects on the child or children involved. This assessment and determination of the child's best interests require

8 The General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration was issued by the United Nations Committee on the Rights of the Child to provide guidance on the interpretation and implementation of Art. 3, para. 1 of the UNCRC.

9 Karima Mohammed Alzytoni, 'A Legal Analysis of the French Juvenile Justice Law no 2018 of 2021, issued on 26 February 2021' (2024) 4(10) Alasala Journal 322.

10 Lisa Sandgren, '"The Best Interest Principle": A Qualitative Study on Interpreting "The Child's Best Interest" by the European Court of Human Rights and National States' (*GUPEA*, 31 January 2022) <https://gupea.ub.gu.se/handle/2077/70497> accessed 15 March 2025; Susana Sanz-Caballero, 'The Best Interests of the Child in Judicial Perspective: Morocco and Chile as Case-Studies (1990–2020)' (2023) 44(1) Children's Legal Rights Journal 25.

11 UN Committee on the Rights of the Child (n 5) para 6.

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procedural safeguards to ensure fairness and thorough consideration. Furthermore, the justification for the decision must demonstrate that the child's rights were explicitly considered. In this context, States parties must explain how the child's best interests were respected in the decision-making process, detailing the factors considered, the criteria applied, and how the child's interests were balanced against other considerations, such as public policy concerns or individual circumstances.

It is clear from the above that, although the UNCRC does not provide a specific definition of the child's best interests, standards have been established through the General Comment. These standards act as guiding principles to ensure the child's best interests are upheld and actively pursued in various legal, social, and procedural contexts.

The same applies to national legislation, where no specific definition has been provided for the principle of the child's best interests, including in Jordanian law. The Jordanian legislator has acknowledged the juvenile's best interests principle without clearly outlining its elements or scope. This approach may have been intended to grant judges the flexibility to determine the juvenile's best interests based on the specifics of each case, as the best interests can vary from one child to another depending on various factors, as previously mentioned.

However, Jordanian Juvenile Law[12] has outlined the ways in which the juvenile's best interests are realised, whether the juvenile is delinquent or requires immediate or ongoing care for delinquency and punishment. These aspects include recognising the juvenile's inherent human dignity, prioritising their education despite their delinquency, and mandating that any institution housing the juvenile must provide appropriate care and refer them to specialised medical facilities for necessary treatment, whether for illness, addiction, or other conditions. Additionally, the law ensures that the juvenile's criminal history does not result in a stigma when they reach adulthood. The legislator also prohibited the mixing of detained or sentenced juveniles with adults and classified juveniles based on their risk level (Article 4). Furthermore, the law requires the judge to consider the probation officer's report and base their decision on the juvenile's best interests, as outlined in the report (Article 18).

Although Jordanian law does not offer a specific definition of the principle of the juvenile's best interests, it does establish fundamental rights for juveniles and sets out principles that allow judges to consider the juvenile's best interests during the investigation and trial phases. These interests are safeguarded whether the juvenile is considered delinquent or in need of care. This approach is consistent with the interpretation of Article 3 of the UNCRC, which views the concept of the child's best interests as flexible and adaptable. It must be tailored to the specific circumstances of

12 Jordanian Law no 32 of 2014 concerning Juvenile Law [2014] Official Gazette 5310/6371.

each child, considering their personal situations, circumstances, and needs[13] under all types of legislation.[14] In individual decisions, the child's best interests must be assessed and determined based on the child's unique circumstances.[15]

The child's best interests must be applied to all matters concerning the child or children and considered when addressing any potential conflict with the rights outlined in the UNCRC or other human rights treaties. It is crucial to identify solutions that serve the child's best interests, particularly as states are obligated to clarify and apply this concept to all children, including those in vulnerable situations, when adopting and implementing measures.[16]

2.2. Scope of the Best Interests of the Juvenile Principle

The principle of the best interests of the juvenile encompasses a broad spectrum of considerations focused on ensuring children's welfare, rights, and development within legal and social systems. Its scope spans multiple areas, including legal protection, rehabilitation, education, and psychological well-being. This principle acts as a fundamental standard in judicial decisions, policy-making, and applying laws concerning juvenile offenders, victims, and other at-risk children. In the legal context, it emphasises rehabilitation over punishment, safeguards children from harm, and facilitates their reintegration into society. Furthermore, it calls for adherence to international frameworks, such as the UNCRC, which underscores the importance of addressing each child's unique needs and circumstances. Thus, the scope of this principle extends to various dimensions, as outlined below.

2.2.1. Personal Scope of the Principle

The United Nations Convention on the Rights of the Child (hereafter: UNCRC)[17] recognises the child as a rights holder in the full legal sense. Unlike earlier, more neutral texts that listed rights to be respected and upheld, the Convention establishes what some experts describe as a democratic dynamic in favour of the child. It positions the child as a rights holder equal to any human being, marking a significant departure from previous approaches.

13 Owiyish (n 1) 173.

14 Ibrahim Kamel Al-Shawabkeh, 'Disabled Persons under the Jordanian Sales Tax and Customs Laws: Favourable Treatment among Conflicting Rules' (2016) 30(2) Arab Law Quarterly 163, doi:10.1163/15730255-12341318.

15 UN Committee on the Rights of the Child (n 5).

16 Mohammed Taher Al-Humaidi, 'Protecting the Rights of Child Victims in the Criminal Justice System from the Perspective of International Standards: A Study to Ensure the Provision of Professional, Unbiased Justice by Honorable Judges Holding Professional Honor Degrees' (Tunisia 2016) 21.

17 UNCRC (n 2).

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The 1924 Declaration of the Rights of the Child and the 1959 UNCRC viewed the child primarily as an object of protection—entitled to enjoy all the rights set forth without any distinction or discrimination based on race, colour, gender, religion, political or non-political opinion, national or social origin, wealth, birth, or any other status belonging to the child or their family.[18] With the adoption of the UNCRC, the child's entitlement to rights was affirmed, ensuring they are no longer merely subjects of protection but active holders of rights under international law.

The legal basis for the child's enhanced status under the Convention is primarily derived from Articles 3 and 12,[19] which enshrine the principles of the child's best interests and the right to be heard. These provisions form the legal and practical foundation for recognising children as full rights holders. The best interest principle is further reinforced by **Article 24 of the EU Charter of Fundamental Rights (CFR)** and **Directive (EU) 2016/800**, establishing child-friendly justice, legal representation, and procedural safeguards in criminal proceedings.[20] This principle is applied and interpreted in alignment with all other provisions of the Convention, including **Article 1**, which defines a child as *"every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."*[21]

This definition adopts a functional approach, emphasising the identification of individuals eligible for the protection offered by the Convention. While it establishes the upper age limit for such protection at eighteen years, it does not explicitly address issues like the starting point of childhood.

The Convention allows for some flexibility in determining the age of majority, as dictated by national laws. However, other provisions provide clear and specific criteria regarding aspects of childhood to ensure children can fully benefit from the rights and protections guarantees. These stipulations include detailed guidance on applying the doctrine of the best interests of the child in different contexts, as outlined below.

1. **Prohibition of Severe Penalties for Minors**: The Convention prohibits executing individuals under the age of eighteen or sentencing them to life imprisonment without the possibility of release. It also requires States Parties to establish a minimum age for criminal responsibility (Articles 37(a) and 4 of the EU Charter of Fundamental Rights).

18 Declaration of the Rights of the Child (UNGA Res 1386 (XIV), adopted 20 November 1959) <https://digitallibrary.un.org/record/195831?ln=en&v> accessed 6 March 2025.

19 Muhammad Al-Mousa, *The Best Interests of the Child: A Guideline for Legal Practitioners* (Mizan Publications 2012) 5.

20 CFR (n 7) art 24; Directive (EU) 2016/800 (n 6).

21 UNCRC (n 2) art 1.

2. **Protection Against Arbitrary Deprivation of Liberty**: The Convention mandates that the deprivation of a child's liberty must only occur in the child's best interests, emphasising the necessity of such measures being a last resort and for the shortest appropriate period (Articles 37(b) and 24 of the EU Charter of Fundamental Rights).
3. **Non-Discrimination in Application**: The Convention obliges States Parties to apply its provisions to all children under their jurisdiction without discrimination of any kind, ensuring equal protection and rights for all children (Articles 2 and 21 of the EU Charter of Fundamental Rights).
4. **Limitation on Parental Authority**: The Convention stipulates that parental authority to provide guidance and direction must always align with the child's best interests, ensuring that this principle overrides all other considerations in parental decisions (Arts. 5, 24 of the EU Charter of Fundamental Rights).
5. **Right to Survival and Development**: States Parties are required to guarantee the child's right to survival and development by fostering an environment that supports their physical, mental, spiritual, and moral growth to the fullest extent possible, in line with human dignity (Articles 6(2) and 24 of EU Charter of Fundamental Rights).
6. **Right to Be Heard**: The Convention establishes the child's right to express their views freely in all matters affecting them, with appropriate weight given to these views based on the child's age and maturity. This right is unrestricted unless the child is incapable of forming or expressing an opinion (Articles 12 and 24 of the EU Charter of Fundamental Rights).

2.2.2. Subjective Scope of the Principle

The subjective scope of the principle of the best interests of the child refers to the specific individuals and institutions responsible for ensuring its application. Undoubtedly, this principle has become a binding international standard for all states that have ratified the UNCRC. The state holds the responsibility for enforcing this principle and must take all necessary measures to implement this right in accordance with its international obligations regarding child rights protection.

States that have ratified the Convention are required to involve all relevant stakeholders to ensure the application of the best interests of the child principle, guaranteeing the child's holistic physical, psychological, and spiritual well-being. This principle must be integrated into all actions, policies, and services that directly or indirectly affect the child, as emphasised in Article 3(1) of the 1989 UNCRC.

From this perspective, state administrative authorities, public and private care institutions, legislative bodies, and courts at all levels are obligated to prioritise the best interests of the child, ensuring that legislation and procedures align with the proper implementation of this principle and respect all rights established under the Convention.

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Jordan ratified the UNCRC on 24 May 1991, the Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography on 4 December 2006, and the Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict on 23 May 2007. As is well established, Jordan upholds the principle of the supremacy of international treaties, placing them second in the legislative hierarchy within the Kingdom. The Jordanian Court of Cassation affirmed this principle in its ruling in Case No. 945/2009.[22]

Based on this, the Jordanian legislator has undertaken significant reforms to amend legal provisions to align with the Convention's principles, focusing on key areas while avoiding excessive detail. Although the Jordanian Constitution predates the UNCRC, the legislator explicitly enshrined the principle of equality among Jordanians, ensuring non-discrimination and the right to education, security, and equal opportunities for all citizens. Article 6(5) of the Constitution specifically emphasises the protection of childhood and the care and safeguarding of youth from abuse and exploitation.[23]

In terms of criminal protection for children, the Jordanian legislator has implemented several amendments to Penal Code No. 16 of 1960[24] to safeguard children's rights and ensure their best interests in alignment with the UNCRC. To uphold the child's right to life and development, crimes committed against children—from the fetal stage to the age of eighteen—have been criminalised. The legislator also designated age as an aggravating factor in crimes committed against juveniles and prohibited perpetrators from benefiting from mitigating excuses, particularly in honour-related crimes when the victim is under the age of majority.

For instance, abortion is criminalised under Articles 321–325 of the Jordanian Penal Code No. 16 of 1960 and its amendments. Furthermore, the use of mitigating excuses in honour crimes is prohibited if the victim is a minor, regardless of gender, under Article 308 (repeated) of the same law. The minimum age for the crime of beating leading to death under Article 330 has been raised to twelve years if the offence is committed against someone under fifteen years of age. While many other aspects of the Penal Code and its supplementary laws could be elaborated upon, these are some of the key measures aimed at protecting children.

Regarding the Personal Status Law, the doctrine of the child's best interests has been accommodated as a key criterion in custody decisions, requiring specific conditions to be

22 See also, the Jordanian Court of Cassation judgments nos. 4390/019 of July 2020; 2433/2006 of 2006; 3965/2003 of February 2004. For more on this, see: Abdallah Majed Abdel Mutaleb Al-Akayleh Esraa, 'The Effectiveness and Supremacy of International Treaties over Domestic Laws in Jordanian Legislation: A Comparative Critical Study' (2023) 4(2) Al-Zaytoonah University of Jordan Journal for Legal studies 108, doi:10.15849/ZUJJLS.230730.06.

23 Constitution of the Hashemite Kingdom of Jordan (adopted 1 January 1952, rev 2011) art 6 <https://www.constituteproject.org/constitution/Jordan_2011> accessed 6 March 2025.

24 Jordanian Penal Code no 16 of 1960 <https://www.wipo.int/wipolex/en/legislation/details/15077> accessed 15 March 2025.

met by those seeking custody of a minor. If these conditions are not fulfilled, custody is not granted.[25] The law also stipulates that custody is retained until the age of fifteen for the mother and ten for others, after which the minor has the right to choose their custodian.[26] In terms of administrative procedures within Sharia courts, training programs are conducted for judges, their assistants, and court staff across the kingdom. These courses focus on the detailed rights of the child as outlined in the Personal Status Law.

3 ASPECTS OF UPHOLDING THE BEST INTERESTS OF THE JUVENILE IN JORDANIAN LAW

The principle of the juvenile's best interests is a cornerstone in Jordanian law, reflected in various guarantees provided by legal provisions and practices to safeguard the rights and welfare of children involved in legal proceedings. The following are key elements of how this principle is upheld in Jordanian law:

3.1. Juveniles' Guarantees During the Three Phases of Criminal Proceedings

In Jordanian law, the protection and well-being of juvenile offenders are prioritised throughout the criminal justice process, which is divided into three main phases: the investigation phase (e.g. police preliminary inquiries and public prosecution investigations), the trial phase, and the post-trial phase.[27] Each stage includes specific legal guarantees aimed at safeguarding the rights of juveniles and ensuring that their best interests are upheld, and their future is not defined by their mistakes. Below is a detailed outline of these guarantees across the three phases.

3.1.1. Guarantees During Police Preliminary Inquiries

The Jordanian legislator has established a comprehensive legal framework that governs this stage of the legal process, ensuring the protection of the rights of both juvenile offenders and crime victims. The legal provisions are specifically designed to prevent any violation of all parties' rights, ensuring that they are treated with dignity, fairness, and respect throughout the criminal proceedings.[28]

When discussing the concept of "crime victims," the immediate focus is often on the individual who suffers harm from the crime. However, the concept can have a broader

25 Jordanian Law no 15 of 2019 on Personal Status, art 171 <https://www.refworld.org/legal/legislation/natlegbod/2019/en/123423> accessed 15 March 2025.

26 ibid, art 173.

27 Jordanian Code of Criminal Procedure no 9 of 1961 <https://bwcimplementation.org/sites/default/files/resource/Jordan_CriminalProcedureCode_EN.pdf> accessed 15 March 2025.

28 Muhammad Saeed Namour, *Fundamentals of Criminal Procedure* (Dar Al Thaqafa Publishing 2016) 88.

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dimension, especially in cases where the perpetrator is also a victim, such as when a juvenile commits a crime. Juveniles, due to cognitive limitations and a lack of full discernment, may not fully understand the consequences of their actions. This developmental stage leads to juveniles' relatively incomplete comprehension of their behaviour. As a result, the Jordanian legislator acknowledges that juveniles can be seen as both offenders and victims of their circumstances.

This dual recognition is reflected in the Jordanian Juvenile Law, which prioritises reform and rehabilitation over punitive measures. The law includes numerous specific guarantees throughout the juvenile criminal process to protect the rights of juveniles, ensuring their welfare is considered at all stages. The Jordanian legislator has adopted a proactive approach in the Juvenile Law to activate the principle of the juvenile's best interests during this stage. This is reflected in several key provisions and reforms aimed at prioritising the welfare and rehabilitation of juveniles within the criminal justice system. These include:

First: Specialised Juvenile Police Unit

The Jordanian legislator has established a specialised Juvenile Police Unit as part of the broader effort to implement the principle of the best interests of the juvenile. This unit plays a crucial role in ensuring that juveniles are treated with care and respect throughout the legal process, particularly during the initial stages of the criminal justice system.

In line with Beijing Rule No. 12,[29] and Article **7** of Directive (EU) 2016/800, Article 3 of the Jordanian Juvenile Law states: "A police department specialised in juvenile affairs shall be established within the Public Security Directorate by this law."[30] This provision highlights the Jordanian legislator's pioneering approach in prioritising juvenile protection within the criminal justice system. Unlike other Arab countries, such as the UAE and Syria, which do not have specific police departments dedicated to juvenile matters, Jordan has set a notable precedent by establishing a specialised unit within the Public Security Directorate. The creation of this specialised police unit ensures that juveniles are treated in a manner that is appropriate to their age, psychological development, and legal status. It reflects Jordan's commitment to upholding the principle of the best interests of the juvenile and fostering a system that prioritises rehabilitation over punishment.

However, it would have been preferable if the Jordanian legislator, in line with the reformative goals unique to the Juvenile Law and its emphasis on the juvenile's best interests, had established specific conditions and legal guidelines for the personnel within these specialised police departments. For example, the selection process for officers could require

29 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (adopted 29 November 1985) <https://digitallibrary.un.org/record/120958?ln=en&v> accessed 15 March 2025.

30 Jordanian Law no 32 of 2014 (n 12) art 3.

them to undergo specialised training courses that focus on psychological and social aspects, equipping them with the skills necessary to handle juveniles effectively. Additionally, it could be beneficial for officers to hold a bachelor's degree in psychology, education, or related fields, ensuring they are qualified to deal with delinquent juveniles in a manner that accounts for their developmental stage and immature thinking.[31]

Such qualifications and training would better align with the juvenile justice system's reformative goals, ensuring that juveniles are treated with understanding, care, and respect throughout their interactions with the police. It would also ensure that the police personnel are equipped with the expertise needed to address the specific needs of young offenders and to minimise the risk of further harm or trauma during the investigative process.

Second: Prohibition of Restraining the Juvenile

In accordance with Article 10 of EU Directive 2016/800**,** Article 4(d) of the Jordanian Juvenile Law similarly prohibits restraining a juvenile, except in cases explicitly outlined by the law.[32] These cases involve the juvenile displaying defiance or violence. The law has rightly restricted the authority of law enforcement officers concerning the restraint of juveniles, recognising the importance of the inquiry stage as the initial point of contact between the juvenile and judicial authorities. Restraining the juvenile could provoke fear and suspicion and instil a sense of belonging to the criminal class, which may have significant psychological impacts on the child.[33] This contradicts the principle of the juvenile's best interests, which requires considering the juvenile's psychological and social well-being.[34]

Third: Presence of Probation Officer

In Jordanian juvenile law, the presence of a probation officer is essential for guaranteeing that the juvenile justice system adheres to the principle of prioritising the best interests of the juvenile. Probation officers play a key role in the rehabilitation and monitoring of juvenile offenders, providing necessary guidance and support throughout the various stages of the criminal proceedings. Likewise, Article 7 of Directive (EU) 2016/800, Article 10(b) of the Jordanian Juvenile Law, requires the presence of a probation officer with the juvenile at all stages of the criminal process.

31 Ibrahim Harb Mohsen, *Procedures for Pursuing Delinquent Juveniles in the Pre-Trial Stage: Inquiry and Investigation* (Dar Al Thaqafa Publishing and Distribution 1999) 51.

32 UNCRC (n 2) art 37.

33 Doha Jamal Muhammad Hamed, 'Procedural Safeguards for Juveniles in Palestinian Legislation in Light of the Best Interests of the Child (An Analytical Study in Light of International Standards)' (master's thesis, Arab American University, Faculty of Law 2023) 17.

34 Suhair Amin Muhammad Tubasi, 'Reformative Justice for Juveniles under Jordanian Criminal Laws' (PhD thesis, University of Jordan, Faculty of Graduate Studies 2015) 70.

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The law assigns specific tasks to probation officers, including preparing two types of reports: comprehensive reports and follow-up reports.[35] These reports are crucial for determining the most appropriate reformative measures for juveniles in need of care.[36] This provision aligns with modern criminal policy objectives, emphasising rehabilitation over punishment.[37]

Establishing this guarantee is especially beneficial as it focuses on diagnosing the underlying causes of juvenile delinquency and selecting the most suitable measures for rehabilitation and reform. By prioritising the juvenile's best interests, probation officers—who are experts in psychological and social fields—can provide personalised interventions to address the root causes of delinquent behaviour. This approach not only aligns with the core principles of juvenile justice but also emphasises rehabilitation over punishment, ensuring that juvenile offenders are treated with care and their successful reintegration into society is facilitated.

Fourth: Settlement of Juvenile Disputes

The settlement of juvenile disputes refers to the legal and social mechanisms through which conflicts involving juveniles, whether as offenders or victims, are resolved without resorting to lengthy and punitive legal processes. In many legal systems, including Jordanian law, the aim is to protect the juvenile's best interests by offering alternative methods of conflict resolution that focus on rehabilitation rather than punishment. In Jordan, the settlement of juvenile disputes is governed by specific laws designed to ensure that juveniles are treated fairly, their rights are protected, and their development is not harmed by prolonged involvement in the legal system. Juvenile disputes can involve a wide range of issues, from criminal offences committed by minors to conflicts between juveniles and other parties, such as victims or families.

35 As part of the probation officer's report, an assessment should be conducted to determine whether the juvenile has any physical, intellectual, or psychological disabilities. This evaluation is essential to ensure that the juvenile receives the necessary support and rehabilitative services in accordance with their best interests and applicable legal standards, including national laws and international obligations such as the Convention on the Rights of the Child. In cases where a disability is identified, the report should include clear and direct recommendations to the relevant authorities on the appropriate measures to be taken. These recommendations should address how to effectively manage the juvenile's case considering their specific needs and circumstances, ensuring their rights are protected and their rehabilitation is supported in a manner that is both just and humane. If the probation officer fails to fulfil any of the duties assigned to them, the court may request their replacement and address the Minister of Social Development to take the appropriate disciplinary action against them. See, Jordanian Law no 32 of 2014 (n 12) art 11.

36 Instructions for Determining the Requirements and Information that Must Be Included in Probation Officers' Reports [2015] Official Gazette 500, art 3.

37 Ahmed Abdel Latif Al-Faqi, *The Public Prosecution and the Rights of Crime Victims* (Dar Al-Fajr Publishing and Distribution 2003) 23.

To this effect, Articles 13 and 14 of the Jordanian Juvenile Law No. (32) of 2014 allows for the settlement of juvenile disputes through the Juvenile Police Unit, aiming to implement more restorative and rehabilitative measures for juvenile offenders, moving away from a purely punitive approach. However, certain conditions must be met before the settlement process can proceed. These conditions ensure the settlement is voluntary, confidential, and based on mutual consent. Additionally, it applies only to contraventions and misdemeanours punishable by imprisonment for up to two years, where the initiation of the criminal case depends on a complaint from the victim or their representative.

Arguably, while this mechanism contributes to promoting rehabilitation and safeguarding juveniles' rights throughout the process, there is room for improvement in Jordanian law to adopt a more effective approach. Specifically, Article 13 of the Jordanian Juvenile Law should be amended to expand the scope of settlement to include all misdemeanours, rather than limiting it to those punishable by imprisonment of up to two years. Furthermore, the Dispute Resolution System in Juvenile Cases, No. 112 of 2016, explicitly excludes crimes against morality and public decency from the settlement process.[38] However, it can be contended that the sensitive and private nature of these crimes, both personally and socially, warrants their inclusion within the scope of settlement procedures to better address the needs of the affected parties.

Additionally, Article 7(B) of the Dispute Resolution System in Juvenile Cases No. 112 of 2016 states: "The settlement agreement between the parties to the dispute referred to in paragraph (A) is subject to the provisions of the civil settlement contract as outlined in the applicable legislation..."[39] This approach warrants reconsideration, as even though settlements made before the police fall under the framework of a civil settlement contract, it does not preclude the injured party from seeking compensation at a later stage.[40]

This is because settlement procedures are treated as confidential, and any statements, discussions, or waivers of rights made by the disputing parties during these procedures cannot be used as evidence in any court or before any authority, as stipulated in Article 14(a) of the Juvenile Law No. 32 of 2014. Moreover, the settlement agreement does not require judicial approval, rendering it essentially a certificate issued by law enforcement officers (police) documenting reconciliation between the parties. For a settlement agreement to effectively serve as a mechanism to bypass lengthy criminal proceedings, it should be subject to judicial approval. This would enhance its credibility and ensure fairness in its implementation.

38 Dispute Resolution System in Juvenile Cases no (112) of 2002, art 5(D) <https://psd.gov.jo/media/izpfv35o/5-1.pdf> accessed 15 March 2025.

39 ibid, art 7(B).

40 Muhammad Khalil Yousef Abu Bakr, 'The Conclusion of a Mediation Agreement before Appearing before the Judicial Authorities under the Jordanian Legislations' (First International Forum "Alternative Justice as an Exceptional Measure for Judicial Work", Al-Zaytoonah University of Jordan 2018) 18.

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Although the Jordanian Juvenile Law appears to align with international conventions on the rights of juveniles, a closer examination reveals room for improvement. Additional guarantees could be incorporated into the law to further enhance the protection of juveniles during police investigations. These guarantees include the following:

First: The Necessity of Legal Representation

Examining the provisions of the Jordanian Juvenile Law reveals that the law does not guarantee legal representation to juveniles during the preliminary investigation stage. This oversight starkly contrasts with Article 6 of Directive (EU) 2016/800, which ensures that children involved in criminal proceedings can access legal assistance from the outset.[41] The right to defend oneself is recognised as subordinate to the presumption of innocence, which underpins criminal proceedings, according to which no one is guilty unless the contrary is evident. The right to an attorney is recognised as a fundamental right in international human rights instruments and most countries' criminal procedural laws.[42] For instance, Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR) states: "Everyone charged with a criminal offence shall have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."[43] The right to legal assistance during this stage is essential for effectively safeguarding juveniles' procedural rights before law enforcement agencies. Thus, it is highly recommended that the Jordanian Juvenile Law be revised in accordance with Article 37(d) of the UNCRC and Beijing Rule No. 7 to effectively address this contentious issue and ensure the law's intended purpose is upheld throughout all criminal proceedings.

Second: Medical Examination Before and After Police Preliminary Inquiries

Any authority where a juvenile is detained is required to provide the necessary health and medical examination, if needed, in accordance with Article 4(w) of the current Jordanian Juvenile Law, which aligns with Article 6 of the EU Directive 2016/800. However, the medical examination should not be limited solely to cases where the juvenile explicitly needs care. Instead, this guarantee should be made mandatory and unconditional before and after the preliminary investigation stage. Subjecting the juvenile to a medical examination at

41 See also, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1, art 3.

42 Mouaid Muhammad Ali Al Qudah, Mamun Muhammad Said Abu Zaytun and Ahmad Musa Muhammad Hayjinah, 'Right to Legal Representation during Pre-Trial Stages: The Victim vs The Accused: Where Does The Law Stand?: A Critical and Comparative Review' (2018) 10(3) Jordan Journal of Law and Political Sciences 11.

43 International Covenant on Civil and Political Rights (UNGA Res 2200A (XXI), adopted 16 December 1966) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 15 March 2025.

these stages would ensure their well-being and serve as a direct oversight mechanism for the conduct of law enforcement personnel. This measure would help protect the juvenile from coercion during their testimony or interactions with law enforcement officials.

Third: Exclusion of Juveniles from the "Flagrante Delicto" Rules

The state of flagrancy in criminal cases is an exceptional situation that broadens the procedural scope for law enforcement officers under Article 28 of the Jordanian Criminal Procedures Law. In such cases, officers are granted additional powers typically reserved for public prosecutors, including arresting suspects without a warrant and entering and searching premises without a warrant (Articles 44, 46, 99, 100). These powers apply broadly, encompassing all suspects, including juveniles, under Article 43 of the juvenile law. However, given these procedures' inherent severity and firmness, it is arguable that their application to juveniles, without a doubt, undermines the principle of acting in the child's best interests. The purpose of pursuing juveniles who commit unlawful acts is reform and rehabilitation, which calls for a less harsh, gentler, and lenient approach.[44] This approach is applied in some comparative laws, such as the Algerian Child Protection Law 2015, Article 64, which states that "the procedures for flagrante delicto are not applied to crimes committed by a child."[45]

3.1.2. Guarantees During Public Prosecution Investigations

In Jordanian law, the doctrine of the best interests of the juvenile continues to be upheld during the public prosecution investigation phase. Several legal provisions ensure that juveniles' rights are safeguarded and treated fairly, with particular emphasis on protection, rehabilitation, and avoiding harm during the investigation process. The following discussion addresses each of these guarantees in turn.

First: Safeguards Pertaining to the Search and Seizure of Materials

A review of the Jordanian Juvenile Law reveals that it contains no specific provisions governing procedures for the search and seizure of materials related to crimes committed by juveniles. Instead, the general rules outlined in the Jordanian Code of Criminal Procedure No. 9 of 1961 are applied. This is affirmed by Article 43 of the Jordanian Juvenile Law No. 32 of 2014, which states: "The provisions of the Criminal Procedures Law apply to all situations not explicitly governed by this law."

44 Thaer Saud Al-Adwan, *Juvenile Criminal Justice: A Comparative Study* (Dar Al Thaqafa Publishing 2012) 134.

45 Law of the Algerian Republic no 15-12 of 15 July 2015 on Child Protection [2015] Official Journal 39/4; Dalali Al-Jalali, 'The Role of Restorative Justice Principles in Reducing Juvenile Delinquency and Protecting Children at Risk According to Law no 15/12 on the Protection of the Child' (2021) 13(2A) Academic Journal of Social and Human Studies 280.

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A closer analysis of these articles reveals various guarantees and requirements that must be upheld during the search and seizure process, including cases involving juveniles. These guarantees include, for example:

- A warrant from the public prosecutor is required before entering and searching premises, except in cases where the accused is caught in the act (Article 81).
- Only the premises of the suspect may be entered and searched (Articles 81 and 82).
- The presence of the accused or their representative during the search and seizure is mandatory, along with their signature on the report (Articles 83, 84, 85).
- The search must be limited to materials directly related to the crime under investigation (Articles 87–89).
- The suspect must be confronted with the seized materials, and both the prosecutor and the suspect must prepare and sign a detailed report (Article 32).

Second: Interrogating the Juvenile by a Specialised Public Prosecutor

The interrogation of juveniles should be conducted in an appropriate psychological environment that acknowledges their status as children in need of protection, rather than as criminals. It is reasonable for the public prosecutor to exercise discretionary power in specific procedures during the investigation, provided these actions are consistent with the juvenile's age and do not contravene the law.[46] Jordanian law has demonstrated significant attention to this issue. Article 7 of the Juvenile Law mandates that only members of the specialised public prosecution may handle juvenile cases. This ensures that investigations are conducted by qualified and trained personnel adept at dealing with juveniles in a manner appropriate to their developmental stage and understanding—distinct from the treatment of adults.

This approach aligns with Article 3 of the UNCRC, which obligates member states to prioritise the best interests of the child in all actions concerning children—whether undertaken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies.

It is also worth highlighting that Article 11(a) of the Juvenile Law requires a probation officer to submit a detailed written report to the public prosecutor at the start of an investigation involving a juvenile. This report must cover various aspects of the juvenile's life, including their personal conditions, family background, financial and social circumstances, upbringing environment, schooling, and educational level. This provision serves as a crucial safeguard, enabling the public prosecutor to gain a comprehensive understanding of the factors surrounding the juvenile's situation that may have contributed to the offence. Armed with this detailed report, the public prosecutor can make informed and appropriate decisions regarding the measures to be taken against the juvenile.

46 Al-Adwan (n 44) 147.

Third: Confidentiality of the Investigation Process

Confidentiality of the investigation means that the procedures are conducted privately, not in public. This principle is a fundamental aspect of the inquisitorial system and serves as a crucial safeguard to ensure the investigation is carried out appropriately, allowing it to proceed without unnecessarily compromising individuals' interests. Therefore, the investigation and its outcomes must remain confidential and cannot be disclosed by the investigator, public prosecutor, their staff, or anyone involved in the investigation, including employees, experts, and others.[47]

Although the Jordanian Juvenile Law does not specifically mandate the confidentiality of juvenile investigations as outlined in Article 14 of EU Directive 2016/**800**, this matter is governed by the general provisions of the Jordanian Code of Criminal Procedure (Article 64),[48] in accordance with Article 43 of the Juvenile Law, which stipulates that the general rules apply to all situations not explicitly addressed within its provisions.

Fourth: Right to Legal Assistance

Legal assistance is a crucial safeguard during the primary investigation and a fundamental aspect of the process (Beijing Rule No. 7; Article 6 of EU Directive 2016/**800**).[49] A lawyer enables the accused to defend themselves against charges, ensuring their right to self-defence. The lawyer's presence offers valuable support in this regard. Article 65 of the Code of Criminal Procedure stipulates that each party may be represented by only one lawyer before the public prosecutor, and the lawyer may address the investigation only with the investigator's consent.[50]

While the Jordanian Juvenile Law does not explicitly include an article guaranteeing this right, it is ensured under Article 65 of the Code of Criminal Procedure, as referenced in Article 43 of the Juvenile Law. This provision extends the rules outlined in the Code of Criminal Procedure to matters not specifically addressed in the Juvenile Law, ensuring that the same protections afforded to adult offenders also apply to juveniles. However, it is strongly recommended that the legislator amend the Jordanian Juvenile Law to include

47 UNCRC (n 2) art 40; The Beijing Rules (n 29) no 8; Namour (n 28) 372.

48 Art. 64 states that: "1: The accused, the person liable for damages, the civil claimant, and their legal representatives are entitled to attend all investigation procedures, except for witness testimonies. They may not speak during the proceedings unless granted permission by the public prosecutor. If such permission is denied, this must be officially recorded in the investigation minutes. 2: The persons mentioned above have the right to access and review the parts of the investigation that were conducted in their absence. 3: The public prosecutor may, in cases of urgency or when deemed necessary to uncover the truth, conduct the investigation without the presence of the aforementioned parties. This decision is final and not subject to appeal. However, upon completion of the investigation, the prosecutor is obligated to allow the concerned parties to review the proceedings".

49 See also, Directive 2013/48/EU (n 41) art 3.

50 Namour (n 28) 374.

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a specific provision mandating the public prosecution to appoint a lawyer for juveniles during the investigation stage if the juvenile, their guardian, or custodian does not do so. Additionally, any procedures conducted without the presence of a lawyer should be deemed null and void.

Fifth: Detention and Restraint of the Juvenile

Article 4(d) of the Jordanian Juvenile Law prohibits using restraints, force, or isolation on juveniles, except in cases where a delinquent juvenile demonstrates defiance or violence towards judicial authorities. Even in such cases, the law strictly prohibits excessive force, allowing only the minimum necessary to address the situation.

Regarding juvenile detention, the Jordanian law permits it under specific conditions:

- **Judicial Authorisation**: Any decision to detain a juvenile or place them in a juvenile care or rehabilitation facility must be issued by a competent judicial authority. This authority includes either the court specialising in juvenile cases or the public prosecution handling juvenile investigations. Thus, the Jordanian legislator restricts juvenile police from detaining or limiting a juvenile's freedom, delegating this authority exclusively to specialised judicial bodies, as outlined in Article 8 of the Jordanian Juvenile Law No. 32 of 2014.

- **Separate Facilities**: Detained and sentenced juveniles must be placed in facilities designated specifically for juveniles and kept separate from adult offenders at all stages of the trial process, including investigation, trial, and execution of the sentence. Article 5(a) of the Juvenile Law explicitly mandates this, in alignment with Article 37(c) of the UNCRC, Article 12 of EU Directive 2016/800, and Beijing Rule No. 13.

To safeguard delinquent juveniles from criminal contamination and ensure their welfare, the fourth provision of the Beijing Rules mandates the separation of detained juveniles from adult detainees in mixed facilities when separate juvenile facilities are unavailable. This provision also emphasises addressing the unique developmental needs of juveniles by providing appropriate social, educational, vocational, psychological, medical, and physical support tailored to their age, gender, and personality. In Jordan, Article 9(a) of the Juvenile Law requires that if the public prosecutor specialising in juvenile investigations decides to detain a juvenile, they must release the juvenile on bail, personal guarantee, or cash security to ensure their presence during investigation or trial unless detention is deemed necessary for the juvenile's best interests.

However, the public prosecutor's authority to detain a juvenile is limited to a maximum of ten days, as outlined in Article 9(d). This detention period may be renewed once for an additional ten days, provided the renewal decision is formally communicated to the juvenile care facility where the juvenile is held. If further detention is necessary for investigative purposes, the Juvenile Court may extend the juvenile's detention for up to ten days per

extension. Unlike the prosecutor, the court's authority to extend detention is not bound by a specific maximum duration, as the general rules of the Jordanian Code of Criminal Procedure do not apply to this matter. To address concerns over excessive detention, the Jordanian legislator recently amended Article 114 of the Jordanian Code of Criminal Procedure. This amendment introduces significant safeguards by limiting detention durations and preventing unwarranted extensions, reflecting a commitment to safeguarding the rights of the accused and promoting fair judicial practices.

3.1.3. Legal Guarantees During the Trial Stage

The trial stage is a critical phase in the administration of justice, particularly for juveniles or vulnerable individuals. Several guarantees are provided to ensure fairness, protect the rights of the accused, and uphold the integrity of the judicial process. The following discussion highlights some of these guarantees under Jordanian law.

First: Presumption of Innocence and the Right to Be Informed of Charges

The principle of presumption of innocence asserts that the accused is considered innocent until proven guilty.[51] This means that the burden of proof rests with the prosecution, and the accused must be acquitted if there is any reasonable doubt about their guilt. Additionally, in line with Article 40 of the UNCRC, Article 22 of the Juvenile Law grants accused juveniles the right to be informed of the charges against them in the presence of their lawyer, probation officer, guardian or custodian, or parent. This ensures they understand the allegations and can adequately prepare a defence. The accused also has the right to present evidence, challenge the prosecution's evidence, and testify in their defence. They cannot be compelled to testify against themselves or confess to a crime. These safeguards protect individuals from coercion or undue pressure during trial proceedings. This fundamental right ensures a fair trial process and upholds the individual's legal standing.

The combination of these rights—presumption of innocence, the right to be informed of charges, active participation in the trial, and protection from self-incrimination—ensures that the legal process remains fair and just for all individuals, including juveniles. They reflect the commitment to providing every accused person, regardless of age, with the means to defend themselves effectively and to avoid wrongful convictions. These principles not only align with national laws but also uphold international standards of justice, reinforcing the importance of safeguarding human rights in the legal system.

51 Jordanian Code of Criminal Procedure no 9 of 1961 (n 27) art 147. This rule is in line with Art. 40 of the UNCRC, Art. 48 of EU Charter of Fundamental Rights, and Beijing Rule No. 7.

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Second: Separate Juvenile Courts

Juvenile trials are conducted exclusively in juvenile courts overseen by specialised judges. In this regard, Article 15(a) of the Juvenile Law specifies that juveniles may only be tried before specialised courts.[52] In accordance with Article 20 of EU Directive 2016/800, the legislator underscores the importance of this provision by requiring judges in juvenile courts to have expertise in handling juvenile cases. This reflects the Jordanian legislator's commitment to appointing not only specialised judges but also ensuring that these judges possess the necessary experience in dealing with juveniles. Article 40(3) of the UNCRC reinforces this principle by obligating member states to establish a specialised and independent judicial authority or body to adjudicate juvenile cases. Additionally, the same article emphasises the need for prompt handling of juvenile cases and ensuring a fair trial in accordance with the law.

To this effect, Article 15 of the Jordanian juvenile law states that: "A. A juvenile shall only be tried before juvenile courts that are specialised in accordance with the provisions of this law. B. Judges of juvenile courts and execution of judgment judges in these courts shall be appointed from those with relevant expertise. C. Continuity of the same judge handling juvenile cases across various levels of juvenile courts shall be observed. D. At least one Juvenile Conciliation Court shall be established in every governorate, with jurisdiction over minor offences (contraventions, misdemeanours with penalties not exceeding two years, protective or care-related measures. E. A Juvenile Court of First Instance shall be established in the centre of each governorate, if necessary, with jurisdiction over Felonies and misdemeanours with penalties exceeding two years. F. Judgments issued by the Juvenile Conciliation and First Instance Courts are subject to the appeal and objection procedures stipulated in the Conciliation Court Law and the Criminal Procedures Law, as applicable. A guardian, custodian, or legal representative may act on behalf of the juvenile in these procedures. G. The geographical jurisdiction of the court is determined as follows: 1. The place where the crime occurred. 2. The place of residence of the juvenile, 3. where the juvenile was found, or the place of arrest, 4. The location of the care facility where the juvenile has been placed."[53]

Third: No Criminal Records for Juveniles Upon Conviction

Article 4(g)(1) of the Juvenile Law explicitly states that a juvenile's conviction should not be recorded as part of a criminal record. This provision marks a departure from the general rules applied to adults. The legislator aims to prevent juveniles from being stigmatised by their actions, ensuring their future opportunities are not jeopardised and facilitating their rehabilitation and reintegration into society as contributing members.

52 Judgment no 3098/2018 [2018] Jordanian Court of Cassation; Judgment no 1985/2018 [2018] Jordanian Court of Cassation.

53 Jordanian Law no 32 of 2014 (n 12) art 15.

This approach is grounded in the understanding that juveniles are often victims of circumstances that led them to commit offences. To support this perspective, the legislator has excluded juveniles from the Penal Code's provisions on rehabilitation and recidivism, emphasising a more rehabilitative and protective approach to juvenile justice.[54]

Fourth: Confidentiality of the Trial

Unlike the general provisions of the Jordanian Code of Criminal Procedure, which require trials to be public, Article 17 of the Juvenile Law mandates that juvenile trials be conducted privately, in accordance with Article 40(b)(vii) of the UNCRC and Article 14 of EU Directive 2016/800. Any violation of this rule results in the trial being deemed null and void.[55] The only individuals permitted to attend are the probation officer, the juvenile's lawyer, their parents, legal guardian, or custodian, and those deemed by the court to have a direct interest in the case. This provision aims to protect the privacy of the juvenile and prevent unnecessary public exposure.

Fifth: Speedy Trial

The principle of expediting legal procedures is one of the foundations upon which the Juvenile Law is based, aiming to quickly resolve juvenile cases in comparative laws such as the French law.[56] Under Article 40/b (iii) of the UNCRC, Article 13 of EU Directive 2016/800, and Beijing Rule (No.20), the Jordanian legislator has given priority to juvenile cases by classifying them as urgent under Article 4(i) of the Juvenile Law. This law mandates that misdemeanour cases (crimes punishable by imprisonment for up to three years) be resolved within three months, and felony cases (crimes punishable by imprisonment for up to 15 years, life imprisonment, or the death sentence) within six months from the date of filing, unless a conclusive medical report or witness testimony is still pending.

In general, felony cases must be concluded within six months, and misdemeanour cases within three months. While swift justice is crucial, strict time limits may hinder the court's ability to make well-informed decisions, especially when cases require more time for thorough investigation. Therefore, the legislator should reconsider the time limits set in Article 20(b) of the Juvenile Law and allow extensions when necessary.

Additionally, the law restricts the court's ability to postpone trial sessions to no more than seven days, except when necessary, and mandates that the reasons for any postponement be documented in the trial record.

Article 22(a) of the Juvenile Law further strengthens safeguards for juveniles by ensuring that no juvenile can be tried without the presence of a parent, guardian, custodian, or

54 Al-Adwan (n 44) 195.

55 Judgment no 1356/2019 [2019] Jordanian Court of Cassation.

56 Alzytoni (n 9) 327.

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caregiver, along with a probation officer and the juvenile's lawyer. This safeguard is essential for protecting the juvenile's psychological well-being and ensuring that decisions are fair, in line with Article 37 of the UNCRC.

A positive development in the Juvenile Law is the introduction of Article 19, which allows the court to hold sessions on weekends, official holidays, or evenings if the juvenile's best interests require it. This demonstrates the legislator's commitment to prioritising the juvenile's rights and welfare throughout the judicial process.

Sixth: Separation of Juveniles from Adults During Trials

In cases of criminal complicity or joint criminal actions, Article 16 of the Jordanian Juvenile Law mandates that when juveniles and adults are involved in the same crime or related offences, they must be separated by a decision from the public prosecution. This provision mandates the creation of a distinct case file for each juvenile involved, which is then processed independently and tried in the juvenile court. This separation aims to uphold the principle that juveniles are not subjected to the same legal framework as adults, safeguarding their rights and ensuring a more rehabilitative approach to their justice process.

Seventh: Privacy Protections

In addition to mandating that all juvenile criminal hearings be held in private, as stipulated in Article 17 of the Juvenile Law, Article 4(h) further prohibits the publication of a juvenile's name or picture during any phase of criminal proceedings, including police inquiries, public prosecution investigations, and the trial stage.[57] This provision is designed to safeguard the juvenile's privacy and prevent unnecessary public exposure, which could negatively impact their reputation and impede their rehabilitation. It aligns with international standards that stress the importance of shielding juveniles from media scrutiny and stigmatisation, ensuring that their rights are upheld throughout the legal process. That is, records of juvenile offenders must remain strictly confidential and inaccessible to third parties. Access shall be restricted to individuals directly involved in the case's resolution or other duly authorised personnel. [58]

Eighth: Right to Legal Representation

According to Article 21(a) of the Juvenile Law, the court must appoint a lawyer for a juvenile in all criminal cases if the juvenile has not chosen an attorney or cannot afford one. The court is responsible for covering the attorney's fees as stipulated by the Code of Criminal Procedure. The appointed lawyer must be present during the trial and is required to

57 Judgment no 462/2006 [2006, 2 May] Jordanian Court of Cassation.
58 The Beijing Rules (n 29) no 21.

effectively defend the juvenile.[59] This provision aligns with Beijing Rule No. 7, Article 6 of EU Directive 2016/800,[60] and Article 40(3) of the UNCRC, which states that a juvenile cannot be tried without legal counsel or appropriate assistance and must have the presence of their parents or legal guardians, unless it is deemed contrary to the best interests of the child, particularly considering their age or condition.

3.2. Guarantees After Concluding the Criminal Case

After the criminal proceedings have concluded, the juvenile's best interests remain a primary concern, particularly in relation to their placement and the penalties they may face. Jordanian law ensures that juveniles are not treated in the same manner as adult offenders, and their rehabilitation and reintegration into society are prioritised.

3.2.1. Placement in Specialised Care Facilities

Jordanian Juvenile Law prioritises rehabilitation over punishment by mandating the placement of juveniles in specialised care facilities instead of adult prisons. These institutions provide educational, psychological, and social support to aid reintegration into society.[61] Under Articles 25 and 26, juveniles convicted of serious crimes may be placed in reform institutions, with sentences ranging from 5 to 10 years for felonies punishable by life imprisonment and 8 to 10 years for felonies punishable by death. Courts may also impose alternative non-custodial measures, such as parental supervision or community service, recognising the importance of individualised rehabilitation while ensuring accountability.[62]

3.2.2. Alternative Penalties and Community Service

Furthermore, in line with Beijing Rule No. 18, in addition to the lenient and reduced sentences that may apply to juvenile offenders, the alternative penalties available to juveniles under the Jordanian juvenile law (Articles 24, 25, 26) reflect a shift away from

59 Judgment no 834/2018 [2018, 4 June] Jordanian Court of Cassation.

60 See also, Directive 2013/48/EU (n 41) art 3.

61 These institutions currently operate under the authority of the Ministry of Social Development in accordance with the Jordanian Juvenile Law. However, it may be proposed that they be restructured as independent bodies, possessing their own administrative frameworks and financial budgets. This transformation could enhance their operational autonomy, improve the quality and consistency of services provided to juveniles, and allow for more specialized and accountable management. Independence may also foster better coordination with other justice and welfare institutions, contributing to more effective rehabilitation and reintegration of juvenile offenders. See, Ibrahim Kamel Al-Shawabkeh and Mouaid Al Qudah, 'Independent Regulatory Bodies in the Jordanian Legal System: An Evaluative Review' (2023) 9(2) International Journal of Public Law and Policy 188, doi:10.1504/IJPLAP.2023.130014.

62 Jordanian Law no 32 of 2014 (n 12) arts 25, 26. See for more details: Azah Adnan Al-Shami, 'The New Measures and Penalties in the Jordanian Juvenile Law no 32 of 2014' (master's thesis, Middle East University, Faculty of Law 2014) 93.

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traditional punitive measures. These alternatives may include community service, probation, or other rehabilitative measures that address the underlying causes of delinquency. The goal is to support the juveniles' personal growth and reintegration into society, rather than subjecting them to the harsh conditions of conventional detention, which could potentially harm their prospects.

Under the Jordanian Juvenile Law, all measures imposed on juvenile offenders—whether custodial or non-custodial—are carried out under the supervision and authority of the execution judge (Articles 27, 30, 32). This ensures that every action taken respects the legal safeguards afforded to juveniles, aligns with their best interests, and adheres to the principles of justice and rehabilitation. The execution judge plays a central role in monitoring the implementation of these measures, reviewing their appropriateness, and making necessary adjustments to promote the juvenile's reintegration into society while safeguarding their rights.[63]

The law aims to prevent recidivism and provide a more constructive path forward for young offenders by prioritising their well-being and focusing on rehabilitative rather than punitive measures. These guarantees underscore the importance of treating juveniles in a manner that respects their age, potential for change, and right to a fair chance at reintegration.

63 Art. 27 states that: "The competent execution judge must visit juvenile rehabilitation and care centers, as stipulated in this law, within their jurisdiction on a regular basis—at least once every three months. A report on each visit must be submitted to the President of the Judicial Council, with a copy also provided to the Minister." Art. 29 states that: "A. Following the issuance of the judgment related to the juvenile, the execution judge shall have the following duties and powers: 1: To monitor the enforcement of any measure or procedure imposed on the juvenile in accordance with the provisions of this law or other applicable legislation. 2.To continuously verify the juvenile's compliance with the conditions of the judgment. The judge may assign a probation officer to carry out this task and submit the necessary reports. B. The juvenile shall remain free during the period of enforcement of any non-custodial sentence". Art. 32 states that: "A. The execution judge may authorize the release of a juvenile from a rehabilitation center after consulting the center's director, provided all the following conditions are met: 1. The juvenile has demonstrated good behaviour during their stay. 2.The juvenile has served at least one-third of their sentence. 3.The release does not pose any risk to the juvenile's life or safety. 4. The juvenile was not convicted of an offense punishable by death or by a sentence of imprisonment for fifteen years or more [This is the original penalty prescribed by law for the offense, which must be reduced when sentencing a juvenile offender to a more lenient punishment] . B. The execution judge is required to periodically review, at least once every three months, the cases of juveniles serving custodial measures to evaluate their eligibility for release based on the conditions outlined in paragraph (A). C. A probation officer in the juvenile's area of residence shall supervise and guide the juvenile throughout the remainder of the sentence following release. D. If the execution judge finds that the juvenile is not complying with the terms of release, the judge shall issue a warning and may revoke the release order. In such a case, the juvenile shall return to complete the remaining custodial sentence, with the time spent in compliance deducted from the total sentence, in accordance with the procedures specified in this article. E. Any decision by the execution judge to deny release or to return a juvenile to a rehabilitation center may be appealed before the competent Court of Appeal…" See, Jordanian Law no 32 of 2014 (n 12).

The introduction of alternative juvenile penalties reflects a thoughtful and deliberate approach to juvenile justice, which aligns with international conventions such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the UNCRC. These frameworks emphasise the importance of rehabilitation, proportionality in sentencing, and avoiding unnecessary deprivation of liberty, enhancing the offenders' sense of responsibility.[64]

4 CONCLUSION

This study highlights that Juvenile Law No. 32 of 2014 provides a comprehensive legal framework aimed at protecting the best interests of juveniles throughout all stages of criminal proceedings, with the trial stage demonstrating the highest level of compliance with this principle compared to earlier phases. The law reflects a strong commitment to protecting the rights and welfare of juveniles through several key principles. A fundamental aspect of the law is the recognition of juveniles' human dignity. It strictly prohibits using restraints, force, or isolation against juveniles and ensures the confidentiality of legal proceedings by banning the publication of their names or images.

In addition, the law prioritises juvenile health, requiring institutions responsible for juveniles to provide proper medical care and refer them to specialised services, regardless of their condition. To support rehabilitation and reintegration, the law severes ties between a juvenile's criminal past and adulthood. Convictions during juvenility do not constitute criminal records, recidivism laws do not apply, and all related records must be erased once the juvenile reaches the age of 18. This ensures that past offences do not create barriers to future opportunities.

Additionally, the law mandates strict separation between juveniles and adults in detention or sentencing. Juveniles must remain apart from adults at all stages of investigation, trial, and imprisonment. Furthermore, they must be categorised based on case severity, ensuring that detainees are housed separately from those serving sentences. Prioritising the juvenile's best interest is a guiding principle in court decisions, ensuring that legal measures focus on rehabilitation rather than punishment. In line with this, juvenile cases are treated as urgent matters, requiring expedited handling to prevent prolonged legal uncertainty.

64 Fatuh Abdullah Al-Shadhili, *United Nations Rules for the Administration of Juvenile Justice* (Dar Al-Matbouat 2006) 66; Jean Chazel, *Delinquent Childhood* (Awadid Publications 1983) 10; Samia Jabari, 'The Role of Community Service in Reducing Juvenile Delinquency' (master's thesis, University of Djilali, Faculty of Social and Human Sciences 2017) 41; Mohamed Salama Ghabari, *Social Service and the Care of Family, Childhood, and Youth* (Modern University Office Alexandria 2011) 66; Beghacheme Zeggay, 'Review of Measures as a Protection Mechanism for the Delinquent Child After the Criminal Trial' (2023) 7(1) International Journal of Legal and Political Research 594.

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Recognising the vulnerability of juveniles in legal proceedings, the law guarantees **legal representation** for all juveniles during the trial stage. If a juvenile lacks a lawyer, the state is responsible for appointing one and covering the associated fees. Moreover, the law introduces **specialised procedures and rehabilitative measures** to enhance juvenile justice. It establishes dedicated police units, public prosecutors, and courts exclusively for juvenile cases. Juvenile offenders are also subject to reduced criminal sentences alongside structured rehabilitation programs designed to support their reform and reintegration into society. Through these provisions, **Juvenile Law No. 32 of 2014** reinforces a justice system that is not merely punitive but fundamentally protective and rehabilitative, ensuring that juveniles receive fair treatment, essential support, and the opportunity for a second chance.

Although the Jordanian Juvenile Law No. 32 of 2014 aligns with international standards aimed at serving the best interests of juveniles, closer analysis reveals areas where amendments are necessary to enhance its effectiveness and ensure more comprehensive protection for juveniles in Jordan. One crucial reform involves mandating legal representation at all stages of criminal proceedings, not just during the trial, and extending this requirement to all offences rather than limiting it to serious felonies. This would guarantee consistent legal protection and advocacy throughout the justice process.

Additionally, the law should introduce stricter limitations on juvenile detention periods, with enhanced judicial oversight to prevent excessive detention. Specifically, Article 9(c) should be revised to state that while the public prosecutor may renew the detention period once, any further extension must be approved by the court, ensuring that the total detention period does not exceed three months under any circumstances.

Another significant amendment concerns the juvenile dispute resolution system, which currently excludes crimes against morals and public decency under Article 5(d). Given the sensitive nature of such offences, it is advisable to include them within the dispute resolution framework to avoid lengthy trial procedures, while also requiring judicial oversight of settlement agreements arranged by the police. Furthermore, expanding the jurisdiction of the settlement court to cover all misdemeanours, rather than limiting it to offences punishable by a maximum of two years' imprisonment, would enhance access to restorative justice mechanisms. Similarly, Article 15(d) should be amended to extend the jurisdiction of Juvenile Conciliation Courts to all misdemeanours, ensuring a broader application of restorative justice principles.

Additionally, the law should mandate medical examinations for juveniles before and after police inquiries to safeguard their physical and mental well-being and provide documented evidence in cases of mistreatment. Lastly, juveniles should be excluded from applying flagrante delicto provisions, as such rules prioritise expedited procedures that may compromise essential safeguards and the rehabilitative approach central to juvenile justice.

These reforms would significantly improve the Jordanian Juvenile Law by strengthening legal protections, ensuring procedural fairness, and prioritising the best interests of juveniles within the justice system.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

НАЙКРАЩЕ ЗАБЕЗПЕЧЕННЯ ІНТЕРЕСІВ ДІТЕЙ: ОЦІНКА ЙОРДАНСЬКОГО ЗАКОНОДАВСТВА ЩОДО НЕПОВНОЛІТНІХ ВІДПОВІДНО ДО КОНВЕНЦІЇ ПРО ПРАВА ДИТИНИ

Муаїд Аль Кудаг, Ібрагім Аль-Шавабкех, Могаммад Алькрішег, Мамун Абу-Зейтун та Агмад Закібг

АНОТАЦІЯ

Вступ. *Принцип «найкращого запезбечення інтересів дітей» є наріжним каменем йорданського законодавства, що відображає зобов'язання країни захищати права та благополуччя дітей. Закріплений у Законі про неповнолітніх № 32 від 2014 року та у міжнародних зобов'язаннях за Конвенцією ООН про права дитини (UNCRC), цей принцип гарантує, що права, розвиток та захист неповнолітніх мають пріоритет у судових, соціальних та адміністративних рішеннях. Йорданське законодавство наголошує на реабілітації, а не на покаранні, зосереджуючись на соціальній реінтеграції неповнолітніх правопорушників з урахуванням їхніх психологічних потреб та необхідності розвитку.*

Методи. *У цій статті досліджується, як принцип «найкращого забезпечення інтересів дітей» втілюються в йорданському законодавстві, аналізуються його сильні сторони та проблеми відповідно до міжнародних стандартів. У роботі підкреслюється важливість міждисциплінарного підходу, зокрема правових, соціальних та*

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психологічних аспектів, для забезпечення дотримання прав дітей на всіх етапах кримінального провадження. З огляду на характер дослідження, було застосовано кілька дослідницьких підходів, включно з аналітичним підходом для вивчення всіх законодавчих статей, що стосуються теми для того, щоб визначити їхній зміст, значення та цілі. Крім того, було використано порівняльний підхід для аналізу відповідних національних законів та міжнародних конвенцій щодо неповнолітніх правопорушників з метою надання критичного аналізу та коментарів.

Результати та висновки. *Результати статті свідчать про те, що принцип «найкращого забезпечення інтересів дітей» функціонує як основоположне право, ключовий правовий стандарт тлумачення та процесуальна основа. Однак його застосування варіюється на різних стадіях кримінального провадження за йорданським законодавством, причому стадія судового розгляду демонструє краще дотримання цього принципу порівняно з попередніми стадіями кримінального провадження. Рекомендується переглянути Закон Йорданії про неповнолітніх та додати до нього чіткі положення, що забезпечують юридичне представництво неповнолітніх на всіх етапах кримінального провадження, охопивши всі види правопорушень під час судового розгляду, а не лише тяжкі злочини. Закон також повинен обмежити повноваження державних прокурорів щодо продовження терміну тримання неповнолітніх під вартою, розширити юрисдикцію судів із питань примирення неповнолітніх, додавши до неї всі проступки, а не лише ті, що караються позбавленням волі на строк до двох років, а також звільнити неповнолітніх від застосування правил щодо затримання на місці злочину.*

Ключові слова: *найкраще забезпечення інтересів дітей, Конвенція про права дитини, ювенальне право Йорданії, юридичне представництво, права дітей, реабілітація неповнолітніх.*

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Research Article

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN KAZAKHSTAN: A COMPARATIVE LEGAL ANALYSIS OF EUROPEAN AND ASIAN MECHANISMS

Azamat Nurtan* and Maygul Abilova

ABSTRACT

Background: *Enhancing the efficiency of Kazakhstan's recognition and enforcement of foreign court and arbitral awards relies significantly on expanding international cooperation. In the context of increasing global legal integration, this strategy is vital not only for supporting the country's foreign economic activities but also for increasing foreign partners' confidence in Kazakhstan's judicial system. Currently, Kazakhstan is a party to key treaties including the 1958 New York Convention, the 1965 Washington Convention, and the 1993 Minsk Convention. However, it has yet to join the 2019 Hague Convention—a modern, universal mechanism supported by numerous countries, including EU member states and the United States—which could further streamline cross-border enforcement processes.*

Methods: *To achieve the objectives, a comparative legal analysis was conducted on the mechanisms for recognising and enforcing foreign arbitral awards in Kazakhstan and leading arbitration jurisdictions across Europe and Asia. This analysis used official court databases from Kazakhstan, AIFC and IAC, as well as supplementary data from court archives, institutions (KIAC, ICC, SIAC), and the CLOUT abstracts, enabling a comprehensive comparison with Asian and European jurisdictions. The study employed methods such as statistical analysis of refusals under Article 501 of the Civil Procedure Code, and a comparative review of national legislation against the provisions of the New York Convention and UNCITRAL.*

Results and Conclusions: *Analysis indicates that over 40% of refusals to recognise and enforce foreign arbitral awards in Kazakhstan are due to vague interpretations of public policy and procedural obstacles, whereas in pro-arbitration jurisdictions across Europe and Asia, such refusals do not exceed 10%. The proposed Kazakhstan Arbitration Enforcement Mechanism (KAEM) includes clarifying criteria for refusals and decision-making based on Article V of the New York Convention, introducing accelerated electronic procedures via a unified e-Justice portal, establishing specialised judicial training programs, and implementing a mechanism for returning awards to arbitral tribunals to address formal obstacles rather than automatic refusals. The authors suggest expanding the contractual framework, acceding to new international conventions, adopting progressive mechanisms from the EU and UNCITRAL, and integrating digital solutions to enhance Kazakhstan's legal enforcement practices, boost its attractiveness as a regional arbitration hub, and strengthen legal certainty and foreign investor confidence.*

1 INTRODUCTION

The relevance of this research topic stems from the urgent need to enhance the system for recognising and enforcing foreign arbitral awards in Kazakhstan, which is fundamental to establishing an effective arbitration framework aligned with the country's international legal commitments. The issue of enforcing international norms, particularly mechanisms for enforcing arbitral awards, becomes increasingly significant amid Kazakhstan's expanding economic relations with China, Turkey, the United Arab Emirates, the United Kingdom, and other countries.

Despite Kazakhstan's ratification of key international conventions such as the 1958 New York Convention,[1] the 1965 Washington Convention,[2] and the 1993 Minsk Convention,[3] it has yet to accede to the 2019 Hague Convention.[4] This limits the effective application of international standards, creating legal uncertainty and hindering the further development of cross-border justice.

The system for recognising and enforcing foreign arbitral awards in Kazakhstan continues to encounter a range of legal and technical challenges, including the absence of clear reciprocity criteria, the requirement to adhere to strict notification procedures, and vague

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (10 June 1958) <https://www.newyorkconvention.org/english> accessed 2 April 2025.

2 Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention) (18 March 1965) [1966] UNTS 575/159.

3 Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases (Minsk Convention) (22 January 1993) <https://www.unhcr.org/media/convention-legal-aid-and-legal-relations-civil-family-and-criminal-cases-adopted-minsk-22> accessed 2 April 2025.

4 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague Convention 2019) [2022] OJ L 187/4.

interpretations of public policy.[5] For instance, Kazakhstani courts often demand paper-based or notarised notifications, despite the fact that countries such as China, the UK, and the US adopt more flexible approaches in this regard.[6] Additionally, there is a tendency to interpret public policy broadly, leading to refusals to recognise decisions of foreign courts and arbitral bodies even when those decisions align with international standards. For example, in several cases involving the recognition of Chinese and Singaporean arbitral awards, Kazakhstani courts have cited concerns about threats to economic stability or violations of other "state interests"—an approach that contradicts established international practice.[7]

The significance of this study lies in the need for a comprehensive analysis of Kazakhstan's law enforcement practices concerning the enforcement of foreign arbitral awards. Further development of theoretical research is also essential, as existing studies primarily focus on theoretical and methodological foundations but lack practical mechanisms to address legal conflicts arising from the application of reciprocity principles and the interpretation of public policy.[8] Bridging this gap in theoretical understanding is particularly relevant not only for Kazakhstan's legal system but also for the broader field of international arbitration.

The practical relevance of this research stems from its focus on addressing specific issues within Kazakhstan's judicial practice related to the recognition and enforcement of foreign arbitral awards. In the context of globalisation and growing economic ties,[9] it is crucial for

5 Dinmukhamed Aktay and Azamat Nurtan, 'Recognition and Enforcement of Foreign Arbitral Awards: The Practice of Applying the New York Convention of 1958 (By the Example of Comparison of the Legislation and Practice of China and Kazakhstan)' (*ResearChgate*, November 2023) <https://www.researchgate.net/publication/375494529> accessed 20 May 2025; Luca G Radicati di Brozolo and Flavio Ponzano, 'How to Assess the Res Judicata Effects of International Arbitral Awards: Giving Concreteness to an Autonomous Approach' (2024) 40(4) Arbitration International 409, doi:10.1093/arbint/aiae020.

6 Madi Kenzhaliyev, 'Perspectives of the Court of the Astana International Financial Centre: Potential to Transform the Central Asian Legal Landscape' (2024) 19 Asian Journal of Comparative Law 160, doi:10.1017/asjcl.2023.37.

7 Riza Marhaba and Zhuldyz Sairambaeva, 'Legal Mechanisms of Functioning of the AIFC Arbitration System' (2024) 110(2) Journal of Actual Problems of Jurisprudence 173, doi:10.26577/japj2024-110-b-016; Ardak Shaimenova and others, 'Development of the Institution of Arbitration in Kazakhstan: Problems of Theory and Practice' (2020) 11(1) Journal of Advanced Research in Law and Economics 169, doi:10.14505//jarle.v11.1(47).21.

8 David N Luder and Louis Christe, 'US Courts' Assistance to International Arbitrations: Recent Developments and Impact on Arbitrations Seated in Switzerland' (2022) 40(4) ASA Bulletin 777, doi:10.54648/asab2022070; Maidan Suleimenov and others, 'Recognition and Enforcement of Arbitration Awards in Kazakhstan' (2018) 5(5) The Journal of Social Sciences Research 358; Yi Tang, 'Charting a New Legal Order: ASEAN's Arbitration Reform in Taming the "Unruly Horse" of Public Policy Exception' (2024) 41 Chinese (Taiwan) Yearbook of International Law and Affairs 112, doi:10.1163/9789004719934_006.

9 Ljuben Kocev, 'Challenges in the Process of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of North Macedonia' in Marc Bungenberg and others (eds), *Alternative Dispute Resolution in the Western Balkans: Trends and Challenges* (European Union and its Neighbours in a Globalized World, Springer 2025) 67, doi:10.1007/978-3-031-76345-8_5.

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Kazakhstan to develop a legal framework aligned with international standards, as this would help enhance the investment climate, reduce legal uncertainty, and improve the predictability of judicial decisions.

The object of this study is the system for recognising and enforcing foreign arbitral awards in Kazakhstan, along with the international treaties and legal norms that regulate these processes. The subject of the research focuses on law enforcement aspects concerning the interaction between Kazakh courts and international arbitration bodies, as well as an analysis of the principles of reciprocity and public policy as they relate to the recognition and enforcement of arbitral awards.

This study aims to conduct a comparative legal analysis of the mechanisms for recognising and enforcing foreign arbitral awards in Kazakhstan and in selected countries that are leaders in international arbitration law, including Switzerland, France, Germany, Singapore, and Hong Kong.

To achieve this goal, the following research tasks will be addressed:

1. To analyse the law enforcement practices of Kazakhstani courts and international arbitration institutions, such as the Astana International Financial Centre (AIFC) and the International Arbitration Court (IAC), with a focus on the application of the principles of reciprocity and public policy.
2. To compare the recognition and enforcement systems for foreign arbitral awards in European and Asian countries – specifically Switzerland, France, Germany, Singapore, and Hong Kong–highlighting features that minimise judicial intervention and streamline procedures.
3. To examine legislative reforms aimed at clarifying the principle of reciprocity and introducing flexible procedures aligned with international standards.
4. To develop recommendations for enhancing national legislation and improving cooperation between state courts and arbitration institutions, considering the specific characteristics of the Kazakhstani legal system.

The authors of this research will develop recommendations to enhance the national legal framework, aligning it more closely with international standards and fostering more effective dispute resolution through international arbitration. Such improvements can significantly enhance Kazakhstan's investment climate and strengthen the confidence of international partners and investors. Therefore, this study contributes to the advancement of both the theory and practice of international arbitration, offering innovative approaches to improving law enforcement practices within Kazakhstan.

2 THEORETICAL BACKGROUND

The recognition and enforcement of foreign arbitral awards are crucial aspects of international commercial law. In Kazakhstan, challenges in this area primarily stem from inconsistent and often formalistic court practices rather than the absence of a legal framework. Although the country's national legislation and international commitments establish the necessary legal mechanisms, their practical application remains ineffective or contradictory, undermining the effectiveness of enforcement processes.

Based on the analysis of judicial practice from 2019 to 2024, as presented in the Supreme Court of Kazakhstan's Review,[10] approximately 10 to 40% of refusals to recognise foreign decisions were justified by references to violations of public policy. This proportion is notably higher than in the legal practices of the EU, the US, and Singapore, where such refusals rarely exceed 10%.[11]

Additionally, courts in the Republic of Kazakhstan frequently refuse recognition on formal grounds not stipulated by the 1958 New York Convention. For example, there are cases in judicial practice in which recognition was denied due to the absence of an apostille, even when the decision was eligible for recognition under the New York Convention, which does not require apostilization of documents.[12]

Another issue is the prolonged duration of proceedings for recognising decisions. Although Article 502 of the Civil Procedural Code of the Republic of Kazakhstan (CPC RK)[13] does not specify a maximum timeframe for consideration, in some cases the process extended up to 4-6 months, which conflicts with the principle of promptness in international justice.

The AIFC promote Kazakhstan as a regional arbitration hub.[14] It offers a modern and transparent dispute settlement platform based on English common law and features an independent arbitration court. Despite these advancements, implementing international arbitral awards is still problematic. Concerns surround the court's inconsistent responses to arbitration; in some cases, courts intervene by assessing arbitral awards on their merits rather than adopting the New York Convention.[15] The

10 'Case Law Reviews' (*Supreme Court of the Republic of Kazakhstan*, 2025) <https://sud.gov.kz/rus/content/obzory-sudebnoy-praktiki> accessed 20 May 2025.

11 *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (UN 2016).

12 Valikhan Zharaskanovich Shaikenov and Ardak Turekhanovna Idayatova, 'The Problem of Choosing Applicable Law to Arbitration and the Arbitration Agreement in the Context of the Kazakhstan Legislation' (2017) 1(46) Bulletin of the Institute of Legislation of the Republic of Kazakhstan 120.

13 Civil Procedural Code of the Republic of Kazakhstan No 377-V LRK of 31 October 2015 <https://adilet.zan.kz/eng/docs/K150000037> accessed 20 May 2025.

14 Kenzhaliyev (n 6).

15 Radicati di Brozolo and Ponzano (n 5).

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uncertainty produced by this judicial overreach discourages parties from choosing Kazakhstan for Arbitration.[16]

Aladaseen[17] argues that the validity and practicality of arbitration as a dispute resolution method are seriously weakened under such conditions. Solis[18] examines adverse inferences in investor-state arbitration, where arbitrators may draw negative conclusions from a party's failure to produce evidence. Despite this ability, arbitrators are cautious about drawing negative conclusions, as they may harm evidence and compromise fairness. Gunning[19] examines proposed revisions to Section 67 of the UK Arbitration Act 1996, which aim to limit arguments and evidence for challenging arbitral awards. However, whether these adjustments are necessary to make arbitration final and efficient remains a subject of debate.

Switzerland and France have taken measures to minimise procedural delays, while several Asian nations have introduced productivity-boosting systems. For instance, Singapore's International Arbitration Act (IAA)[20] sets enforcement request timelines, enhancing procedural predictability. Hong Kong's Arbitration Ordinance (Cap. 609),[21] which follows the UNCITRAL Model Law,[22] facilitates swift and transparent enforcement.[23] Kazakhstan could similarly improve efficiency by adopting digital case management tools and expedited enforcement petitions.

Kazakhstan has moved toward arbitration-friendly conditions by creating the AIFC and its International Arbitration Centre.[24] Modelled after the most notable arbitration centres, the AIFC provides a neutral forum for dispute resolution under English common law.

16 Sauryk Abirbek, 'Problems of Recognition of Judgments and Other Acts of Unrecognised States in Private International Law' (2022) 1(138) Bulletin of LN Gumilyov Eurasian National University: Law Series 69, doi:10.32523/2616-6844-2022-138-1-69-77; 'Recognition and Enforcement of Foreign Arbitral Awards' (*Law and Right*, 20 September 2023) <https://zakonpravo.kz/ru/priznanie-i-privedenie-v-ispolnenie-arbitrazhnyh-resheniy-inostrannyh-arbitrazhey> accessed 2 April 2025.

17 Mohammed A Aladaseen, 'Unlocking Arbitration: Evolving Legal Standards for Commercial Agency Disputes in Jordan and the UAE' [2025] International Journal of Law and Management, doi:10.1108/ijlma-09-2024-0316.

18 Menalco J Solis, 'Adverse Inferences in Investor–State Arbitration' (2018) 34(1) Arbitration International 79, doi:10.1093/arbint/aix029.

19 Alexander Gunning, 'Has a Sufficient Case Been Made for the Law Commission's Proposals in Respect of Section 67?' (2023) 40(1) Arbitration International 25, doi:10.1093/arbint/aiad048.

20 International Arbitration Act 1994 (rev 2020) <https://sso.agc.gov.sg/act/iaa1994> accessed 2 April 2025.

21 Arbitration Ordinance (Cap 609 Laws of Hong Kong) <https://www.elegislation.gov.hk/hk/cap609> accessed 2 April 2025.

22 *UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006* (UN 2008) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 2 April 2025.

23 Darius Chan, 'The Scope of "De Novo" Review of an Arbitral Tribunal's Jurisdiction' (2015) (Nov) Singapore Law Gazette 16 <https://ink.library.smu.edu.sg/sol_research/3038> accessed 2 April 2025.

24 Jędrzej Górski and Yun Zhao, 'Introduction: Challenges to Aviation Global Regulatory Milieu in the Geoeconomic and Long-History Context' in Jędrzej Górski and Yun Zhao (eds), *Aviation Law and Governance: Navigating Global Challenges and Conflicts* (Routledge Research in Air and Space Law, Routledge 2025) 1, doi:10.2139/ssrn.4953683.

Kazakhstan's interventionist policies make arbitration agreement enforcement uncertain; therefore, foreign investors avoid it.[25] French courts support arbitration autonomy and will only challenge a ruling if it violates international public policy.[26] Swiss law is known for its arbitration-friendly stance, which limits court involvement to procedural problems. Singapore and Hong Kong, two pro-arbitration regimes in Asia, restrict court participation to exceptional circumstances to increase public faith in their justice systems.[27]

Table A1 (see Appendix 1) provides a structured overview of the primary sources that form the enforcement regime for foreign arbitral awards in Kazakhstan, comparing them with contemporary judicial practices of leading European and Asian jurisdictions. The analytical block discloses the latest amendments to the Law on Arbitration,[28] the Civil Procedure Code and regulatory decisions of the Supreme Court, which have strengthened formal control and specified the criteria of public order. The AIFC Court and state court precedents are further summarised, capturing the autonomy of the AIFC procedures and the problem of compound interest. The comparative section analyses the decisions of the Court of Cassation (France), the Federal Court of Justice (Germany), Singapore and Hong Kong courts, highlighting a trend towards narrow application of exceptions and the spread of remit-mechanism.

Contemporary studies by Suleimenov et al.[29] focus on the fundamental principle of recognition of arbitral awards—namely, the principle of reciprocity. However, these approaches overlook potential legal conflicts that may arise in the absence of bilateral agreements with Kazakhstan's major trading partners. Aukhadiyev[30] argues that Kazakhstan cannot fully integrate into the international legal system without applying the reciprocity principle. Yet, he fails to offer concrete recommendations to resolve emerging contradictions, such as the lack of clear criteria for establishing reciprocity. Conversely, Shaimenova et al.[31] suggest legislative amendments to align domestic laws with international standards; however, their analysis remains purely theoretical and does not

25 Finnur Magnússon, 'Sanctions against Individuals and Investment Law' (2024) 27(1) Austrian Review of International and European Law Online 219, doi:10.1163/9789004705555_011.

26 Jan Kleinheisterkamp, 'The Myth of Transnational Public Policy in International Arbitration' (2023) 71(1) The American Journal of Comparative Law 98, doi:10.1093/ajcl/avad021.

27 Kai-Shen Huang, 'Internationalization as a Leap of Faith: Arbitration Reforms in China and the Challenges of Implementation' (2023) 10(2) Asian Journal of Law and Society 241, doi:10.1017/als.2022.23.

28 Law of the Republic of Kazakhstan No 488-V LRK of 8 April 2016 'On Arbitrage' <https://adilet.zan.kz/eng/docs/Z1600000488> accessed 2 April 2025.

29 Maidan K Suleimenov, 'Recognition and Enforcement of Foreign Arbitration and State Courts' Decisions on Investment Disputes: Kazakhstan's Experience' (*Paragraph: Yurist*, 13 May 2009) <https://online.zakon.kz/Document/?doc_id=31644606> accessed 2 April 2025; Suleimenov and others (n 8).

30 Maxat Aukhadiyev, 'Enforcement and Recognition of Foreign Arbitral Awards in Kazakhstan' (PhD thesis, University of Debrecen 2021).

31 Shaimenova and others (n 7).

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account for the complexities of law enforcement in Kazakhstan, where judicial practice often diverges from international norms.

France and Switzerland are recognised for their arbitration-friendly legal systems. Owing to the consistent support of arbitral awards by French courts, enforcement judgments are rare.[32] Luder and Christe[33] report that the Swiss Federal Supreme Court supports arbitration due to the parties' independence and the binding character of arbitration awards. Following the landmark BALCO case in 2012, India became more arbitration-friendly; however, procedural delays persist.[34]

European courts, such as those in Sweden, Germany, and the UK, follow the Convention and employ minimal judicial review. German courts must have solid reasons to refuse enforcement under Article V of the Convention. Hong Kong's Arbitration Ordinance ensures compliance due to its prominence in the arbitration sector.[35] Indonesia and Vietnam have, however, been criticised for inconsistent enforcement, as they have sometimes invoked public-policy exceptions to withhold recognition.[36] Kazakhstan's implementation of the New York Convention remains uneven despite its status as a contracting state. Courts have occasionally declined to recognise claims on purely procedural grounds, often due to application errors.

In summary, the conducted analysis of recognition and enforcement of foreign judicial and arbitration awards in Kazakhstan indicates that the core issue lies not in the absence of a legal basis, but in incoherent and unnecessary formalised judicial practice. Despite Kazakhstan's national legislation and internal obligations providing the necessary legal mechanisms, their application in arbitral practice often proves to be ineffective or controversial.

3 METHODS

3.1. Research Design and Approach

In this study, the UK, France, Switzerland, Singapore, and Hong Kong are selected as comparative jurisdictions alongside Kazakhstan. Firstly, they represent different legal families—Anglo-American (Great Britain, Singapore, Hong Kong) and continental

32 Marie-Laure Bizeau and Aleksandra Fedosova, '"Forum of Necessity": Using French Law's "Juge d'Appui" in Foreign-Seated Arbitrations as a Cure for Denial of Justice' (2022) 39(5) Journal of International Arbitration 749, doi:10.54648/joia2022032.

33 Luder and Christe (n 8).

34 Utkarsh Vaishnav, 'Judicial Intervention in Arbitration Related to BALCO Judgment' (2024) 7(5) International Journal of Law Management and Humanities 1474, doij:10.10000/IJLMH.118382.

35 Michael Hwang, Gokce Uyar and Cosima Wimmers, 'The Enka v Chubb/Anupam Mittal v Westbridge Controversies: Why Not the Hong Kong (Partial) Solution?' (2024) 41(5) Journal of International Arbitration 531, doi:10.54648/joia2024023.

36 Tang (n 8).

(France, Switzerland)—allowing an assessment of how civilizational and procedural traditions influence arbitration award enforcement procedures. Secondly, all these jurisdictions have incorporated the provisions of the New York Convention and the UNCITRAL Model Law[37] into their national legislation, demonstrating high efficiency ("limited review") and prompt enforcement. Lastly, London, Paris, Geneva, Singapore, and Hong Kong are globally recognised as major centres of international arbitration, making their practices indicative for formulating universal recommendations to enhance Kazakhstan's arbitration enforcement framework.

This study is based on an analysis of arbitration proceedings in the Republic of Kazakhstan from 2014 to 2024. A total of 112 cases related to the enforcement of arbitral awards were selected: 88 from Kazakhstan (66 concerning domestic arbitral awards and 22 regarding foreign awards) and 24 from leading jurisdictions in the UK, France, Switzerland, Singapore, and Hong Kong. The selection criteria included:

1. Availability of primary sources (comprehensive court acts and registers accessible in the public domain);
2. Representativeness for analysis (cases that highlight typical procedural features and issues within the enforcement system);
3. Influence on the process (precedents that significantly impact the development of law enforcement practice).

Additionally, data from commercial arbitration were analysed to evaluate the compliance of national procedures with international standards, specifically the 1958 New York Convention and the 1961 European Convention,[38] and to support the proposed recommendations. The main sources of information included the following:

(1) official databases of the RK courts and registers of the AIFC Court/IAC;

(2) open statistical reports from international arbitration institutions such as UNCITRAL, ICC, SIAC, and LCIA;

(3) publications and reports from the Kazakhstan International Arbitration Centre (KIAC).

Figure 1 shows the research flow of the study.

37 UNCITRAL Secretariat Guide (n 11).

38 European Convention on International Commercial Arbitration (21 April 1961) [1965] UNTS 484/349.

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Figure 1. The research flowchart of the study

3.2. Methodology Justification and Legal Framework for the "Kazakhstan Arbitration Enforcement Mechanism (KAEM)"

The study proposes the Kazakhstan Arbitration Enforcement Mechanism (KAEM) to strengthen Kazakhstan's legal environment for international arbitration enforcement. The mechanism aims to enhance Kazakhstan's legal framework by aligning it with global best practices, taking into account its unique political, economic, and legal context. To implement this, the study proposes legislative reforms to Kazakhstan's arbitration techniques to align them with those of Hong Kong, the UK, Singapore, Switzerland, and France. The legislation should clarify when courts may participate in arbitration cases, enhance the independence and assertiveness of arbitration institutions, and limit court involvement in arbitration processes to cases involving clear public policy violations.

3.2.1. Testing the KAEM's Reliability

To test the mechanism, the study compares Kazakhstan's arbitration success rates and enforcement processes to those of well-established jurisdictions. The KAEM—which aspires to reform Kazakhstan's legal system—prioritises practical enforcement and conformity to its legal framework.

The KAEM framework rests on four key pillars that aim to support and enforce foreign arbitral awards in Kazakhstan:

1. Legal changes to make the arbitration rules easier;
2. Knowledge of judgment enforcement and judicial education;
3. Strengthening the arbitration centre institutions;
4. Government policy standardisation and openness.

The legal mechanisms behind the main discussed regulations and laws align Kazakhstan's arbitration apparatus with international standards and facilitate the implementation of arbitral awards.

I. Phase 1: Law changes to ease arbitration compliance.

The KAEM framework aims to align Kazakhstan's arbitration laws with international standards, particularly the UNCITRAL Model Law on International Commercial Arbitration and the 1958 New York Convention. This research advises modifying the CPC RK and the Law on Arbitration of 2016 to clarify international arbitral award recognition and enforcement. The law should codify enforcement, denial, and judicial role in arbitration, i.e.,

1. Courts should not review arbitral decisions, save as the New York Convention provides.
2. The party opposing enforcement should have the burden of proof, not the side seeking award recognition. These legislative reforms will enhance the legal validity of international arbitration, providing certainty to investors both domestically and abroad.

II. Phase 2: Judicial specialisation and training on arbitration enforcement.

Kazakh courts' unpredictability in treating foreign arbitral awards hinders the arbitration system. The KAEM framework suggests mandatory judicial training programs and specialised arbitration courts to address this issue.

Projects under this pillar include:

- Create Specialised Arbitration Divisions: International arbitration-experienced judges should conduct enforcement procedures to ensure uniformity and predictability.
- Mandatory Training for Judges: ICC, SIAC, and LCIA should collaborate on continuous education. This course will address essential arbitration laws, public policy issues, and best enforcement practices.
- Introducing Judiciary Performance Metrics: A system must assess how effectively judges adhere to international arbitration norms when ruling.

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III. Phase 3: Institutionally empowering arbitration centres.

The third pillar focuses on strengthening arbitration institutions to drive enforcement efficiency improvements. The AIC and AIFC Courts are becoming increasingly significant in dispute resolution, but they require greater institutional support to effectively execute their enforcement mechanisms. Key recommendations include:

- Granting the AIFC Court the authority to enforce international arbitral awards, reducing reliance on local courts.
- Enhancing e-Justice, the online dispute resolution, to simplify the electronic implementation of arbitral awards with low procedural hurdles.
- Promote the inclusion of AIC or AIFC arbitration clauses in commercial contracts through government policy, thereby simplifying domestic enforcement procedures.

IV. Phase 4: Streamlining and discussing public policy.

Public policy remains a contentious topic when contesting foreign arbitral awards. Kazakhstani courts have made inconsistent enforcement awards due to their subjective public policy determinations. To solve this, the KAEM offers a PPSF or Public Policy Standardisation Framework.

- Kazakhstan's arbitration legislation should define "public policy" to comply with the "internationally recognised restrictive approach."
- Courts could only refuse enforcement for public policy reasons in fraud or due process violations.
- Public access to all public policy court opinions would improve consistency and legal clarity.

The KAEM framework limits the public policy exemption to prevent courts from interfering in arbitration enforcement.

3.2.2. Implementation and Feasibility of the KAEM

Institutional, judicial, and legislative adaptation must be gradual to apply the KAEM paradigm. A recommended three-step plan:

I. Phase 1 (Short-Term: 1-2 Years) – Legal and Institutional Reforms

- Declare public policy and enforcement boundaries in the Arbitration Law.
- Establish enforcement-related arbitration units in key courts.
- Develop judicial training programs with international arbitration bodies.

II. Phase 2 (Mid-Term: 3-5 Years) – Strengthening Enforcement Mechanisms

- This phase will bring all international arbitral award execution cases within the AIFC Court and AIC jurisdiction.
- Enforce digital arbitration using e-Justice.
- Set performance-based awards for arbitration-friendly court awards.

III. Phase 3 (Long-Term: 5+ Years) – Global Integration and Recognition

- Promote AIFC/AIC globally to establish Kazakhstan as a regional arbitration hub.
- Bilateral agreements with significant arbitration jurisdictions are suggested for mutual recognition of arbitral decisions.
- Establish higher education and public policy research institutions to explore the best arbitration techniques.

4 RESULTS AND DISCUSSIONS

The proposed KAEM presents a legally robust, globally transferable mechanism for reforming arbitral award enforcement in emerging jurisdictions. It aligns domestic enforcement with transnational legal standards and reinforces Kazakhstan's strategic role as a regional arbitration platform bridging Europe, Asia, and the Middle East. The mechanism ensures compliance with Kazakhstan's international obligations—particularly the 1958 New York Convention, the UNCITRAL Model Law, and emerging soft law standards—while addressing institutional fragmentation, legal unpredictability, and judicial overreach. It is not merely a set of legislative amendments but a juridical blueprint capable of elevating Kazakhstan to a leading dispute resolution hub within the wider Eurasian legal space.

KAEM application must begin with codified reforms to harmonise Kazakhstan's arbitration laws with globally accepted legal standards:

- Amendments to the Law on Arbitration (2016).
- Amendments to the CPC RK.
- Harmonisation of AIFC arbitration rules.

Recognising the judiciary's gatekeeping function in arbitration enforcement, KAEM recommends structural measures to consolidate competence and ensure consistent adjudication:

- Establishment of arbitration enforcement chambers within the judiciary, empowered to hear such cases with expedited procedures.

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- Judicial training must be conducted with consideration for the best examples of international arbitration practices observed in leading world jurisdictions, such as Singapore or the UK.
- Adoption of interpretive consistency through centralised publication of key decisions, aligning Kazakhstan's courts with common law jurisdictions where predictability and reasoning matter in cross-border enforcement.

4.1. Regional Arbitration Infrastructure and Transnational Partnerships

KAEM is expected to transform Kazakhstan into an acknowledged arbitral jurisdiction:

- The AIFC Court and its affiliated IAC are positioned to serve as neutral English-speaking platforms applying internationally consistent rules.
- Full adoption of UNCITRAL principles ensures jurisdictional compatibility, facilitating seamless enforcement of foreign awards.
- Strategic cooperation with leading arbitral bodies (LCIA, SIAC, ICC, HKIAC, Swiss Arbitration Centre) fosters a shared legal culture. It promotes Kazakhstan as a venue for dispute resolution for Belt and Road Initiative countries, Eurasian Economic Union members, and Gulf investors.

4.2. Public Policy Transparency and Legal Openness

KAEM addresses one of the most controversial aspects of enforcement—the abuse of public policy exceptions—by promoting transparency and principled adjudication:

- Narrowing the public policy doctrine: Courts should be guided by a codified and restrictive interpretation of public policy exceptions, consistent with international arbitral jurisprudence.
- Creation of a centralised enforcement database: a publicly accessible online repository of enforcement-related case law, procedural timelines, and outcomes will support transparency and the development of coherent doctrine.
- Policy consultation and stakeholder dialogue: Legal and business stakeholders must be systematically engaged in legislative development to maintain alignment with international market expectations.

Figure 2 illustrates the structure of KAEM.

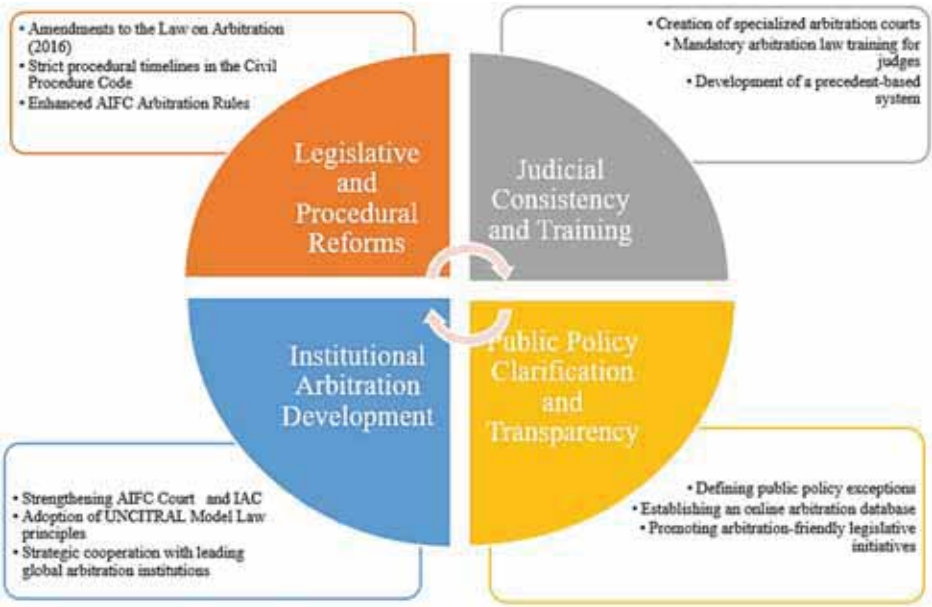

Figure 2. Kazakhstan Arbitration Enforcement Mechanism (KAEM): A Four-Pillar Framework for Strengthening Arbitration Enforcement

Study results reveal that Kazakhstan fails to execute international arbitral awards owing to procedural inefficiencies, court participation issues, and enforcement delays. The comparative Table 1[39] shows significant discrepancies in arbitration enforcement between Kazakhstan, France, Switzerland, the UK, Singapore, and Hong Kong. The results highlight Kazakhstan's inadequate arbitration framework, including judicial involvement, enforcement deadlines, international arbitral award recognition, and arbitration process quality.

39 Authors extracted information from the AIFC Judgments, ICC Arbitration Database, World Bank Doing Business Reports, and UNCITRAL Model Law. See, 'AIFC Judgements' (*Astana International Financial Centre - AIFC Court*, 2025) <https://court.aifc.kz/judgments/> accessed 2 April 2025; 'Publication of ICC Arbitral Awards with JUS MUNDI' (*International Chamber of Commerce*, 2025) <https://iccwbo.org/dispute-resolution/resources/publication-of-icc-arbitral-awards-jus-mundi-not-icc-publication/> accessed 2 April 2025; 'Data Bank Doing Business' (*World Bank Group*, 2025) <https://databank.worldbank.org/source/doing-business> accessed 2 April 2025; UNCITRAL Model Law (n 22).

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***Table* 1. Comparative analysis of Arbitration Frameworks and Enforcement in Selected Countries**

Criteria	France	Switzerland	UK	Singapore	Hong Kong	Kazakhstan (Current System)
Judicial Intervention	Minimal	Minimal	Minimal	Minimal	Limited	High (some delays and inconsistencies)
Enforcement Speed	Fast	Fast	Fast	Fast	Fast	Slow (some legal and bureaucratic hurdles)
Recognition of Foreign Awards	Strong	Strong	Strong	Strong	Strong	Inconsistent
Arbitration Framework	Pro-arbitration	Pro-arbitration	Pro-arbitration	Pro-arbitration	Pro-arbitration	Mixed (conflicting legal provisions)

Table 1 indicates that arbitration procedures in most of the analysed jurisdictions (France, Switzerland, the United Kingdom, Singapore, and Hong Kong) demonstrate pro-arbitration legislation, minimal judicial intervention, high enforcement speed, and stable recognition of foreign arbitration awards. Kazakhstan, however, demonstrates a significant judicial intervention level, slow, bureaucratized enforcement, inconsistent recognition of foreign arbitration awards and conflicting legal provisions.

While arbitration awards in Kazakhstan take longer to be executed than in other countries,[40] the KAEM seeks to establish a pro-arbitration legal framework to align Kazakhstan's arbitration rules with global norms, expedite enforcement, and increase acceptance of foreign court arbitration decisions. The mechanism uses Swiss judicial autonomy principles, French and British streamlined enforcement tools, and Singaporean procedural efficiencies to create Kazakhstan as a trustworthy arbitration centre. Table 2[41] compares enforcement delays and court participation in the UK, France, Kazakhstan, Switzerland, and Singapore.

40 Anselmo Reyes and Till Haechler, 'Anti-Corruption Laws and Investment Treaty Arbitration: An Asian Perspective' in Nobumichi Teramura, Luke Nottage and Bruno Jetin (eds), Corruption and Illegality in Asian Investment Arbitration. Asia in Transition (Asia in Transition, Springer 2024) 89, doi:10.1007/978-981-99-9303-1_4.

41 Authors extracted information from the AIFC Court Reports, ICC Arbitration Database, World Bank Doing Business Reports 2023, and UNCITRAL Model Law (n 39).

***Table* 2. Comparative Analysis of Enforcement Delays, Judicial Intervention, and Investor Confidence in Selected Jurisdictions**

Country	Average Time for Enforcement	Judicial Intervention Frequency	Investor Confidence Level
Switzerland	3-6 months	Low	High
Singapore	4-8 months	Low	High
UK	6-9 months	Low	High
Kazakhstan (Current System)	18-24 months	High	Medium-Low

Table 2 shows that judicial intervention and procedural complexities hinder Kazakhstan's enforcement operations, making a stark contrast with Singapore and Switzerland. Long timeframes and legal hurdles in arbitration enforcement harm international investors' trust in Kazakhstan's arbitration jurisdiction.

Table 3[42] compares the duration from arbitration claim submission to enforcement across different jurisdictions, including the forecast results under the KAEM framework. The KAEM model will address the revealed inefficiencies in Kazakhstan by streamlining processes, eliminating judicial intervention in enforcement activities, and utilising global best practices.

Table 3 demonstrates that introducing a new mechanism could potentially reduce the arbitration enforcement timeline in Kazakhstan, making the timeframe comparable to that of Singapore or Switzerland. Due to shortening the time for appeals consideration and optimising the enforcement procedure, the arbitration system of Kazakhstan is expected to become more operational and competitive in the international context.

42 Authors extracted the information from the different reports of ICC, SIAC, LCIA, and AIFC. See, 'ICC Dispute Resolution' (*International Chamber of Commerce*, 2025) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/arbitrators/> accessed 20 May 2025; 'SIAC Administered Arbitration' (*Singapore International Arbitration Centre*, 2025) <http://siac.org.sg/administered-arbitration> accessed 20 May 2025; 'LCIA Arbitration' (*London Court of International Arbitration*, 2025) <https://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx> accessed 20 May 2025; 'AIFC Judgements' (n 39).

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***Table* 3. Comparative analysis of arbitration enforcement timeframes between the selected jurisdictions**

Country	Filing to judgment	Appeal process	Final enforcement	Total duration
Switzerland	2-4 months	1-2 months	1-3 months	4-9 months
Singapore	3-5 months	2-3 months	2-3 months	7-11 months
UK	4-6 months	3-4 months	2-4 months	9-14 months
France	5-7 months	3-5 months	3-5 months	11-17 months
Kazakhstan (Current)	6-9 months	6-12 months	6-9 months	18-30 months
Kazakhstan (Proposed KAEM)	3-5 months	2-4 months	1-3 months	6-12 months

Table 4[43] shows the judicial interventions in arbitration enforcement among the selected arbitration centres.

***Table* 4. Judicial intervention in arbitration enforcement**

Country	Cases with No Intervention (%)	Cases with Partial Intervention (%)	Cases Overturned (%)
Switzerland	92%	6%	2%
Singapore	89%	8%	3%
UK	87%	9%	4%
France	85%	10%	5%
Kazakhstan (Current)	55%	30%	15%
Kazakhstan (KAEM)	85%	10%	5%

Legal uncertainty for foreign investors is exacerbated by the high levels of judicial engagement in the present Kazakhstan system (30% +15% = 45% of cases involve some

43 Authors extracted the information from AIFC Court Annual Reports, SIAC Annual Review, and LCIA Case Statistics. See, AIFC Annual Reports' (*Astana International Financial Centre - AIFC Court*, 2025) <https://court.aifc.kz/en/annual-report> accessed 20 May 2025; 'SIAC Annual Reports' (*Singapore International Arbitration Centre*, 2025) <https://siac.org.sg/annual-reports> accessed 20 May 2025; 'LCIA Reports' (*London Court of International Arbitration*, 2025) <https://www.lcia.org/lcia/reports.aspx> accessed 20 May 2025.

court action). By harmonising arbitration enforcement with international leaders like Switzerland and Singapore, KAEM would minimise judicial intervention and unite Kazakhstan with its global counterparts. Table 5[44] shows the possible pre- and post- KAEM implementation projection.

***Table* 5. Arbitration case outcomes in Kazakhstan (before and after KAEM implementation projection)**

Case Type	Total cases (Before KAEM)	Cases enforced (%)	Cases delayed (%)	Cases rejected (%)	Projected enforcement rate (KAEM)
Commercial disputes	500	55%	30%	15%	85%
Investor-state disputes	300	50%	35%	15%	82%
Contractual disputes	400	58%	32%	10%	87%
Cross-border arbitration	350	52%	33%	15%	84%

Table A2 in Appendix 2 systematically catalogues the legislative and regulatory acts of the Republic of Kazakhstan that influenced the mechanism for recognising and enforcing foreign arbitral awards in 2024. The legal significance of these acts lies in strengthening judicial scrutiny of non-arbitrability and public policy compliance in award enforcement, establishing the direct primacy of the international convention over national procedural law, clarifying the scope of grounds for annulment, and broadening the procedural framework of the AIFC.

Tables A3–A5 of Appendix 2 analyse and synthesise judicial practices from 2024 in Kazakhstan, France, Germany, as well as in Singapore and Hong Kong, identifying opportunities for improvement in Kazakhstan's legislation. Table A6 of Appendix 2 presents the conclusions for enhancing the Kazakh mechanism.

44 Authors extracted from the ICC Case Information, HKIAC and French arbitration law case studies. See, 'ICC Case Information' (*International Chamber of Commerce*, 2025) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/arbitrators/> accessed 20 May 2025; *Hong Kong International Arbitration Centre (HKIAC)* <https://www.hkiac.org> accessed 20 May 2025; Alice Clavière-Schiele and others, 'French Case Law on Arbitration: In-Depth Review' [2019] Arbitration Journal <https://journal.arbitration.ru/ru/reviews/french-case-law-on-arbitration-in-depth-review-/> accessed 2 April 2025.

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According to the analysis of judicial practices from 2019 to 2024, as outlined in the 2024 reviews of the Supreme Court of the Republic of Kazakhstan,[45] approximately 40% of rejections to recognise foreign arbitration awards were based on public order violations. This figure is significantly higher than that observed in the legal practices of EU countries, the US and Singapore, where the aforementioned value appears to be significantly smaller.[46]

Furthermore, courts of the Republic of Kazakhstan often refuse to recognise the awards on formal grounds not envisaged by the 1958 Convention. For example, judicial practice demonstrates some cases of rejection due to a lack of an apostille, even though the award in question met the Convention's requirements, which do not mandate apostilling the documents.[47]

Another challenge is the delays in processing recognition applications. While Article 502 of the Civil Procedure Code of the Republic of Kazakhstan does not establish a time limit for consideration, there have been instances where the arbitration process has lasted 4 to 6 months, contradicting the principle of international justice efficiency.

In contrast, pro-arbitration laws in other countries ensure enforceable, predictable, and timely rulings. Kazakhstan's municipal courts' excessive involvement in arbitration, particularly international arbitral awards, raises neutrality and efficiency concerns.[48]

To improve the legal enforcement practice, the following measures are proposed:

- Regular generalisation of judicial practice by the Supreme Court of Kazakhstan with a focus on positive precedents and successful applications of international norms. This initiative will help unify the approaches of lower-level courts.
- Development and dissemination of methodical recommendations for judges on applying the New-York 1958 Convention, Law "On Arbitration" and Article 501 of the Civil Procedure Code of the Republic of Kazakhstan. These recommendations can be based on the UNCITRAL principles and international court awards.
- Mandatory professional development for judges handling cases on recognition of foreign awards and transboundary justice matters. This is especially important in modern conditions of digitalisation and the increasing number of arbitrations that involve digital agreements.
- Establishment of special judicial structures within economic courts, tasked with handling petitions regarding the recognition of foreign awards. This approach—successfully utilised in Singapore and some countries of the EU—ensures that transnational cases are addressed by qualified and specialised judges.

45 'Case Law Reviews' (n 10).
46 UNCITRAL Secretariat Guide (n 11).
47 LS Tleulina, 'Recognition and Enforcement of Decisions of Commercial Arbitrations and Foreign Courts in Kazakhstan' (2015) 6 Legal Insight 33.
48 Weixia Gu and Jacky Tam, 'The Global Rise of International Commercial Courts: Typology and Power Dynamics' (2021) 22(2) Chicago Journal of International Law 443.

- Creation of a public database of Kazakhstani court decisions on the recognition and enforcement of foreign judicial decisions and arbitration awards. This could be implemented as a yearly updating report (similar to Supreme Court reviews), including general statistics, analysis of rejection justifications, and examples of successful recognition.

Summarising, improvements in legal enforcement practices require not just legislative changes, but also a systemic approach to judicial training, practice analysis and the harmonised application of international agreements.

Tables A7-A8 (see Appendix 3) systematise the legal mechanisms and functioning of the proposed KAEM and legal enforcement practice improvement directions, as well as the ways of implementing it into Kazakhstan's law. The proposed mechanism is a modular extension of the existing procedural process, not a replacement for it.

International corporations and investors are often deterred from selecting Kazakhstan as their preferred arbitration seat due to lengthy and complex court proceedings, unclear legislative provisions and bureaucratic red tape. One key finding is the disparity in enforcement timelines: in Kazakhstan, it may take 30 months from complaint to enforcement, while in Switzerland and Singapore, arbitration issues are often resolved in less than a year. Lengthy appeals and enforcement delays add uncertainty to conflict resolution. Delays in corporate disputes involving large sums or time-sensitive agreements can harm the economy.

Kazakhstani companies may lose out to countries with better arbitration enforcement systems. The KAEM approach is expected to strengthen Kazakhstan's arbitration enforcement framework, enabling the country to attract more investors and establish itself as a regional dispute resolution hub.

To resolve inconsistencies in the adoption and implementation of foreign arbitral awards, Kazakhstan's legislation should be better harmonised with international accords, notably the New York Convention.[49] Although Kazakhstan is a signatory, its implementation of the Convention remains inconsistent. Legal ambiguity and the uncommon refusal of home courts to enforce foreign awards hinder the purpose of international arbitration. Adopting a pro-arbitration judicial policy, as seen in Switzerland, Singapore, and the UK, could help bridge this gap. Establishing arbitration tribunals and judicial training programs may lessen the likelihood of international judges reaching divergent decisions.[50]

49 Mosleh A Tarawneh and Tariq K Alhasan, 'Between Commitment and Reality: A Critical Examination of Jordan's Adherence to the New York Convention 1958' (2024) 41(4) Conflict Resolution Quarterly 491, doi:10.1002/crq.21419.

50 Greg Lourie, 'The Case for Judicial Capacity Building through International Arbitration' in Marc Bungenberg and others (eds), *Alternative Dispute Resolution in the Western Balkans: Trends and Challenges* (European Union and its Neighbours in a Globalized World, Springer 2025) 37, doi:10.1007/978-3-031-76345-8_3.

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5 CONCLUSIONS

5.1. Prospects for International Cooperation and Adoption of Foreign Practices

As a result of the conducted comparative legal research, the stated goals and objectives were successfully achieved. First and foremost, the analysis of law enforcement practice confirmed the existence of contradictions between the norms of the New York Convention and the CPC RK regarding the enforcement of arbitral awards in state courts. It also highlighted the distinctive features of procedures applied in the AIFC Court and the IAC.

Furthermore, a comparison of European and Asian jurisdictions revealed that countries such as Switzerland, France, Germany, Singapore, and Hong Kong employ limited review procedures for awards and have regulated application procedures, thereby enhancing procedural predictability. The legal comparison also identified key institutional and procedural barriers within Kazakhstan's enforcement system, including fragmented rules, the absence of digital registers, and extended judicial discretion in assessing "public policy" considerations.

Based on these findings, the development of recommendations justified the creation of the KAEM, which advocates for unifying procedural steps, introducing electronic tracking of applications, and establishing clear criteria for limited review in line with international standards.

Summarising the conducted research, the authors propose the following prospects for international cooperation and the adoption of foreign practices:

- Accession to the 2019 Hague Convention: Kazakhstan should consider joining the 2019 Hague Convention, a modern, universal mechanism supported by numerous countries, including EU member states, the US, and Uruguay. Joining this Convention could significantly facilitate cross-border cooperation and enhance the predictability of law enforcement practices.
- Replacing outdated bilateral agreements: The 2019 Hague Convention establishes a new standard that could potentially replace existing bilateral agreements. Additionally, given Kazakhstan's increasing economic engagement with China, Turkey, the UAE, and the UK, it is advisable to intensify bilateral negotiations to establish legal assistance agreements that include provisions for recognising court decisions. Experience shows that bilateral agreements with clear reciprocity clauses help avoid legal uncertainties, which continue to pose challenges under Article 501 of CPC RK.

- Learning from the EU's Brussels I Recast Regulation: The Brussels I Recast Regulation (Regulation No. 1215/2012), in force since 2015,[51] allows for the automatic recognition and enforcement of court decisions across the EU without any additional procedures. This regulation has significantly reduced the time required for recognition and the number of refusals.
- Adopting international model laws: Kazakhstan should more actively adopt and adapt model instruments of international law, such as the 2006 UNCITRAL Model Law on International Commercial Arbitration. This law offers more flexible procedures for recognising electronic agreements and arbitral awards, which is increasingly important in the digital age.
- Advancing digital justice and court interoperability: To strengthen digital justice, Kazakhstan could introduce platforms for exchanging information between courts in different countries, similar to those successfully implemented in Singapore and Estonia. Such systems enhance transparency and help mitigate risks related to improper party notification and document falsification.

5.2. Theoretical Contributions

This study advances international arbitration theory, particularly legal jurisprudence, by proposing a new legal framework to increase arbitration enforcement in Kazakhstan. It proposes a dynamic, multi-layered enforcement framework tailored to Kazakhstan, emphasising the integration of domestic and international legal principles, such as sovereignty and recognition of foreign awards. The framework advocates updating Kazakhstan's Arbitration Law to reduce judicial involvement, align with global best practices, and enhance enforcement transparency and predictability, especially for emerging nations.

Challenging the traditional notion of delocalisation, the study emphasises the importance of national legal systems in arbitration enforcement, recommending a clearer separation of powers between courts and arbitrators to limit judicial discretion. Its comprehensive approach offers valuable insights into strengthening arbitration frameworks, with implications for Kazakhstan and similar countries seeking effective enforcement mechanisms within international legal obligations, such as the New York Convention.

51 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (recast) [2012] OJ L 351/1.

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5.3. Practical Implications

This study holds relevance for politicians, lawyers, and foreign investors. Policymakers must review and amend the Law on Arbitration and the CPC RK (Articles 8 and 255) to solve current arbitration procedure restrictions. Research suggests that the KAEM framework could help facilitate these law changes by lowering the bar for judicial intervention, extending enforcement deadlines, and aligning the system with international arbitration standards, specifically the 1958 New York Convention.

One of the most significant areas for change is the enforcement of arbitration. Under the CPC, courts may intervene in arbitration through claims, award annulment, and enforcement proceedings. However, the existing framework is unclear, especially regarding arbitration rule enforcement and nullification. These issues must be addressed to enhance Kazakhstan's arbitration system and reassure foreign investors that it can effectively resolve disputes.

Legislative reforms should also allow the AIFC to operate more autonomously within Kazakhstan's broader legal system, ensuring consistency and predictability. Furthermore, Kazakhstan's legal framework must be modernised to recognise and enforce foreign arbitration awards.

Addressing these legal difficulties can enhance Kazakhstan's arbitration system and attract more foreign investors and corporations. Arbitral institutions and legislative bodies should apply the study's findings to streamline proceedings, promote predictability, and ensure compliance with international legal norms.

5.4. Limitations

Despite the comprehensive nature of the approach, the study has several significant limitations.

Due to the confidential nature of many arbitration cases and limited access to unpublished court decisions and hearing transcripts, only a selective sample of proceedings with publicly available judgment texts or those provided by arbitral institutions was analysed. This limitation may have led to an underestimation of certain procedural nuances and an incomplete picture of actual enforcement practices.

Additionally, the analysis primarily focused on key institutional and procedural barriers—such as limited judicial review, filing deadlines, and enforcement conflicts—without addressing related administrative procedures (e.g., enforcement proceedings, securing evidence in the recognition of foreign awards). Financial aspects, including arbitration costs and funding, were also excluded, though they may significantly impact the efficiency and speed of enforcement.

Given the large volume of arbitration cases and the diversity of disputes (commercial, investment, cross-border), the research focused on the most representative and significant precedents. While this approach enabled in-depth analysis, it may have excluded atypical cases that could still offer valuable insights for improving enforcement.

The study covers the period from 2014 to 2024 but does not account for legislative changes or evolving court practices after the data collection phase, which may substantially affect the identified trends.

The Kazakhstan Arbitration Enforcement Mechanism remains a conceptual framework that has not yet been tested in practice; pilot projects and comprehensive institutional testing are necessary to evaluate its effectiveness and sustainability across various scenarios before the proposed system can be fully implemented.

5.5. Recommendations for Future Studies

Future arbitration enforcement studies in Kazakhstan should focus on the interpretation and implementation of arbitration law by courts, as well as the enforcement outcomes. Kazakhstan's legal stance may be compared to global norms by examining how other nations address the enforcement of annulled awards.

Kazakhstan's Arbitration Law (2016) and the CPC also warrant a deeper study of domestic courts' relationships with arbitration institutions. Future studies should examine whether domestic courts follow arbitration-friendly rules or whether judicial involvement continues to impair arbitral outcomes.

Exploration of "delocalisation" as a legal theory in the Kazakhstani context would also be valuable. This is important because countries have different approaches to enforcement, including territorial and global approaches. Understanding how Kazakhstan fits within this spectrum can enhance the country's legal coherence and international standing.

Public policy exceptions remain a contentious issue. Courts in Kazakhstan may use public policy as a reason to deny recognition of foreign awards. A comparative analysis of how various jurisdictions interpret public policy could provide valuable insights into Kazakhstan's arbitration enforcement system.

Ultimately, future studies may investigate how consistent and clear arbitration decisions impact investor trust. Kazakh arbitration case law may be contradictory because *stare decisis* is not strictly implemented. Research aimed at fostering legal predictability by modifying laws or creating new legal precedents could strengthen the country's arbitration enforcement.

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APPENDIX 1

Table A1. Legal Interpretation of Article V of the 1958 New York Convention in the Context of Enforcement of Foreign Arbitral Awards in Kazakhstan, Europe and Asia for 2023-2024

Article V of the 1958 New York Convention	Established doctrinal positions and key case law	Kazakhstan: current norms and judicial practice 2023-2024	Decisions demonstrating pro-arbitrage trend mechanisms (Europe)	Decisions demonstrating pro-arbitrage trend mechanisms (Asia)	Targeted adjustments that should be incorporated into the KAEM
V(1)(a) Invalidity/ incapacity of arbitration agreement	Validity is assessed on the dual test of *lex arbitri* or *lex causae*; the burden of proof is on the defendant[52]	CPC RK Article 501 ↔ Law on Arbitration; NP SC RK No. 3/2023 requires to check only obvious defects in the agreement[53]	BGH, 9 March 2023 (case concerning the "group of companies") – exequatur refused because the tribunal unlawfully extended the clause to third parties[54]	SGCA Anupam Mittal (2023) – affirmed "composite approach" to arbitrability; agreement is valid if parties knowingly accepted forum[55]	To clarify in the SC the criteria of "manifest invalidity" and exclude the broad interpretation of "third parties" according to the BGH model

52 UNCITRAL Secretariat Guide (n 11) art V(1)(a).

53 Civil Procedural Code of the Republic of Kazakhstan No 377-V LRK (n 13) art 501; Law of the Republic of Kazakhstan No 488-V LRK (n 28); Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No 3 of 2 November 2023 'On Certain Issues of Application of Arbitration Legislation by Courts' <https://adilet.zan.kz/rus/docs/P230000003S> accessed 20 May 2025.

54 Markus Altenkirch and Maria Barros Mota, 'German Federal Court of Justice on the Extension of Arbitration Agreements to Non-Signatories (Piercing of the Corporate Veil)' (*Global Arbitration News: Blog by Baker McKenzie*, 30 June 2023) <https://www.globalarbitrationnews.com/2023/06/30/germany-bgh-refused-recognition-and-enforcement-of-award-because-the-arbitral-tribunal-exceeded-its-personal-jurisdiction-by-extending-an-arbitration-agreement-to-a-de-facto-group-of-companies/> accessed 20 May 2025.

55 Akash Karmarkar, '*Anupam Mittal v Westbridge*: Potential Paradox of the Singapore Court of Appeal's 'Composite Approach' on the Law Applicable to Arbitrability' (*Kluwer Arbitration Blog*, 26 May 2023) <https://arbitrationblog.kluwerarbitration.com/2023/05/26/anupam-mittal-v-westbridge-potential-paradox-of-the-singapore-court-of-appeals-composite-approach-on-the-law-applicable-to-arbitrability/> accessed 20 May 2025.

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V(1)(b) Violation of the right to be heard	The court checks whether there was a "meaningful opportunity" – formal flaws ≠ refusal (Parsons; Karaha Bodas)[56]	No due process defect cases recorded in 2024; Supreme Court clarifies: missing a session ≠ automatic refusal if notification is proven[57]	Cass., 6 November 2024, Libye – Claimed "dual form" did not violate procedural rights[58]	SGHC CZD v CZE (2023) – defendant's participation offsets procedural flaws[59]	To establish the presumption of "real possibility" in lieu of formal notification criteria; refer to Cass. 2024 as a pro-arbitration example
V(1)(c) Excess of competence (ultra petita)	Narrow reading: only if the award clearly exceeds the clause[60]	Kazakh courts in the SC review (2023) recognised 2 cases of refusal (extra elements of the decision)[61]	BGH 2023 – refusal, because the tribunal considered persons who did not sign the clause[62]	HK BB v KO 2023 – refusal in set-aside, but the court upheld the award, indicating *de minimis excess*[63]	To introduce a procedural option to remit awards to arbitrators (under the HK model) instead of an outright refusal

56 UNCITRAL Secretariat Guide (n 11) art V(1)(b); Lianjun Li and others, 'Hong Kong Court Orders Remission of Arbitral Award on Public Policy Grounds' (*Reed Smith*, 30 January 2024) <https://www.reedsmith.com/en/perspectives/2024/01/hong-kong-court-orders-remission-of-arbitral-award-on-public-policy-grounds?/> accessed 20 May 2025.

57 *CIS Legislation* <https://cis-legislation.com> accessed 20 May 2025.

58 'The French Supreme Court (Cour de cassation) Rules on the Liquidator's Intervention Not Granted Exequatur in France' (*Teynier Pic*, 3 January 2025) <https://www.teynier.fr/en/the-french-supreme-court-cour-de-cassation-rules-on-the-liquidators-intervention-not-granted-exequatur-in-france/> accessed 20 May 2025.

59 Yu-Jin Tay and Charles KS Tay, 'The High Court of Singapore Gives Additional Insight in Relation to Enforcement of Foreign Arbitral Awards in Singapore' (*Mayer Brown*, 12 April 2023) <https://www.mayerbrown.com/en/insights/publications/2023/04/the-high-court-of-singapore-gives-additional-insight-in-relation-to-enforcement-of-foreign-arbitral-awards-in-singapore?/> accessed 20 May 2025.

60 UNCITRAL Secretariat Guide (n 11) art V(1)(c).

61 Maxim Telemtayev and Assel Konyskerey, 'Kazakhstan Law News Digest for April – June 2023' (*White & Case*, 4 July 2023) <https://www.whitecase.com/insight-alert/kazakhstan-law-news-digest-april-june-2023> accessed 20 May 2025.

62 Altenkirch and Mota (n 54).

63 Li and others (n 56).

V(1)(d) Inconsistency in the procedure/composition of the tribunal	Priority of autonomy of will; national procedure – only *subsidiaria*[64]	No cases on composition of tribunal; RK Law Chapter IV allows for challenge in case of conflict of interests	Cass. 2024 recognised *ad hoc* procedure although ICC rules were partially violated[65]	SGHC DDI v DDJ 2024 - confirmed finality of appointment of arbitrator, rejecting set-aside[66]	To formally clarify that insignificant departures from the rules ≠ grounds for refusal
V(1)(e) Cancellation of set aside or annulled arbitral awards at the seat of arbitration	Cancellation = discretionary ground; 'limited deference' is possible (Karaha-Bodas)[67]	Kazakh courts traditionally follow the principle of 'automatic' refusal if the award is cancelled	Cass. Paris 2024 (Siba Plast) - executed award despite partial cancellation in Libya[68]	SGCA Deutsche Telekom v India 2023 - upheld execution although annulment was pending in The Hague[69]	To clarify in the Supreme Court that cancellation ≠ automatic barrier; the court has the right to consider the circumstances (forum shopping, discrimination)
V(2)(a) Non-arbitrability of the subject matter	Determined by *lex fori*; trend – narrowing of non-arbitrable categories[70]	Amendments to the Law (19.06.2024) introduced a ban on disputes between banks and MFOs[71]	BGH 2024 found sanctions disputes arbitrable (no automatic ban)[72]	SGCA Westbridge 2023 – developed a "composite test" for arbitrability[73]	Conduct an industry analysis: is it advisable to maintain a complete ban on bank disputes?; consider the "conditional arbitrability" model

64 UNCITRAL Secretariat Guide (n 11) art V.

65 The French Supreme Court (n 58).

66 *DDI v DDJ and another* [2024] SGHC 68.

67 Li and others (n 56).

68 *Siba Plast SARL v Libya* RG n° 21/11112 [2024] Paris Court of Appeal.

69 *Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10.

70 UNCITRAL Secretariat Guide (n 11) art V(2)(a).

71 'Baker McKenzie International Arbitration Yearbook 2024-2025 – Kazakhstan' (*Global Arbitration News: A Blog by Baker McKenzie*, 1 January 2025) <https://www.globalarbitrationnews.com/2025/01/01/baker-mckenzie-international-arbitration-yearbook-2024-2025-kazakhstan/> accessed 20 May 2025.

72 Antonios Politis, 'No Signature – No Problem? German Court Addresses Arbitral Award's Signature Requirement Under UNCITRAL Model Law' (*Kluwer Arbitration Blog*, 9 December 2024) <https://arbitrationblog.kluwerarbitration.com/2024/12/09/no-signature-no-problem-german-court-addresses-arbitral-awards-signature-requirement-under-uncitral-model-law/> accessed 20 May 2025.

73 Karmarkar (n 55).

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APPENDIX 2. Legal analysis of primary sources for 2024

***Table* A2. Regulatory framework of the Republic of Kazakhstan**

Legal act / source	Key changes in 2024	Legal significance for the enforcement of foreign arbitral awards
Law on Arbitration (No. 488-V)	— Law No. 97-VIII (19 June 2024) prohibited arbitration institutions created by MFOs/debt collection agencies from considering disputes between banks and microcreditors. — Non-arbitrable categories were expanded (disputes involving individual debtor were included)[74]	When filing for enforcement, the court checks whether the subject falls under the new prohibitions. An arbitration agreement concluded after 19 June 2024 will be null and void if the dispute relates to the specified sectors.
Civil Procedure Code of the Republic of Kazakhstan, Chapter 46 (Articles 501–504)	No changes, but the Supreme Court clarified the interpretation (see paragraph 4)[75]	Courts are again instructed to apply the New York Convention directly, the Civil Procedure Code - subsidiary.
Regulatory Resolution of the Supreme Court dated 2 November 2023 No. 3	Provides mandatory clarifications to courts on public order, time limits and evidence in recognition/enforcement[76]	In 2024, courts referred to it as a guide to assessing the "manifest breach" of public policy.
Resolution of the Constitutional Court dated 13 September 2024 No. 51-NP	The wording of paragraph 3 of Article 52 (grounds for cancellation) is recognised as constitutional[77]	The narrow, exhaustive nature of the grounds for cancellation/refusal of recognition is confirmed.
AIFC Regulations (Arbitration Regulations 2017; IAC Rules 2018)	No changes; AIFC Court confirmed their priority over the Arbitration Law[78]	Allows for the recognition of awards *ex parte,* without prior notice to the debtor.

74 Baker McKenzie (n 71).
75 Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No 3 (n 53).
76 ibid.
77 Law of the Republic of Kazakhstan No 488-V LRK (n 28).
78 *Aqua Factoria LLP v AOM SDF I BV Private Limited Company* No AIFC-C/CFI/2024/0001 (AIFC Court, 22 May 2024) <https://court.aifc.kz/judgments/case-no-1-of-2024/> accessed 20 May 2025.

***Table* A3. Judicial practice in Kazakhstan for 2024**

Case	The essence of the dispute / the position of the court	Precedent Significance
AIFC Court, Case No 1/2024, Aqua Factoria LLP v AOM SDF *I B.V.* (22 May 2024)[79]	A claim to cancel the IAC award. The defendant referred to the lack of consent of the state body (Article 8(10) of the Law). The court indicated that only the AIFC regulations apply to the IAC; consent is not required; public order is not violated.	Establishes the autonomy of AIFC procedures: when executing such awards, government agencies cannot refer to internal public order.
Kazakhstani state courts (based on Baker McKenzie 2024): enforcement of an award with compound interest against a state agency[80]	Refused: the amount in the writ of execution must be expressed in an easily calculable fixed amount; the court of execution cannot calculate the interest itself.	Practical conclusion: when working with government agencies, arbitrators must indicate a specific amount of debt or the calculation procedure, otherwise there is a risk of refusal.
Examples of refusal to recognize Russian judicial acts (Signum Law case)[81]	The court refused, referring to the absence of an international treaty + reciprocity.	Confirms that reciprocity is an independent basis of Part 1 of Article 501 of the Civil Procedure Code; in 2024, courts actively require evidence of it.

79 ibid.

80 Baker McKenzie (n 71).

81 Sergazy Tuleu, 'Recognition and Enforcement of Judicial Acts of Russian State Courts on the Territory of Kazakhstan' (*Signum Law Firm*, 27 November 2024) <https://signumlaw.com/posts/priznanie-i-ispolnenie-sudebnyh-aktov-rossiyskih-gosudarstvennyh-sudov-na-territorii-kazahstana> accessed 20 May 2025.

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Table A4. Judicial practice of European countries for 2024

Jurisdiction	The essence of the dispute / the position of the court	Opportunities for improvement in Kazakhstan legislation
France	The Paris Court of Appeal obliged to attach a translation already when filing the application; otherwise, there is a risk of rejection.[82] Cassation (6 November 2024) supported the effect utile of the arbitration clause, rejected the argument on "double consent".[83]	1) Careful control of procedural safeguards, but refusal is rare. 2) Narrow interpretation of public policy (only clear violations)[84]
Germany (BGH 11 July 2024)	The presumption of enforceability has been strengthened; violation of the sanction regime is not an automatic basis for refusal.	Sanctions/sovereignty arguments do not work without direct violation of order public.

Table A5. Judicial practice of Asian countries for 2024

Jurisdiction	Tendency in 2024	Opportunities for improvement in Kazakhstan legislation
Singapore	High Court (March 2024) upheld DIAC interim award under DIFC-LCIA; key factor was the fact of voluntary participation of the defendant.[85] Court of Appeal clarified: arbitrators are not obliged to "guarantee" global enforceability.[86]	Confirms pro-arbitration approach: courts look at actual conduct of parties.
Hong Kong	High Court (9 February 2024) refused enforcement under public policy due to insufficient reasons for the award, but returned it to the tribunal for correction of violations[87]	Court seeks to preserve award; gives tribunal chance to correct deficiencies instead of outright refusal.

82 William Brillat-Capello, 'French Translations Needed to Enforce Arbitral Awards in France' (*Pinsent Masons*, 15 May 2025) <https://www.pinsentmasons.com/out-law/analysis/french-translations-enforce-arbitral-awards-france> accessed 20 May 2025.

83 Baker McKenzie (n 71).

84 Marie-Laure Cartier and Alexandre Meyniel, 'Enforcement of Judgments 2024, France: Trends and Developments' (*Chambers and Partners*, 19 July 2024) <https://practiceguides.chambers.com/practice-guides/enforcement-of-judgments-2024/france/trends-and-developments> accessed 20 May 2025.

85 'International Arbitration in the Middle East: 2024 in Review and What to Expect in 2025' (*Covington*, 21 January 2025) <https://www.cov.com/en/news-and-insights/insights/2025/01/international-arbitration-in-the-middle-east-2024-in-review-and-what-to-expect-in-2025> accessed 20 May 2025.

86 Koh Swee Yen and others, 'Enforcement of Judgments 2024, Singapore: Trends and Developments' (*Chambers and Partners*, 19 July 2024) <https://practiceguides.chambers.com/practice-guides/enforcement-of-judgments-2024/singapore/trends-and-developments/O17884> accessed 20 May 2025.

87 Li and others (n 56).

***Table* A6. Comparative conclusions**

Kazakhstan 2024	Europe 2024	Asia 2024	Conclusion for improving the mechanism
Strict formal requirements for the amount of debt; new non-arbitrability (financial sector).	Narrow interpretation of public policy; translation requirements (France); protection of the effectiveness of the clause.	Pro-arbitrage position (Singapore), flexible defect resolution (Hong Kong).	1. Clarify in the Law: allow the execution of awards with interest according to the formula, as in France or Singapore. 2. In the Code of Civil Procedure, secure the right of the court to remit the award to arbitrators for correction, following the example of the Hong Kong. 3. Introduce an explanation of the Supreme Court (or an amendment) on the criteria for reciprocity—use public lists. 4. Continue digitalization: extend the AIFC portal to the consideration of ex parte applications in state courts.

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APPENDIX 3

***Table* A7. Kazakhstan Arbitration Enforcement Mechanism (KAEM): a unified scheme of work linked to existing norms and step-by-step legal implementation**

No.	KAEM stage	What is already enshrined in the current law of the Republic of Kazakhstan	What exactly does KAEM add/clarify	Necessary regulatory changes (ways of implementing)	Practical effect
1	Electronic appeal	The E-Sot portal and Article 150 of the Code of Civil Procedure allow filing claims digitally. The Law on Electronic Document and Electronic Digital Signature recognizes electronic signatures.	Specialised e-Justice-KAEM module; automatic validation of arbitral award, translations and NYC checklist; chamber (summary) proceedings instead of general claims.	New Article 501-1 of the Code of Civil Procedure "Filing a petition for recognition and enforcement of an arbitral award"; Article 66-1 of the Law "On Arbitration" - a direct reference to the electronic format.	Reduction of the initial inspection to 1 day; elimination of returns due to formal defects.
2	Accelerated notification	Electronic notification is provided for by the Code of Civil Procedure, but the period starts from paper delivery.	Presumption of proper notification via personal account + e-mail; 14 days for objections are recorded automatically.	Article 501-2 of the Code of Civil Procedure "Electronic notification to KAEM"; by-laws of the Ministry of Justice on the e-service algorithm.	Eliminates disputes about “improper delivery”, disciplines the debtor.

3	Specialised proceedings	Competence of general courts (Chapter 46 of the Code of Civil Procedure). AIFC Court already considers intra-center disputes.	Collegium KAEM at the Astana court (3 judges with MA certification); online hearing — only six grounds of Article V NYC, without revision on the merits.	New Chapter 46-1 of the Code of Civil Procedure "Special procedure for the enforcement of foreign arbitral awards"; amendment to the Law "On the Judicial System" on the creation of a panel.	Creates uniformity of practice; reduces the burden on district courts; increases predictability.
4	Remit mechanism	The Code of Civil Procedure provides only for refusal or satisfaction; there is no return for revision.	The court may return the arbitral award to the AIFC tribunal/panel to correct a remediable defect (e.g. compound interest formula) within 60 days.	Art. 501-4 of the Code of Civil Procedure "Return of an arbitral award to eliminate defects (remit)"; Article 66-3 of the Law "On Arbitration" - a direct reference to remit as an analogue of para. 1059 ZPO / para. 68 AA HK.	Avoids automatic refusal; solves the problem of "compound interest"; the investor is protected.
5	Issue of execution writ and open register	An electronic writ of execution is permissible (Law on Enforcement Proceedings).	The writ of execution is generated by the portal within 3 working days after the decision of the Collegium KAEM; the final acts are published in the KAEM register.	Article 12-1 of the Law "On Enforcement Proceedings" - automatic generator of executors; order of the Ministry of Justice on the open register of KAEM.	The enforcement stage is accelerated; transparency and market confidence increase.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВИКОНАННЯ ІНОЗЕМНИХ АРБІТРАЖНИХ РІШЕНЬ У КАЗАХСТАНІ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АНАЛІЗ ЄВРОПЕЙСЬКИХ ТА АЗІЙСЬКИХ МЕХАНІЗМІВ

Азамат Нуртан* та Майґуль Абілова

АНОТАЦІЯ

Вступ. *Підвищення ефективності визнання та виконання Казахстаном іноземних судових та арбітражних рішень значною мірою залежить від розширення міжнародного співробітництва. У контексті посилення глобальної правової інтеграції ця стратегія є життєво важливою не лише для підтримки зовнішньоекономічної діяльності країни, але й для підвищення довіри іноземних партнерів до судової системи Казахстану. Наразі Казахстан є учасником ключових договорів, зокрема Нью-Йоркської конвенції 1958 року, Вашингтонської конвенції 1965 року та Мінської конвенції 1993 року. Однак він ще не приєднався до Гаазької конвенції 2019 року — сучасного універсального механізму, що підтримується багатьма країнами, до яких належать і держави-члени ЄС, і Сполучені Штати, — що могло б ще більше спростити процеси транскордонного виконання рішень.*

Методи. *Для досягнення цілей було проведено порівняльно-правовий аналіз механізмів визнання та виконання іноземних арбітражних рішень у Казахстані та провідних арбітражних юрисдикціях Європи та Азії. У цьому аналізі використовувалися офіційні судові бази даних Казахстану, AIFC та IAC, а також додаткові дані із судових архівів, установ (KIAC, ICC, SIAC) та виклади CLOUT, що дозволило провести комплексне порівняння азійської та європейської юрисдикції. У дослідженні використовувалися такі методи, як статистичний аналіз відмов відповідно до статті 501 Цивільного процесуального кодексу та порівняльний огляд національного законодавства з положеннями Нью-Йоркської конвенції та UNCITRAL.*

Результати та висновки. *Аналіз показує, що понад 40% відмов у визнанні та виконанні іноземних арбітражних рішень у Казахстані зумовлені нечітким тлумаченням публічного порядку та процесуальними перешкодами, тоді як у юрисдикціях, що підтримують арбітраж, у всій Європі та Азії, такі відмови не перевищують 10%. Запропонований механізм забезпечення виконання арбітражних рішень у Казахстані (KAEM) містить уточнення критеріїв відмов та прийняття рішень на основі статті V Нью-Йоркської конвенції, запровадження прискорених електронних процедур через єдиний портал електронного правосуддя, створення спеціалізованих програм підготовки суддів , а також впровадження механізму*

повернення справ до арбітражних судів для усунення формальних недоліків, замість практики автоматичної відмови у визнанні та виконанні таких рішень. Автори пропонують розширити договірну базу, приєднатися до нових міжнародних конвенцій, прийняти прогресивні механізми ЄС та UNCITRAL, а також інтегрувати цифрові рішення для покращення практики правозастосування в Казахстані, підвищення рівня зацікавленості в ньому як у регіональному арбітражному центрі, а також зміцнення правової визначеності та довіри іноземних інвесторів.

Ключові слова: *іноземні арбітражні рішення; виконання арбітражних рішень; арбітражна реформа в Казахстані; Нью-Йоркська конвенція (1958 р.); судове втручання в арбітраж; порівняльно-правовий аналіз; механізм забезпечення виконання арбітражних рішень у Казахстані.*

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Research Article

LEGAL CULTURE AND LEGAL CONSCIOUSNESS IN KAZAKHSTAN: AN ANALYSIS OF THE ANNUAL REPORTS OF THE OMBUDSMAN FOR HUMAN RIGHTS AND LEGAL ACTS

Darkhan Bakirov, Nurmukhamed Myrzatayev*, Kairly Ospanov, Akzira Zhangaziyeva and Saule Suleimenova

ABSTRACT

Background: *Legal consciousness and legal culture are interrelated but different concepts. Legal consciousness is a set of ideas, views, beliefs and feelings of people regarding law, legality and justice. It reflects the attitude of society or an individual toward the law. Legal culture is a broader concept that includes not only the level of legal consciousness but also the degree of implementation of legal norms in society, as well as the lawful behaviour of citizens. The development of legal awareness and legal culture is necessary for the construction of a legal state and the observance of democratic principles. Examining these elements is important for evaluating how effectively policies fulfil human rights obligations and identifying key directions to improve justice and equity.*

Methods: *The study utilised document and legal analysis approaches. It examined the legal culture and legal consciousness in Kazakhstan by analysing the annual reports of the Ombudsman for Human Rights from 2019 to 2023, as these provide authoritative assessments of human rights, legal awareness, and access to justice in Kazakhstan. Additionally, the study analysed current legislation and policy documents relevant to legal culture and legal consciousness in Kazakhstan, including the Constitution of the Republic of Kazakhstan, the Concept for the Development of Legal Policy in the Republic of Kazakhstan until 2030, and the National Plan for Human Rights and the Rule of Law.*

Results and Conclusions: *The study revealed the dynamics of public legal consciousness and the challenges of adjusting national policies to global human rights standards. The findings were categorised into three main themes: complaints as indicators of legal culture and legal*

consciousness; human rights in criminal proceedings and rights of convicts; and legal education and public engagement. As the findings indicate, human rights violations during pre-trial investigations, allegations of coercion, and mistreatment of convicts remain significant concerns in ensuring access to justice in Kazakhstan. These results highlight gaps in institutional accountability and policy implementation, stressing persistent difficulties in protecting human rights within the criminal justice and judicial systems. An analysis of key legal acts in the context of legal culture and legal consciousness revealed that the development of a strong legal culture in Kazakhstan requires a number of reforms aimed at increasing the level of legal education of the population, institutional accountability, and effective implementation of laws. The study concludes that to promote legal culture and legal consciousness in Kazakhstan, it is imperative to address identified systemic issues through legal reforms, public education, and institutional strengthening.

1 INTRODUCTION

Examining the formation of legal culture and legal consciousness is necessary to understand the difficulties of maintaining the rule of law in society. Legal consciousness and legal culture are closely interconnected. The latter reflects the level of legal development in a society and is an essential component of culture overall. A high level of legal culture signifies a state governed by the rule of law. Legal culture characterises the level of legal consciousness in society.[1] In turn, the population's legal consciousness level depends on how deeply they have mastered such legal phenomena as the value of human rights and freedoms, the value of lawful behaviour, and the extent to which they are informed about legal responsibility for various types of offences. Despite their close relationship, these concepts reflect different aspects of how people and societies perceive, engage with, and apply the law.[2] Unlike legal consciousness, legal culture covers legal structures, relations regarding the role of law, relations with citizens, and interpenetration with other cultural systems. These concepts are particularly important in transitional countries such as Kazakhstan due to the complex interaction between the effects of globalisation, historical legacies and socio-political changes.

1 Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 710, doi:10.1093/oxfordhb/9780198810230.013.22; David Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches, and Values' (2016) Annual Review of Law and Social Science 45, doi:10.1146/annurev-lawsocsci-110615-084950.

2 István H Szilágyi, 'Social Legal Consciousness or Legal Culture?' (2022) 7(2) Public Governance, Administration and Finances Law Review 5, doi:10.53116/pgaflr.2022.2.1.

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This article examines legal culture and legal consciousness in Kazakhstan through a detailed analysis of key legal acts and the annual reports of the Ombudsman for Human Rights.[3] The reports provide a rich source for the analysis of legal culture and legal consciousness and include data on public attitudes towards human rights, institutional responses and systemic legal problems. By analysing these reports, this study looks at how legal consciousness manifests in the everyday interactions of citizens and government institutions and highlights areas of progress and persistent challenges. Through this analysis, the article aims to shed light on how legal consciousness and culture are formed and improved, providing a basis for more effective governance and legal policymaking.

2 METHODOLOGY

This study explored legal culture and legal consciousness in Kazakhstan through the analysis of the annual reports of the Ombudsman for Human Rights from 2019 to 2023. By documenting complaints, investigations and resolutions, the reports mirror social attitudes toward the legal system. The reports present quantitative and qualitative data, including the number of complaints and types of violations. This data provided the main trends and inequalities and contributed to the overall understanding of Kazakhstan's legal culture and consciousness. The reports were retrieved from the official website of the Ombudsman to ensure their authenticity and credibility. A systematic analysis was conducted to identify key themes and trends within the reports.

In addition, a legal analysis method was used to analyse key legal and policy documents in the context of legal culture and legal consciousness in Kazakhstan, including Constitution of Kazakhstan, legislative acts and policy acts. Documents were chosen based on their relevance to legal norms, societal values, and the development of legal culture and legal consciousness.

3 EVOLUTION OF LEGAL CULTURE AND LEGAL CONSCIOUSNESS IN KAZAKHSTAN

The traditional foundations of legal culture in Kazakhstan included adat, sharia, Soviet and modern legislation. While adat and sharia prioritised social harmony and moral values, the Soviet period introduced a centralised legal system that strengthened state authority in personal and cultural matters.[4] Before the establishment of a formal state legal system,

3 Human Rights Ombudsman in the Republic of Kazakhstan, 'Report for 2023 on the Activities of the Human Rights Ombudsman in the Republic of Kazakhstan' (*gov.kz The Single Platform of Government Agencies*, 22 April 2024) <https://www.gov.kz/memleket/entities/ombudsman/documents/details/649896?lang=en> accessed 4 February 2025.

4 Allen J Frank, '*Sharī'a* Debates and Fatwas among Nomads in Northern Kazakhstan, 1850-1931' (2017) 24(1-2) Islamic Law and Society 61, doi:10.1163/15685195-02412p03.

Kazakh society was governed by customary law (adat), deeply rooted in the nomadic way of life and collective social structure. It consisted of unwritten norms and practices that regulated relations between people, resolved disputes and maintained order between clans and tribes. Adat placed great emphasis on social values, negotiations, and compromises.[5]

The main sources of Kazakh customary law are the legislative acts of the khans, such as the "Clear Path" of Khan Kasym, the old path of Khan Yesim, and the "Seven Charters" of Khan Tauke (Zheti Zhargy). Zheti Zhargy formalised the judicial power of the biys (judges) and codified the norms concerning crimes against the person, property, and family relations.[6] Biys were not hereditary leaders but were selected for their wisdom, impartiality, and deep understanding of customary laws. The Zheti Zhargy consisted of seven sections and resolved disputes in seven areas of public life: land disputes, disputes over widows, disputes over kun (ransom), child upbringing and marital relations, responsibility for crimes, inter-tribal disputes, and ensuring national security. During this period, legal culture was shaped by the nomadic lifestyle, where relationships were often unstable and mediated through social bonds rather than centralised legal institutions. The primary purpose of adat was to maintain harmony within the tribe, preventing and resolving disputes. In this context, legal culture was less formalised and more reliant on social practices and mutual respect. This traditional legal system provided the foundation for legal consciousness in pre-Soviet Kazakhstan, shaping the Kazakh nomadic traditions of justice, fairness, and the articulation of human rights.[7] Thus, customs and traditions were closely linked to legal consciousness, absorbing aspects of social ideology.

The spread of Islam in Central Asia brought sharia as an additional legal structure, which impacted Kazakh society.[8] Although Islam became an important part of Kazakhstan's cultural and spiritual life, its legal principles did not fully suppress adat. Instead, the two systems worked in co-existence and reconciled with each other. Sharia was mostly used for private matters such as marriage, divorce and inheritance, while adat continued to govern social and tribal matters.[9] These norms allowed the Kazakh society to preserve its nomadic traditions by integrating the Islamic values of justice and morality.

5 Natal'ya M Bezkaravaeva, 'Modernization of the Kazakh Institutions of Power in the Structure of West Siberian Governorate-General in the 19th Century' (2023) 7(1) Historia Provinciae 238, doi:10.23859/2587-8344-2023-7-1-6.

6 Rafail N Zinurov, 'The "Sudebnik" by Mkhitar Gosh and "Zheti Zhargy" by Tauke Khan as Unique Ethno-Legal Monuments of the Past Centuries' (2021) 3 Law and State 26, doi:10.51634/2307-5201_2021_3_26.

7 Beibit Yu Shangirbayeva, '"The Freedom of a Fair Word": The Roots of Human Rights Discourse in Kazakh Cultural Heritage' (2023) 42(3) Central Asian Survey 444, doi:10.1080/02634937.2023.2192742.

8 Frank (n 4); Zaur Jalilov and Bolatbek Batyrkhan, 'Islam in Kazakhstan: History of Revival under Conditions of Independence' (2019) 20(3) Central Asia and the Caucasus 124.

9 Frank (n 4).

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With Kazakhstan's entry into the Soviet Union, adat and sharia were replaced by a centralised socialist legal system that established a codified and state-controlled legal system. Soviet legal culture placed a priority on social welfare, the strengthening of state authority, and tight centralisation.[10] Customary practices and traditional legal institutions, such as the biys, were eliminated in favour of codified laws that reflected Marxist-Leninist doctrine. The Soviet government sought to standardise legal systems across the union, frequently disregarding local cultural and historical contexts.[11]

Positive changes in the legal system of Soviet Kazakhstan included the destruction of certain harmful institutions of Kazakh customary law, the increase in the social status of women, and the creation of a new Soviet concept of civil rights. Although the Soviet government permitted some traditional customs such as polygamy, the levirate custom, and kalym (wedding price) under specific constraints during Kazakhstan's early Soviet era, they recognised these practices as destructive relics of patriarchal institutions that harmed women. These traditional practices often conflicted with the Soviet administrative structure.[12] Nevertheless, Soviet legal reforms had a notable impact on legal culture and legal consciousness in Kazakhstan.

Kazakhstan retained not only the legal structures and institutions of the USSR after independence in 1991, but also a strong bond with the Russian language and legal traditions.[13] However, in the post-Soviet era, the development of the Kazakh ethnic group and the growing importance of the Kazakh language played a critical role in national identity.[14] The 1995 Constitution was instrumental in strengthening the rule of law and advancing democratic governance. Despite these achievements, there are still a number of

10 Robert Sharlet, 'Stalinism and Soviet Legal Culture' in Robert C Tucker (ed), *Stalinism: Essays in Historical Interpretation* (Routledge 2017) 155, doi:10.4324/9781315130217-7.

11 Edward Lemon and Oleg Antonov, 'Authoritarian Legal Harmonization in the Post-Soviet Space' (2020) 27(7) Democratization 1221, doi:10.1080/13510347.2020.1778671.

12 Yerlan Sailaubay and Albina Zhanbossinova, 'Kazakh Nomads, Social Class Transformations and Soviet Power during the Period of Collectivization' [2024] Central Asian Survey, doi:10.1080/02634937.2024.2407967.

13 Matthew Blackburn, 'Discourses of Russian-Speaking Youth in Nazarbayev's Kazakhstan: Soviet Legacies and Responses to Nation-Building' (2019) 38(2) Central Asian Survey 217, doi:10.1080/02634937.2019.1615409; Aziz Burkhanov, 'Kazakhstan's National Identity-Building Policy: Soviet Legacy, State Efforts, and Societal Reactions' (2017) 50(1) Cornell International Law Journal 1, doi:10.31228/osf.io/2hfr6; Marlene Laruelle, Dylan Royce and Serik Beyssembayev, 'Untangling the Puzzle of "Russia's Influence" in Kazakhstan' (2019) 60(2) Eurasian Geography and Economics 211, doi:10.1080/15387216.2019.1645033.

14 Aiganym Maulen, Rustem Kadyrzhanov and Seilbek Mussatayev, 'Post-Soviet Ethnodemographic Dynamics as a Factor of National Building in Kazakhstan' (2025) 31(1) Nationalism and Ethnic Politics 138, doi:10.1080/13537113.2024.2422196.

challenges, including the independence of the judiciary, ensuring equal access to justice, and combating corruption.[15]

Kazakhstan's post-Soviet transition has been impacted by globalisation in a significant way, affecting both its legal and cultural context. As a result, the government has integrated democratic principles and international legal norms into national policies.[16] Kazakhstan has also been actively involved in international organisations and has integrated international human rights standards into the national legal system.[17] However, the World Bank report highlights that in Kazakhstan, available information is not easily accessible for public participation and understanding, which hinders citizen engagement.[18]

4 LITERATURE REVIEW

Legal culture and legal consciousness are crucial for understanding how society perceives the legal system. Legal culture refers to society's collective values, beliefs, and practices around law and justice.[19] Elements of legal culture include knowledge and understanding of laws, compliance with legal norms, development of lawmaking and law enforcement, and protection of human rights and freedoms. Legal consciousness is a part of legal culture, but it does not guarantee lawful behaviour. Thus, legal consciousness belongs to individuals' perceptions and attitudes towards legal institutions and norms.[20] Legal culture includes not

15 Kanatay Dalmatov and others, 'Addressing Human Rights Violations in the Criminal Justice System of Kazakhstan: The Role of the Prosecutor's Office and a Call for Legislative Reforms' (2024) 7(3) Access to Justice in Eastern Europe 63, doi:10.33327/AJEE-18-7.3-a000323; Zhaslan Khamitov, Colin Knox and Gulsara Junusbekova, 'Corruption, Public Procurement and Political Instability in Kazakhstan' (2023) 42(1) Central Asian Survey 89, doi:10.1080/02634937.2022.2072811; Olzhas Ramashov and others, 'Constitutional and Legal Framework of Anti-Corruption Measures in the Republic of Kazakhstan: Problems, Trends, Solutions' (2024) 45(6) Deviant Behavior 870, doi:10.1080/01639625.2023.2268249.

16 OECD, *Reforming Kazakhstan: Progress, Challenges and Opportunities* (OECD Publishing 2018) doi:10.1787/18ba0d60-en.

17 Dalmatov and others (n 15); Anja Mihr, 'Human Rights Education and Human Rights in Central Asia' in Anja Mihr and Cindy Wittke (eds), *Human Rights Dissemination in Central Asia: Human Rights Education and Capacity Building in the Post-Soviet Space* (SpringerBriefs in Political Science, Springer 2023) 31, doi:10.1007/978-3-031-27972-0_3; Roman Podoprigora and Alexandr Klyushev, 'International Instruments Influencing Religious Freedom in Kazakhstan' (2018) 16(2) Review of Faith and International Affairs 90, doi:10.1080/15570274.2018.1469829.

18 World Bank, *Kazakhstan: Strengthening Public Finance for Inclusive and Resilient Growth: Public Finance Review* (World Bank Group 2023) <http://documents.worldbank.org/curated/en/099057102282440191> accessed 4 February 2025.

19 Cotterrell (n 1); Nelken (n 1).

20 Lynette J Chua and David M Engel, 'Legal Consciousness Reconsidered' (2019) 15 Annual Review of Law and Social Science 335, doi:10.1146/annurev-lawsocsci-101518-042717; Filip Horák, David Lacko and Adam Klocek, 'Legal Consciousness: A Systematic Review of Its Conceptualization and Measurement Methods' (2021) 31(1) Anuario de Psicologia Juridica 9, doi:10.5093/APJ2021A2.

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only the level of legal consciousness, but also the degree of implementation of legal norms in society, as well as the lawful behaviour of citizens. In other words, high legal culture presupposes not only an understanding of laws but also their active application in practice. Together, legal culture and legal consciousness provide an insight into how the general public perceives justice and law, which directly impacts the efficacy and validity of the legal system. Public collaboration with legal institutions is generally higher in societies with a strong legal culture and a positive legal consciousness, which increases the credibility and effectiveness of legal institutions.[21] Factors, such as trust and transparency of legal processes in the judicial system, greatly affect public perception of justice.[22]

Recent studies highlight the complexity of legal culture and consciousness, discovering their role as an outline to understand the engagement of individuals with laws and institutions. Some researchers argue that the concept and measurement of legal consciousness are underdeveloped and lack clarity and functionality.[23] Despite its importance as a construct to understand the legitimacy of law, many studies fail to provide a clear definition of legal consciousness. Some authors view legal consciousness as a framework through which individuals express and clarify their dissatisfaction with state institutions.[24]

Post-Soviet countries as transitional societies provide a compelling case to examine the development of legal culture and legal consciousness. Research indicates that these nations demonstrate common characteristics, including centralised legal structures, limited judicial freedom, a legacy of undemocratic political authorities, and extensive public mistrust of legal institutions.[25] However, there are also significant differences due to cultural, economic and political contexts and influences.[26] In Kazakhstan, the

21 Alejandra Díaz Gude and Iván Navarro Papic, 'Restorative Justice and Legal Culture' (2020) 20(1) Criminology and Criminal Justice 57, doi:10.1177/1748895818796549; Kathryne M Young and Katie R Billings, 'Legal Consciousness and Cultural Capital' (2020) 54(1) Law and Society Review 33, doi:10.1111/lasr.12455.

22 Stephan Grimmelikhuijsen and Albert Klijn, 'The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment' (2015) 93(4) Public Administration 995, doi:10.1111/padm.12149; Shlomo Mizrahi, Eran Vigoda-Gadot and Nissim Cohen, 'Antecedents of Trust in the Judiciary: Between Fair Process and High Satisfaction' (2020) 24(2) International Public Management Journal 250, doi:10.1080/10967494.2020.1819920.

23 Horák, Lacko and Klocek (n 20).

24 Mayra Feddersen and others, '"The State Is Something That Disappoints": Legal Consciousness amid Institutional Dissatisfaction' (2024) 58(1) Law and Society Review 69, doi:10.1017/lsr.2023.3.

25 Artem Galushko, 'The Soviet Kingdom of Crooked Mirrors and Its Legacy of "Twofold Constitutionalism": Politically Motivated Trials against Citizens of Ukraine in the Russian Federation' (2016) 8 Hague Journal on the Rule of Law 155, doi:10.1007/s40803-016-0026-x; William M Reisinger, Marina Zaloznaya and Vicki L Hesli Claypool, 'Popular Legal Attitudes and the Political Order: Comparative Evidence from Georgia, Russia and Ukraine' (2021) 73(1) Europe-Asia Studies 36, doi:10.1080/09668136.2020.1807469.

26 Peter H Solomon and Kaja Gadowska, 'Legal Change in Post-Communist States: Contradictions and Explanations. Introduction' (2018) 51(3) Communist and Post-Communist Studies 173, doi:10.1016/j.postcomstud.2018.07.004.

adoption of international legal norms presented both opportunities and challenges for its legal system.[27]

5 FINDINGS AND DISCUSSION

5.1. Complaints as Indicators of Legal Culture and Legal Consciousness

Complaints in any legal system are an important element because they reflect the experiences, perceptions, and understanding of individuals regarding the law. They are often seen as a direct response to the functioning of legal norms, practices and justice systems.

Figure 1[28] shows the number of appeals received by the Ombudsman for Human Rights in Kazakhstan, which increased considerably in 2023 compared to previous years. The total number of appeals reached 5,773 in 2023, 1.5 times more than in 2022 (3948). This increase in appeals reflects several critical aspects of Kazakhstan's legal culture and legal consciousness. The rising number of appeals suggests increasing awareness about the mechanisms available for legal rights and justice among the citizens. Overall, Figure 1 underlines the evolving legal culture in Kazakhstan, where public engagement with the legal mechanisms is increasing.

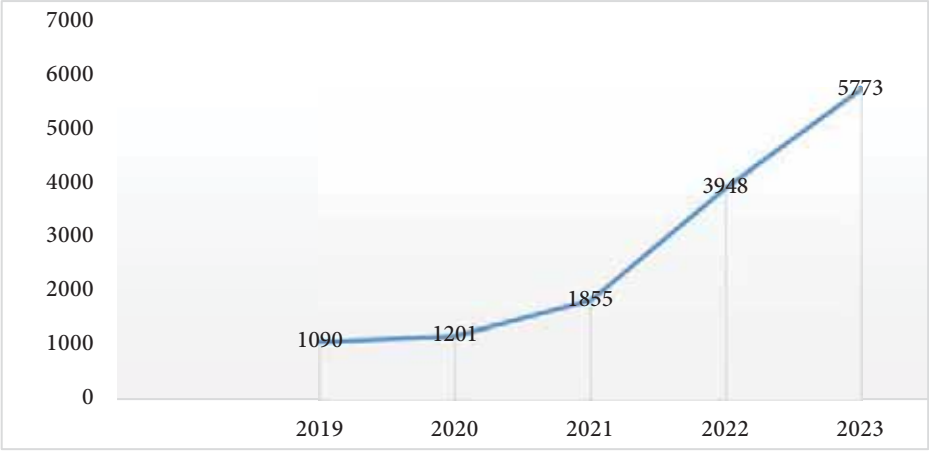

Figure 1. The number of appeals to the Ombudsman for Human Rights of the Republic of Kazakhstan

27 Marzhan Bilyalova and others, 'Principles of Administrative Procedure and Proceedings in Kazakhstan against the Background of Foreign Experience' (2023) 25(4) Public Integrity 399, doi:10.1080/10999922.2022.2054570; Shokan Burashov and others, 'Consumer Rights in the Republic of Kazakhstan and Their Legal Regulation: Transformation in the Context of Global Experience' (2023) 25(6) Public Integrity 614, doi:10.1080/10999922.2022.2101268.

28 Source: Human Rights Ombudsman in the Republic of Kazakhstan (n 3).

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The report stresses that the availability of regional representatives has contributed to this trend by making the Ombudsman's services more accessible. Table 1[29] presents data on the regional distribution of individual consultations conducted by Ombudsman representatives in 2023. Currently, Kazakhstan is administratively divided into 17 regions (oblys) and 3 cities of republican significance.[30] The table lists both regions and cities of republican significance (Astana, Almaty, and Shymkent).

Table 1. Regional distribution of individual consultations conducted by representatives in 2023

No.	Region	Q1	Q2	Q3	Q4	Total
1	Zhambyl	44	47	51	84	**226**
2	Astana City	60	70	71	5	**206**
3	Shymkent City	20	49	47	42	**158**
4	Akmola	23	31	75	15	**144**
5	Kyzylorda	13	64	44	19	**140**
6	North Kazakhstan	15	35	46	31	**127**
7	Almaty City	14	27	44	38	**123**
8	Karaganda	29	23	29	42	**123**
9	Pavlodar	28	43	32	19	**122**
10	Aktobe	15	44	29	31	**119**
11	East Kazakhstan	35	29	15	20	**99**
12	West Kazakhstan	6	25	35	33	**99**
13	Mangystau	10	23	13	45	**91**
14	Atyrau	6	16	31	33	**86**
15	Turkestan	10	25	16	28	**79**
16	Zhetysu	26	32	5	2	**65**
17	Kostanay	14	24	13	8	**59**
18	Ulytau	-	6	21	23	**50**
19	Abay	-	7	18	23	**48**
20	Almaty City	-	-	-	7	**7**
	Total	**368**	**620**	**635**	**548**	**2171**

29 Source: ibid.

30 'Republic of Kazakhstan' (*Official website of the President of the Republic of Kazakhstan*, 2025) <https://www.akorda.kz/en/republic_of_kazakhstan/kazakhstan> accessed 4 February 2025.

As Table 1 indicates, the highest number of consultations occurred in Zhambyl Region (226) and Astana City (206). Low activity was recorded in the Almaty Region due to the recent appointment of a representative and a lack of office infrastructure. The content and volume of complaints suggest different levels of public awareness regarding legal rights. The distribution of complaints across different regions suggests variations in legal consciousness and access to justice. Some regions may have high complaint rates due to socio-economic conditions, levels of legal education, or inequalities in law enforcement practices.

Figure 2[31] presents the results of appeals submitted to the Ombudsman for Human Rights in 2022 and 2023. The data highlights an increase in both the number of complaints and their resolution rates, providing significant insights into evolving legal culture and legal consciousness in Kazakhstan.

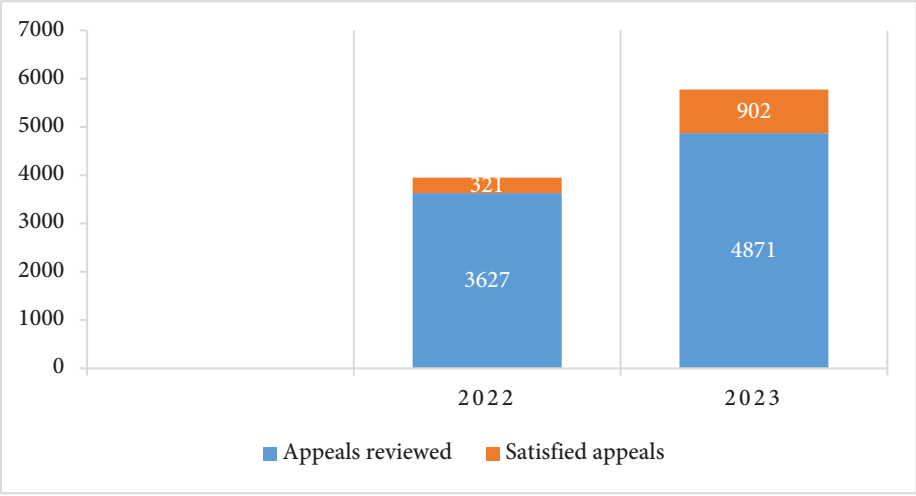

Figure 2. Results of consideration of appeals in 2022-2023

In 2023, out of 5,773 total appeals, 4,871 were reviewed, and 902 appeals (15,6 %) were resolved positively. This marked a significant growth compared to 2022, when 3,627 appeals were reviewed, and 321 (8,1 %) appeals were successfully resolved out of a total of 3,948 appeals. The number of positively resolved appeals increased significantly, rising from 321 in 2022 to 902 in 2023. The rise in appeals indicates that people are becoming more conscious of their legal rights and the mechanisms available to resolve complaints. A high percentage of resolved cases indicates a more institutional desire to address human rights concerns, though most appeals still receive only explanations rather than direct intervention. While the overall resolution rate improved, the fact that most appeals resulted in mere explanations rather than concrete actions suggests ongoing barriers to legal remedies. In 2023, only 15,6 % of cases resulted in a favourable outcome, which could indicate institutional limitations in enforcing rights and addressing systemic issues. The

31 Source: Human Rights Ombudsman in the Republic of Kazakhstan (n 3).

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increasing number of complaints also reflects continuing distrust in other legal institutions, pushing citizens to seek assistance from the Ombudsman instead.

Figure 3[32] presents the analysis of the main complaints submitted to the Ombudsman for Human Rights in Kazakhstan from 2020 to 2023. Key findings indicate that the highest number of complaints was related to the actions/inaction of pre-trial investigative authorities (1,263 cases in 2023). This figure increased by 9% compared to 2022.

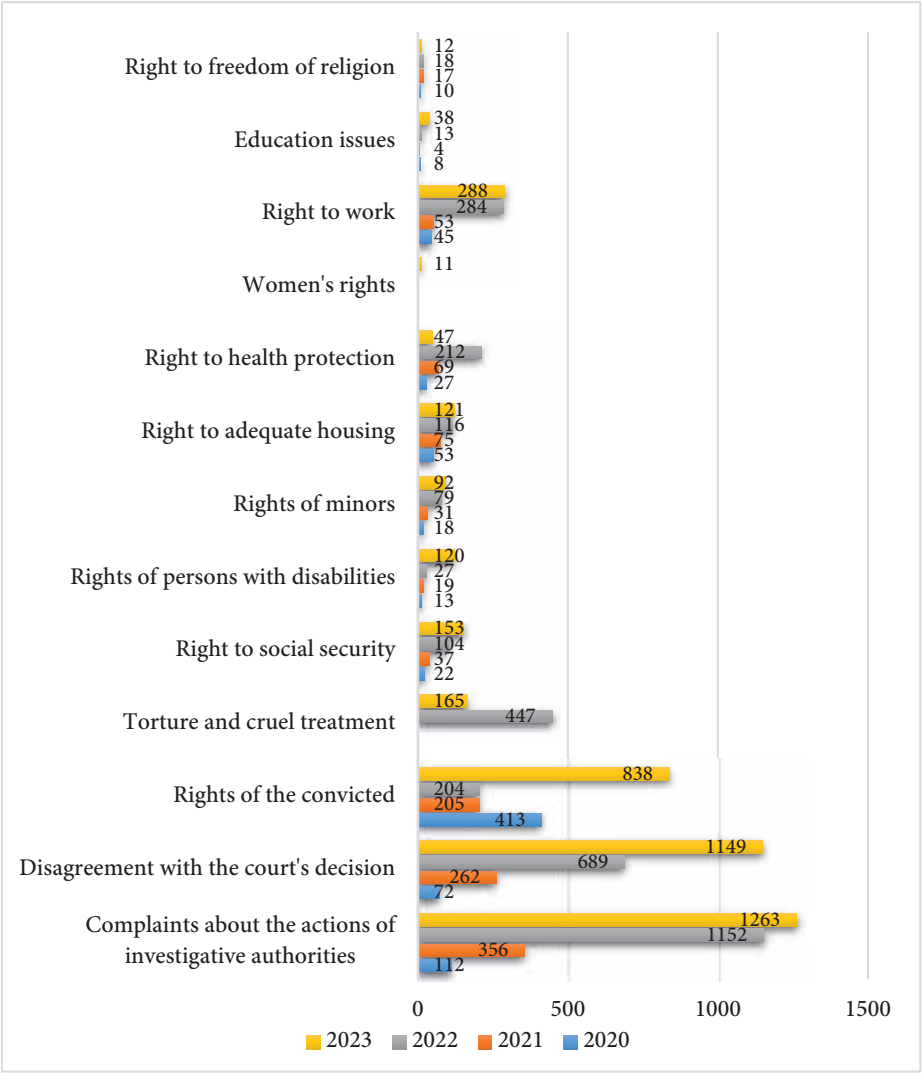

Figure 3. Complaints received by the Ombudsman in 2020-2023

32 Source: ibid.

A significant increase was observed in complaints regarding disagreement with court decisions (+66% compared to 2022). Complaints from convicted individuals quadrupled, indicating systemic issues in the penitentiary system. The number of complaints related to the rights of persons with disabilities increased fourfold. The analysis of Figure 3 highlights that the most pressing issues in Kazakhstan are criminal justice (pre-trial investigations and court decisions), imprisonment conditions, and social protection for vulnerable groups. The rise in appeals concerning criminal proceedings, social security, and the rights of vulnerable groups (such as prisoners and individuals with disabilities) reflects systemic legal challenges.[33] The prevalence of these complaints suggests weaknesses in institutional accountability and policy implementation, which may impede the growth of a more robust legal culture. At the same time, the rise in complaints can signify both a deterioration of these issues and a growing trust in the Ombudsman for Human Rights institution.

5.2. Human Rights in Criminal Proceedings and Rights of Convicts

The report highlights important issues related to human rights in Kazakhstan's criminal justice system, particularly the rights of individuals during criminal proceedings and the treatment of convicted persons. Key concerns include ensuring fair trial standards, access to justice, and protection from unlawful detention, coercion, and mistreatment. Despite legislative reforms aimed at strengthening due process and procedural safeguards, the data reveals systemic violations, including complaints about unlawful investigations, procedural delays, unjustified detentions, and cases of torture or ill-treatment.

Figure 4[34] presents complaints related to violations of access to justice during pre-trial investigations. The chart categorises complaints into four main types: violations of Criminal Procedure Code norms (47%) including improper pre-trial investigations, procedural delays, unfair preventive measures, and unjustified case dismissals; pressure, torture, and coercion to confess (16%); disagreement with the charges filed (19%); and unjustified or illegal detention (18%).

The high percentage of complaints related to procedural violations (47%) suggests systemic inefficiencies within Kazakhstan's pre-trial investigation system. Although the category of pressure, torture, and coercion into confession is smaller compared to procedural violations, 16% remains a concerning figure, indicating the continued use of coercive methods. Despite international pledges against torture and legal improvements, the presence of these complaints calls into doubt the accountability and enforcement in criminal investigations.[35]

33 Human Rights Watch, 'World Report 2024: Kazakhstan' <https://www.hrw.org/world-report/2024/country-chapters/kazakhstan> accessed 4 February 2025.

34 Source: Human Rights Ombudsman in the Republic of Kazakhstan (n 3).

35 US Department of State, '2022 Country Reports on Human Rights Practices: Kazakhstan' <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/kazakhstan/> accessed 4 February 2025.

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A deeper analysis is needed to determine whether these cases lead to prosecutions of law enforcement officials or remain unresolved.

Almost one-fifth of complainants (19%) claim that they were unjustly accused or mischarged, pointing to potential shortcomings in evidence collection, investigative procedures, or prosecutorial discretion. This trend aligns with broader concerns about the fairness of the legal system, particularly regarding the presumption of innocence.[36] The significant proportion of complaints about illegal arrests and detention (18%) suggests that preventive detention is being misused. Over-reliance on detention instead of alternative measures (e.g., bail, house arrest) may reflect weak judicial oversight over law enforcement.

Taken together, the prevalence of complaints about procedural violations and coercion suggests deep-rooted problems in law enforcement culture.[37] Overall, Figure 7 provides a critical snapshot of the weaknesses in Kazakhstan's criminal justice system, particularly in pre-trial investigations.

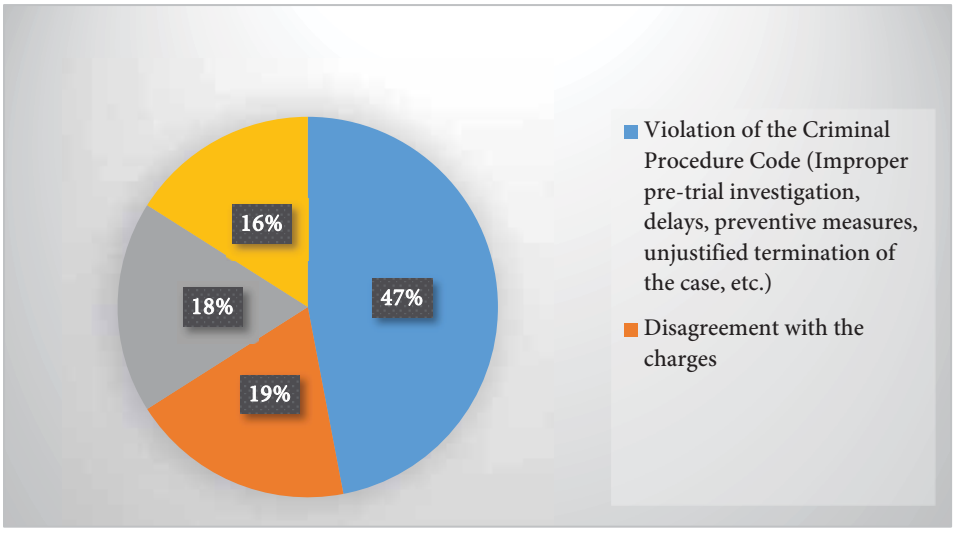

Figure 4. Complaints regarding violations of the right to access to justice during the pre-trial investigation

Figure 5[38] presents 838 appeals related to the rights of convicts in 2023. The data highlights key areas of concern, including medical care, detention conditions, and allegations of torture. The complaints reflect systemic challenges within Kazakhstan's penitentiary system, raising questions about prison conditions, legal protections, and human rights enforcement.

36 Pamela R Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 27 Criminal Law Forum 131, doi:10.1007/s10609-016-9281-8.

37 Dalmatov and others (n 15).

38 Source: Human Rights Ombudsman in the Republic of Kazakhstan (n 3).

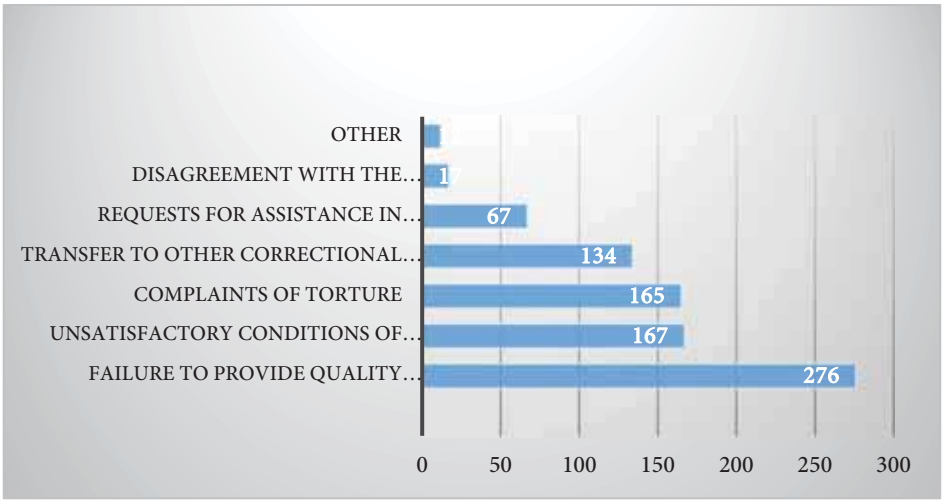

Figure 5. Appeals regarding the rights of convicts in 2023

The highest number of complaints (276) concerns failure to provide quality medical care. This suggests systemic deficiencies in healthcare services within correctional facilities, possibly shortages of medical staff, limited access to treatment, and inefficient emergency care. Complaints about unsatisfactory detention conditions (167) highlight issues such as overcrowding, inadequate sanitation, and poor nutrition. This aligns with broader concerns about prison conditions in Kazakhstan, where facilities often fail to meet international human rights standards.[39]

Additionally, 165 convicts filed complaints concerning allegations of torture, indicating serious human rights violations. This demonstrates that despite legal reforms prohibiting torture, instances of mistreatment, excessive force, and coercion continue to persist in correctional facilities. The high number of complaints signals either an increase in reported cases or a growing willingness to report abuses.

A significant number of convicts (134) requested transfers to different correctional institutions, indicating concerns about safety, conflicts with other prisoners, or unfavourable conditions in their current facilities. This may also indicate regional disparities in prison conditions.

The 67 appeals for assistance in case reviews suggest that many prisoners believe they were wrongly convicted or did not receive fair legal representation, reflecting broader concerns about access to justice and procedural fairness in Kazakhstan's legal system.[40]

39 Human Rights Watch (n 33).
40 Dalmatov and others (n 15).

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Disagreements with disciplinary sanctions (17 cases) and miscellaneous complaints (12 cases) had lower reporting rates. While these numbers are smaller, they indicate issues with due process in prison disciplinary actions and potential cases of unjust punishment.

To sum up, Figure 5 shows significant challenges regarding prisoners' rights in Kazakhstan, particularly in healthcare, detention conditions, and allegations of torture. The high number of complaints reflects both systemic deficiencies and a growing willingness to report abuses. Addressing these issues requires comprehensive prison reforms, including prison monitoring initiatives.[41]

5.3. Legal Education and Public Engagement

Legal education provides individuals with a foundation for understanding the law. This knowledge gives citizens the right to navigate legal systems, claim their rights and engage in informed discussions about legal and policy issues. Legal literacy, which includes the ability to understand the functioning of legal rights, obligations and justice systems, is important for active participation in a democratic society.[42]

The reports highlight the efforts of the Ombudsman for Human Rights to promote legal awareness and human rights education. However, several aspects warrant further discussion. A major point is the effectiveness of legal education and public awareness campaigns. According to the report, 196 events were organised, reaching 16,512 people. While this is a notable figure, it questions the overall impact in a country with a population of 20 million. Additionally, the use of TV, media, and social networks is notable, but it is important to assess engagement metrics such as comments to determine public interest and participation.

Another important aspect is the involvement of the Ombudsman's representatives in 51 meetings of advisory and supervisory bodies. While this displays active participation in policy discussions, the important question is how effective this participation has been. Without clear results, the effectiveness of such engagements remains uncertain.

The report also focused on initiatives to improve public legal literacy, which is an indicator of social legal consciousness. It highlights key efforts to promote human rights education and legal awareness in Kazakhstan, especially through initiatives led by the Ombudsman and other various governmental and non-governmental organisations. The report also discusses extensive reform efforts in Kazakhstan, including the abolition of the death

41 Sophie van der Valk and Mary Rogan, 'Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland' (2021) 18(1) European Journal of Criminology 101, doi:10.1177/1477370820960024.

42 Michaela Dombrovská, 'Literacy for Democracy: What Can Information Literacy Learn from Legal Literacy, and Vice Versa?' in Serap Kurbanoğlu and others (eds), *Information Literacy in a Post-Truth Era* (Communications in Computer and Information Science, Springer 2022) 741, doi:10.1007/978-3-030-99885-1_61.

penalty, the strengthening the judiciary, and the expansion of the Ombudsman's powers—all part of Kazakhstan's broader commitment to human rights and democracy.[43]

A comparative analysis of the annual reports of the Ombudsman for Human Rights from 2019 to 2023 revealed notable trends and developments. Specifically, in response to public demand, the scope of free legal assistance has been broadened. In June 2022, the list of individuals eligible for free legal aid was expanded to cover victims of domestic violence, sexual violence, trafficking, terrorism, and torture.

The analysis also reveals improvements in institutional capacity: in 2019, the Ombudsman's office budget was over 80 million tenge; by 2022, it had increased to over 500 million tenge, and in 2023, it exceeded 1 billion tenge.[44] Most notably, in 2023, the appointment of the Presidential Commissioner for the Rights of Vulnerable Social Groups underscored a dedication to protecting marginalised groups.

Between 2019 and 2023, complaints to the Ombudsman consistently centred on issues within the criminal justice system. The most common issues were: in 2023, complaints about the actions of investigative authorities (1,263 cases); in 2022, similar complaints about the actions of investigative authorities (1,152 cases); in 2021, disagreements with court decisions (262 cases); and in 2020, violations of the rights of convicted individuals (413 cases). This data indicates ongoing concerns about law enforcement practices, judicial decisions, and the treatment of individuals within Kazakhstan's criminal justice system.

5.4. Analysis of Key Legal Acts in the Context of Legal Culture and Legal Consciousness in Kazakhstan

The selected legal acts provide an important basis for understanding the legal culture and legal consciousness in Kazakhstan. Their provisions shape public legal awareness, the accessibility of justice and legal education, which correspond to the key themes discussed in this article. The Constitution of Kazakhstan[45] serves as the fundamental legal framework of the country, establishing the principles of human rights and the rule of law. The Constitution enshrines key democratic principles such as equality before the law (Article 14), and the protection of fundamental rights and freedoms (Articles 10-39). These norms promote a strong legal culture by ensuring that legal norms are accessible and applicable to all citizens. The Constitution also contains provisions guaranteeing various mechanisms for public participation, including freedom of speech and assembly (Articles 20 and 23). These rights are critical for the development of a more informed and law-conscious society.

43 Dalmatov and others (n 15); Human Rights Watch (n 33).

44 Human Rights Ombudsman in the Republic of Kazakhstan (n 3).

45 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 1 January 2023) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 4 February 2025.

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The Administrative Procedural and Process-Related Code of the Republic of Kazakhstan regulates the appeals of individuals and legal entities, which came into force on 29 June 2020.[46] The purpose of this Code is to establish a comprehensive framework for the effective management of administrative appeals and legal procedures. Individuals and legal entities have the right to seek protection against violations and disputes of their rights, freedoms, or legal interests as guaranteed in Article 9 of the Code. Furthermore, the article declares that any attempt to waive this right is invalid. This ensures that no one can be compelled to abandon their right to file a complaint or appeal a decision. All individuals are guaranteed legal protection under this provision, and state authorities are held accountable for their actions.

Article 22 of the Code outlines the rights of individuals and legal entities when interacting with administrative bodies. According to this article, individuals and legal entities may file both individual and collective appeals. Applicants are granted several basic rights, including the right to receive explanations on their case, to be heard before a decision is made, and to have access to and copy the case materials. In addition, they have the right to terminate the administrative procedure if they were its initiators. The Code also ensures that foreigners, stateless persons, and foreign companies have the same rights and obligations as citizens of Kazakhstan, unless otherwise provided by law or international agreements. Overall, this article guarantees fairness, transparency, and accessibility of administrative procedures, ensuring that individuals and organisations can effectively protect their rights.

Article 64 of the Code outlines rules on how administrative bodies must consider appeals from individuals and legal entities. It ensures that all appeals are received, registered, and processed properly, promoting transparency and accountability. Refusal to accept an appeal is not permitted. Appeals must be registered on the same day they are received, unless received on a non-working day, in which case they are registered on the next working day. If an appeal is submitted electronically, it must comply with Kazakhstan's requirements for a digital document and electronic signature to be considered valid. If an appeal does not meet legal requirements, the administrative body must inform the applicant of the problems and give them time to correct them. It may be returned if the applicant fails to correct the appeal within the specified time. However, returning the appeal does not prevent the applicant from resubmitting it.

Article 76 of the Code establishes the time limits for handling administrative procedures based on appeals. It ensures that cases are processed in a timely manner and efficiently. Unless otherwise stipulated in law, the standard timeframe for completing an administrative procedure is 15 working days from the day an appeal is received. The countdown commences once the administrative procedure has been officially initiated.

46 Code of the Republic of Kazakhstan No 350-VI of 29 June 2020 'Administrative Procedural and Process-Related Code of the Republic of Kazakhstan' (amended 1 January 2025) <https://adilet.zan.kz/eng/docs/K2000000350> accessed 4 February 2025.

Another key policy document, the Concept of Legal Policy of the Republic of Kazakhstan until 2030, is a strategic document that aims to modernise the legal system and align it with international human rights standards.[47] The Concept promotes legal education and awareness programmes, which are critical for developing legal consciousness among citizens. It emphasises transparency and public engagement in lawmaking.

Legal education and public awareness are crucial to building a strong legal state. Section 7 of the Concept states that an active civil society depends on a high level of legal culture among individuals and society. To achieve this, it is necessary to continuously promote legal literacy and encourage socially responsible behaviour based on constitutional values. Government agencies and local authorities are responsible for regularly informing the public about legal policies and new laws. The Concept highlights that various methods should be employed to accomplish this, including mass media campaigns, free legal literature, and public events. Furthermore, it acknowledges the significance of legal research in policymaking and proposes providing incentives and state aid to research institutions to enhance their role in legal development.

The National Plan for Human Rights and the Rule of Law**,** adopted on 8 December 2023,[48] sets 41 targets across nine key areas. These include the promotion of equal rights and opportunities for men and women; children's rights; the elimination of discrimination against women; human rights in criminal justice; enforcement of penalties and prevention of torture and ill-treatment; the right to freedom of association; the human rights of migrants, stateless persons, and refugees; the rights of persons with disabilities; the right to work, labour protection, and trade union activity; and human rights in business activities. The National Plan focuses on enhancing human rights protections and bringing Kazakhstan's legal framework into parity with international standards. It prioritises access to justice, prisoners' rights, and legal education, and aims to increase public engagement through awareness campaigns and improved legal aid services.

In summary, the analysis of these legal and policy acts shows that to foster a more robust legal culture in Kazakhstan, it is crucial to strengthen public legal education, increase institutional accountability, and ensure the effective implementation of laws. To improve legal culture and legal consciousness, constitutional provisions must be combined with effective law implementation, judicial reforms, and increased public engagement.

47 Decree of the President of the Republic of Kazakhstan No 674 of 15 October 2021 'On the approval of the Concept of Legal Policy of the Republic of Kazakhstan until 2030' <https://adilet.zan.kz/kaz/docs/U2100000674> accessed 4 February 2025.

48 Decree of the President of the Republic of Kazakhstan No 409 of 8 December 2023 'On the Plan of Action in the Field of Human Rights and the Rule of Law' <https://adilet.zan.kz/kaz/docs/U2300000409> accessed 4 February 2025.

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6 CONCLUSION

This study explored the state of legal culture and legal consciousness in Kazakhstan through an analysis of the annual reports of the Ombudsman for Human Rights and legal acts. The findings provided important insights into the changing legal culture, regional differences in legal consciousness, and public trust in legal institutions. A growing awareness of citizens' rights and legal protection mechanisms is evident in the significant increase in complaints to the Ombudsman in 2023 compared to previous years. However, the number of systemic issues, particularly in the criminal justice system and prison conditions, highlights persistent challenges in ensuring access to justice and human rights protections. The Concept of Legal Policy until 2030 stresses the importance of strengthening legal education programmes to address these gaps.

As the findings indicate, human rights violations during pre-trial investigations, allegations of coercion, and mistreatment of convicts remain significant concerns in ensuring access to justice. Key recommendations to overcome these challenges include enhancing oversight mechanisms, legal reforms, improving investigative standards, and stronger anti-torture measures.

In conclusion, the study found that there are still significant challenges in ensuring access to justice and protecting human rights in Kazakhstan, which can negatively impact the legal culture and legal consciousness in Kazakhstan. Addressing these issues requires meaningful legal reforms, public education, and institutional strengthening.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВА КУЛЬТУРА ТА ПРАВОВА СВІДОМІСТЬ У КАЗАХСТАНІ: АНАЛІЗ ЩОРІЧНИХ ЗВІТІВ УПОВНОВАЖЕНОГО З ПРАВ ЛЮДИНИ ТА НОРМАТИВНО-ПРАВОВИХ АКТІВ

Дархан Бакіров, Нурмухамед Мирзатаєв*, Кайрли Оспанов, Акзіра Жанґазієва та Сауле Сулейменова

АНОТАЦІЯ

Вступ. *Правова свідомість та правова культура – це взаємопов'язані, але різні поняття. Правова свідомість – це сукупність ідей, поглядів, переконань та почуттів людей щодо права, законності та справедливості. Вона відображає ставлення суспільства чи окремої особи до права. Правова культура – це ширше поняття, яке містить не лише рівень правосвідомості, але й ступінь впровадження правових норм у суспільстві, а також правомірну поведінку громадян. Розвиток правової свідомості та культури необхідний для побудови правової держави та дотримання демократичних принципів. Вивчення цих елементів важливе для оцінки ефективності політики виконання зобов'язань щодо прав людини та для визначення ключових напрямків зміцнення справедливості та рівноправ'я.*

Методи. *У дослідженні використовувалися методи документального та правового аналізу. Було вивчено правову культуру та правову свідомість у Казахстані за допомогою аналізу щорічних звітів Уповноваженого з прав людини за 2019–2023 роки, оскільки вони містять авторитетні оцінки стану прав людини, правової свідомості та доступу до правосуддя в Казахстані. Крім того, у статті було проаналізовано чинне законодавство*

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та програмні документи, що стосуються правової культури та правової свідомості в Казахстані, зокрема Конституцію Республіки Казахстан, Концепцію розвитку правової політики в Республіці Казахстан до 2030 року та Національний план дій щодо прав людини та верховенства права.

Результати та висновки. *У статті було виявлено динаміку суспільної правової свідомості та проблеми адаптації національної політики до світових стандартів у сфері прав людини. Результати дослідження були розділені на три основні теми: скарги як показники правової культури та правової свідомості; права людини в кримінальному судочинстві та права засуджених; а також правова освіта та залучення громадськості. Як показують результати дослідження, порушення прав людини під час досудового розслідування, заяви про примус та жорстоке поводження із засудженими залишаються суттєвою проблемою у забезпеченні доступу до правосуддя в Казахстані. Ці результати висвітлюють прогалини в інституційній підзвітності та реалізації політики, наголошуючи на постійних труднощах у захисті прав людини в межах системи кримінального правосуддя та судовій системі. Аналіз ключових нормативно-правових актів у контексті правової культури та правової свідомості показав, що розвиток сильної правової культури в Казахстані вимагає низки реформ, спрямованих на підвищення рівня правової освіти населення, інституційної підзвітності та ефективного впровадження законів. У статті було зроблено висновок, що для сприяння правовій культурі та правовій свідомості в Казахстані вкрай важливо вирішувати виявлені системні проблеми за допомогою правових реформ, освіти громадськості та зміцнення інституцій.*

Ключові слова: *правова культура, правова свідомість, Казахстан, права людини, Уповноважений з прав людини.*

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Research Article

AI AND CORRUPTION: LEGAL LIABILITY IN ALGORITHMIC DECISION-MAKING

Naeem AllahRakha

ABSTRACT

Background: *The question of whether machines can be corrupt appears paradoxical; nevertheless, it is rapidly gaining relevance in the world of artificial intelligence (AI) and changing how decisions are made in public and government systems. These systems offer notable advantages, including enhanced efficiency, reduced human error, and the ability to combat corruption by detecting fraud, tracking funds, and improving public services. It can make decisions based on data instead of personal interests. However, the use of AI is not without risks. When trained on biased datasets, AI systems may produce unfair outcomes. Additionally, if AI systems are deliberately manipulated for personal or political gain, they may support or conceal corrupt actions. This research examines the role of AI in public services, exploring its potential to prevent or contribute to corruption. The goal is to understand where AI is safe and where it is risky.*

Methods: *The research used a qualitative research design. Data was collected by reviewing academic papers, laws, and official reports. Sources were identified using academic databases such as Google Scholar, with a focus on peer-reviewed law journals, policy briefs, and official government documents. All materials were checked using the CRAAP test. The method for analysing the data was doctrinal legal analysis.*

Results and Conclusions: *The findings indicate that AI has considerable potential to enhance transparency and reduce bribery by limiting human control in administrative processes. However, in countries with weak legal systems, AI can be misused. When AI systems lack transparency or explainability, they can obscure corrupt practices rather than expose them. This risk is pronounced in high-stakes domains such as public procurement and budgeting systems.*

While certain countries have implemented robust legal safeguards and effective audits that mitigate risks, many others lack clear rules on who is responsible when AI contributes to corruption. In numerous cases, public AI systems lack external checks, and existing mechanisms for reporting corruption are not equipped to address AI-specific issues. As a result, accountability gaps persist.

The study highlights the continued importance of human oversight to stop manipulation. It recommends that governments strengthen regulatory frameworks by introducing explicity provisions on accountability. Independent audits should be added to all public AI systems. Whistleblower systems should be updated to accommodate AI-related cases.

1 INTRODUCTION

Can machines be corrupt? Although the question may appear unconventional, it has emerged as a pressing issue in the world of artificial intelligence (AI). Governments and public bodies utilise AI for various tasks, including hiring, tax audits, public procurement, and even court decisions.[1] AI offers valuable tools for combating corruption, particularly by detecting fraud and anomalies within large sets of data.

However, the use of AI also introduces significant risks. If AI systems are poorly designed or secretly modified, they can conceal corrupt actions rather than expose them. Algorithms may favour some people or companies without transparent justification. As AI systems grow more complex and opaque, they often function as "black boxes"—powerful but hard to understand or control.[2]

These challenges underscore the importance of critically examining the dual role of AI, specifically how it can help combat corruption and how it can be exploited for corrupt purposes. Most importantly, the question of accountability arises: who is responsible when AI is used in a corrupt manner?

Traditional government systems have long struggled with corruption and biased decision-making. The Gürtel case in Spain became the country's largest corruption scandal, in which bribes were allegedly given to the ruling party in exchange for rigged contracts.[3] Instances of public welfare benefits being allocated to undeserving recipients through bribery, and police investigations exhibiting bias against specific social groups, illustrate the risks associated with excessive discretionary power held by human decision-makers.

1 Leif Jonas Tveita and Eli Hustad, 'Benefits and Challenges of Artificial Intelligence in Public Sector: A Literature Review' (2025) 256 Procedia Computer Science 222, doi:10.1016/j.procs.2025.02.115.

2 Bartosz Brożek and others, 'The Black Box Problem Revisited: Real and Imaginary Challenges for Automated Legal Decision Making' (2024) 32(2) Artificial Intelligence and Law 427, doi:10.1007/s10506-023-09356-9.

3 Javier Moreno Zacarés, 'The Iron Triangle of Urban Entrepreneurialism: The Political Economy of Urban Corruption in Spain' (2020) 52(5) Antipode 1351, doi:10.1111/anti.12637.

In response to such concerns, artificial intelligence has emerged as a potential solution to reduce human bias and limit opportunities for corruption. For example, in 2014, Estonia became the first country in the world to launch its e-Residency program, fulfilling its ambition of creating a borderless digital society.[4]

In 2013, the city of Rongcheng was one of the areas in China that established a social credit score system, assigning each resident a base personal credit score of 1,000 that could increase or decrease based on behaviour.[5]

In the US, Executive Order 14110, signed by former U.S. President Joe Biden on 30 October 2023, focused on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, including identification and surveillance through recognising faces, fingerprints, and tracking license plates.[6]

AI can help combat corruption by detecting fraud, tracking financial transactions, and enhancing public services. It can make decisions based on data instead of personal interests. However, its application is not without risks. When trained on biased or incomplete data, AI systems may make unfair decisions. If algorithms are deliberately manipulated or used for political or personal gain, AI may support corrupt actions.

These risks are intensifying as artificial intelligence becomes more powerful and is increasingly integrated into public systems. The primary issue lies in the ambiguity of existing legal frameworks, which often fail to delineate accountability when AI is misused. If an AI system makes a corrupt decision, it is not always evident who is to blame: the developer, the government, or organisations. This research focuses on examining the ways in which corruption enters AI systems and how the law should respond.

The existing literature presents both the promise and peril of utilising AI in anti-corruption efforts. Studies reveal that AI systems, when trained on biased or incomplete data, can inadvertently perpetuate existing forms of discrimination. For instance, the UK's welfare fraud detection AI was found to disproportionately target individuals based on age, disability, and nationality, raising concerns about fairness and transparency.[7] Similarly, in France, legal challenges have been mounted against algorithms that police welfare systems

4 Rainer Kattel and Ines Mergel, 'Estonia's Digital Transformation: Mission Mystique and the Hiding Hand' in Paul 't Hart and Mallory Compton (eds), *Great Policy Successes* (OUP 2019) 143, doi:10.1093/oso/9780198843719.003.0008.

5 Genia Kostka, 'China's Social Credit Systems and Public Opinion: Explaining High Levels of Approval' (2019) 21(7) New Media & Society 1565, doi:10.1177/14614448198264.

6 Tara N Cho, Vincent Look and Hayden J Silver, 'Recognizing the Primacy of Artificial Intelligence in America: Biden's Executive Order Sets a High Bar for Regulation and Innovation' (*Womble Bond Dickinson*, 10 November 2023) <https://www.womblebonddickinson.com/us/insights/alerts/recognizing-primacy-artificial-intelligence-america-bidens-executive-order-sets> accessed 5 July 2025.

7 Robert Booth, 'Revealed: Bias Found in AI System Used to Detect UK Benefits Fraud' *The Guardian* (London, 6 December 2024) <https://www.theguardian.com/society/2024/dec/06/revealed-bias-found-in-ai-system-used-to-detect-uk-benefits> accessed 5 July 2025.

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are accused of discriminating against disabled individuals and single mothers, highlighting the ethical implications of algorithmic decision-making.[8] Moreover, the opacity of AI systems complicates accountability, as it's often unclear who is responsible when algorithms produce biased outcomes.[9] While AI has the potential to enhance efficiency in detecting corruption, its effectiveness depends on the quality of data and human oversight.[10]

The literature indicates that AI can be both beneficial and detrimental in combating corruption. The problems are biased data, unfair decisions, and a lack of transparency. The laws are unclear on who is responsible when AI systems are used in a corrupt manner. However, most of the current research focuses on technical or ethical issues. There is very little work on legal responsibility. There is also a lack of research on how to develop legal frameworks for AI in public systems, such as welfare, hiring, or policing. Most studies call for further research on legal liability and regulation. This is the gap. We need more research that connects law and AI to stop corruption. This study will look at legal liability for the misuse of AI in government decision-making. The objective of this research is:

- To examine how artificial intelligence can be used to prevent, detect, and reduce corruption in public decision-making systems.
- To identify and analyse the legal and ethical risks that arise when AI systems are misused to enable or hide corruption.
- To propose a clear definition of responsibility for the misuse or manipulation of AI in public decision-making.

How can legal liability be effectively assigned when artificial intelligence systems are misused to enable or conceal corruption in public decision-making processes?

This study is important because it addresses a significant issue that many countries face: corruption in government systems. As more public decisions are made using AI, it is crucial to ensure that these systems are not employed in harmful or unfair ways. Many people trust AI to be neutral, but if it is used incorrectly, it can conceal corruption instead of preventing it. This research will help us understand who should be responsible when AI is used for corrupt purposes. It will also help to create better rules to stop this kind of misuse. The study will provide new insights into how to integrate law and technology in a safe and equitable manner. This research will also help protect citizens' rights by making public systems fairer and more transparent. That is why this work is helpful for both academics and society.

8 Morgan Meaker, 'Algorithms Policed Welfare Systems For Years. Now They're Under Fire for Bias' (*Wired*, 16 October 2024) <https://www.wired.com/story/algorithms-policed-welfare-systems-for-years-now-theyre-under-fire-for-bias/> accessed 5 July 2025.

9 Ben Chester Cheong, 'Transparency and Accountability in AI Systems: Safeguarding Wellbeing in the Age of Algorithmic Decision-Making' (2024) 6 Frontiers in Human Dynamics 1421273, doi:10.3389/fhumd.2024.1421273.

10 Luis A Garcia-Segura, 'The Role of Artificial Intelligence in Preventing Corporate Crime' (2024) 5 Journal of Economic Criminology 100091, doi:10.1016/j.jeconc.2024.100091.

2 METHODOLOGY

This research employed a qualitative research design, focusing on understanding the relationship between AI systems and corruption. A qualitative approach is well-suited for exploring the complex legal and social issues, as it allows the researcher to analyse laws and policies in depth. This method is particularly useful when the objective is to examine real-world challenges, such as legal gaps in AI governance.

The population of this research consists of international laws, national regulations, and policies related to AI and anti-corruption. The sample includes specific AI-related laws from the European Union, the United States, and Uzbekistan, selected because they represent active legal efforts to regulate AI.

Data was collected by reviewing academic papers, laws, and official reports. Google Scholar was used to locate recent scholarly articles. Only reliable sources—such as law journals, policy briefs, and official government documents—were considered. The laws were sourced from official websites, including the European Commission portal and government pages. All materials were evaluated using the CRAAP test, which assesses sources for Currency, Relevance, Authority, Accuracy, and Purpose. Only up-to-date papers by law scholars, professors, or researchers were included. Each article included proper citations and underwent peer review. The purpose of each source was academic or policy-based; no commercial or biased sources were included.

The main method for analysing the data was doctrinal legal analysis, which involved reading and comparing laws and legal texts. The researcher also analysed how different countries apply AI laws in practice. Findings were compared to draw meaningful conclusions.

There were no human participants in this study; all data used were available in the public domain. Every article or source was properly referenced, ensuring academic honesty and transparency. The research was conducted solely for educational and scientific purposes, and the researcher declares no conflict of interest.

This study has several limitations. It primarily focused on a limited number of countries and did not include other regions. It also focused solely on the public sector's use of AI, rather than the private sector. These boundaries were chosen to maintain clarity and focus.

It is important to note that laws and policies are evolving rapidly due to ongoing developments in emerging technologies, meaning new rules may not be included. This research is based on a few assumptions. First, it assumes that the legal sources used are accurate and current. Second, it assumes that the selected sample laws represent broader global trends. Third, it assumes that the articles used are honest and objective. Finally, it assumes that the data collected provides a representative view of the topic.

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3 RESULTS

AI is now used in many areas of public life. Governments rely on AI to assist in decision-making processes in areas such as hiring, welfare, policing, and public services. While AI offers the potential to reduce human bias and improve fairness, it can also be misused. In particular, some systems may be designed or trained in a way that allows corruption to occur or remain undetected.

This research posed a crucial question: Who should be held responsible when AI is used to support or conceal corruption? This study aimed to examine how AI is currently being utilised, its potential for misuse, and the legal responses to this issue.

3.1. AI Applications in Anti-Corruption

Mexico has begun utilising artificial intelligence to combat corruption and enhance public services. The Tax Administration Services utilised AI in a pilot project, identifying 1,200 fake companies and 3,500 false transactions within just three months—work that would have taken 18 months without AI. AI is also supporting the telecom sector by making services more affordable and accessible. Mexico aims to utilise AI to deliver more affordable government services and improve public procurement.

A joint project by IMCO and OPI used AI to study six million records of government contracts from 2012 to 2017. This helped build a Corruption Risk Index for over 1,500 government units. The data used in this project is shared with the public. Mexico is also the first to adopt the Open Up Guides as a national standard.[11]

South Africa is currently exploring how artificial intelligence can enhance tax compliance. In its 2018/19 Annual Performance Plan, the South African Revenue Service (SARS) announced it would explore the use of AI and new data tools to gain a deeper understanding of how taxpayers behave and make more informed decisions. SARS did not provide details but wants to utilise better data to improve its services.

At the same time, several government and financial institutions are working together on a new policy aimed at regulating crypto assets and the companies that handle them. The first step is to register all the actors in this market. This will help the government understand how the market works. Future steps will involve determining whether existing laws can be used to control crypto activities.[12]

11 Emma Martinho-Truswell and Constanza Gomez Mont, 'Mexico Leads Latin America as One of the First Ten Countries in the World to Launch an Artificial Intelligence Strategy' (*Oxford Insight*, 24 May 2018) <https://oxfordinsights.com/insights/mexico-leads-latin-america-as-one-of-the-first-ten-countries-in-the-world-to-launch-an-artificial-intelligence-strategy/> accessed 5 July 2025.

12 Nabil Brahmia, 'The Role of Artificial Intelligence in Enhancing Tax Compliance and Customs Efficiency: A Case Study of the South African Revenue Service (SARS)' (2025) 19(5) International Journal of Economic Perspectives 1881.

Brazil is also using artificial intelligence to fight corruption in the public sector. The Office of the Comptroller General has developed a machine learning tool to estimate the risk of corruption among civil servants. The tool uses a person's social security number and evaluates many factors—such as the person's hiring process, education, criminal record, business affiliations, political connections, and job rank—to assess the likelihood of corrupt behaviour. It was trained using data from real corruption cases. A similar AI tool is being developed to detect potential corruption in companies.

However, a problem remains. Brazilian law does not allow punishment based on the tool's results. Authorities cannot refuse bids from companies marked as high-risk or initiate an investigation solely based on this data. This indicates that while AI can aid in detecting corruption, legal rules also need to be adjusted to fully leverage these new tools.[13]

Spain has conducted a research project using AI and neural networks to analyse past corruption cases. The goal was to find patterns and predict future corruption risks. Researchers utilised multiple datasets and examined their connections, uncovering risks that are difficult to detect through manual work. The study found that certain conditions often lead to corruption. These include rising property prices, increased presence of banks and deposit institutions, strong economic growth, and the same political party remaining in power for an extended period. All of these factors together can increase the chance of corruption.

The study demonstrates that AI tools are capable of identifying early signs of corruption in public projects years before they occur, thereby enabling a timely intervention. This proactive approach has the potential to strengthen public trust and improve the efficiency and accountability of public funds management in the future.[14]

3.2. How AI Systems Perpetuate Bias and Discrimination

In the UK, the government uses an AI system to detect welfare fraud. However, a report reveals that this system may unfairly target people based on age, disability, nationality, or marital status. It appears to prioritise certain groups for fraud checks, according to a fairness review by the Department for Work and Pensions (DWP). While the DWP states that final decisions are made by human workers, not by the AI, the review did not evaluate whether the system is biased based on race, gender, religion, or pregnancy. Campaigners argue that this is unfair and demand greater transparency. They urge the government to stop using such tools without knowing the risks. Experts are increasingly concerned about the

13 Wagner Menke, Ricardo Gomes and Flávia Xavier, 'Impacts of AI-Based Anti-Corruption Audits on Risk Aversion in Decision-Making: A Case Study of the Brazilian ALICE Tool' (2024) 4 Global Public Policy and Governance 273, doi:10.1007/s43508-024-00098-1.

14 Marcio Salles Melo Lima and Dursun Delen, 'Predicting and Explaining Corruption across Countries: A Machine Learning Approach' (2020) 37(1) Government Information Quarterly 101407, doi:10.1016/j.giq.2019.101407.

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widespread use of AI tools across public offices without proper oversight. Although the DWP defends that the tool helps combat fraud, critics argue that more transparency and fairness are necessary before such systems are implemented.[15]

In France, human rights groups are suing the government over an algorithm used in the welfare system. They say the tool unfairly targets single mothers and disabled people. The algorithm assigns a risk score ranging from 0 to 1, based on the likelihood of making mistakes or committing fraud in claiming benefits. Those with high scores may face strict checks or have their payments revoked. Critics argue that this is unfair and feels like mass surveillance. They claim it breaches French and EU laws regarding privacy and discrimination. The groups also claim that the system is secret because the government refuses to disclose how the algorithm works. Older versions of the algorithm assigned higher scores to individuals with disabilities or those who were single parents. Many affected people feel scared and helpless. Experts warn that using AI in this manner for welfare purposes is risky and potentially harmful. In 2025, new EU laws may ban such systems under "social scoring" rules.[16]

Many banks utilise AI algorithms to determine loan approvals, but applicants often have no insight into why their applications were rejected.[17] For instance, if someone with a good credit history is denied a mortgage, they might only receive a generic rejection letter without understanding whether the algorithm flagged their social media activity, shopping patterns, or other non-traditional factors.

In 2019, Apple Card users discovered gender discrimination. Tech entrepreneur David Heinemeier Hansson was granted 20 times the credit limit that his wife received, despite their equal income and shared bank accounts. Apple co-founder Steve Wozniak reported the same experience.

The credit decisions were made by Goldman Sachs using AI algorithms to decide credit limits. It was impossible to determine if the Apple Card discriminated against women, as creditworthiness algorithms are notoriously opaque.[18] Although Goldman Sachs stated that it did not use gender data, the algorithms may have relied on proxy variables correlated with gender. Since the model's logic was a black box, no one could verify whether discrimination occurred.[19]

15 Booth (n 7).

16 Meaker (n 8).

17 Hicham Sadok, Fadi Sakka and Mohammed El Hadi El Maknouzi, 'Artificial Intelligence and Bank Credit Analysis: A Review' (2022) 10(1) Cogent Economics & Finance 2023262, doi:10.1080/23322039.2021.2023262.

18 Clare Duffy, 'Apple Co-Founder Steve Wozniak Says Apple Card Discriminated against His Wife' (*CNN Business*, 11 November 2019) <https://edition.cnn.com/2019/11/10/business/goldman-sachs-apple-card-discrimination> accessed 5 July 2025.

19 Evelina Nedlund, 'Apple Card Is Accused of Gender Bias. Here's How That Can Happen' (*CNN Business*, 12 November 2019) <https://edition.cnn.com/2019/11/12/business/apple-card-gender-bias> accessed 5 July 2025.

IBM's Watson for Oncology was deployed in hospitals worldwide to provide recommendations for cancer treatments. However, internal IBM documents revealed that Watson often proposed unsafe and incorrect cancer treatment recommendations.[20] One dangerous case involved an elderly patient with blood cancer, where Watson recommended a severe drug that had the potential to cause dangerous bleeding. Doctors could not understand why Watson made this decision, as the AI system did not explain its reasoning. Watson's recommendations were based on the preferences of just one or two doctors, not real patient data. The AI system was trained on fake "synthetic" patient cases created by engineers.[21] Despite these flaws, doctors using the system had no way of detecting the issue, since the black box design concealed these serious flaws.

Social media platforms like Facebook and YouTube use AI to automatically flag and remove content. However, creators do not understand why their posts were flagged.[22] Many educational history channels face constant removals. Videos showing World War II footage or discussing historical violence are flagged without explanation. AI can misinterpret context, leading to false positives. Creators receive simple messages, such as "violent content," without details of what triggered the removal. YouTube's automated flagging systems removed over 6.8 million videos in just three months.[23] This lack of contextual understanding results in false positives, especially for educators. The black box system renders it impossible for educators to create content that adheres to the rules, forcing them to remake videos and waste valuable time without knowing what needs to be corrected.

Amazon famously scrapped an AI recruiting tool after discovering it was biased against women.[24] The system, trained on resumes from the previous ten years—during which men dominated tech — penalised resumes containing the word "women's" or referencing all-female colleges.

The AI learned to prefer words like "executed" and "captured" over softer language. Job applicants were unaware of this discrimination, as the system operated opaquely.

20 Casey Ross and Ike Swetlitz, 'IBM's Watson Supercomputer Recommended "Unsafe and Incorrect" Cancer Treatments, Internal Documents Show' (*STAT*, 25 July 2018) <https://www.statnews.com/2018/07/25/ibm-watson-recommended-unsafe-incorrect-treatments/> accessed 5 July 2025.

21 Jennings Brown, 'IBM Watson Reportedly Recommended Cancer Treatments that Were "Unsafe and Incorrect"' (*GIZMODO*, 25 July 2018) <https://gizmodo.com/ibm-watson-reportedly-recommended-cancer-treatments-tha-1827868882> accessed 5 July 2025.

22 Tarleton Gillespie, 'Content Moderation, AI, and the Question of Scale' (2020) 7(2) Big Data & Society 2053951720943234, doi:10.1177/2053951720943234.

23 Ajinkya Kawale, 'YouTube Says It Restricts Misleading Videos, Removes Harmful Ones' *Business Standard* (Mumbai, 30 November 2023) <https://www.business-standard.com/technology/apps/youtube-takes-down-videos-circulating-misinformation-and-fake-news-123113001021_1.html> accessed 5 July 2025.

24 Jeffrey Dastin, 'Amazon Scraps Secret AI Recruiting Tool That Showed Bias against Women' *Reuters* (San Francisco, 11 October 2018) <https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/> accessed 5 July 2025.

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Rather than eliminating human bias, the tool replicated and masked it through automation. Women applying to Amazon had no idea the system automatically scored them lower. The tool effectively concealed this discrimination. The tool was discontinued by Amazon in 2017.

Volkswagen's Dieselgate scandal illustrates how companies can corrupt AI systems for profit.[25] Between model years 2009 and 2015, Volkswagen installed software in its 2.0-litre diesel cars that circumvented EPA emissions standards. The software, known as a "defeat device," was designed to detect when a vehicle was undergoing emissions testing and temporarily activate full emission controls. The cars could sense when they were being tested. During tests, they would run clean. On real roads, they polluted up to 40 times more than allowed. Volkswagen later admitted that some of its engineers installed software in diesel-powered vehicles that caused the cars to recognise when they were being tested.[26] This manipulation affected 11 million cars worldwide. Customers were unaware that their cars were equipped with software that manipulated emissions data—a hidden backdoor that falsified data to regulators.

3.3. Current State of Liability

The application of traditional anti-corruption frameworks to AI systems creates a complex regulatory landscape where existing laws must be interpreted in new technological contexts.[27] The EU AI Act—the world's first complete law for artificial intelligence—was officially adopted on 1 August 2024, with most of its provisions set to take effect on 2 August 2026.[28] The Act adopts a risk-based approach, applying different rules for different types of AI. Under Article 6, AI systems are classified as "high risk" if they are used by police and law enforcement to prevent, investigate, and detect crimes.[29]

High-risk AI systems are subject to stringent regulatory requirements. Under Article 9, they must implement robust risk management systems and be trained on high-quality datasets. Companies must keep detailed records of how the system works. Providers and deployers face significant regulatory obligations with enhanced diligence and transparency requirements. Both providers and deployers of high-risk AI systems are held to high

25 Margarita Leib and others, 'Corrupted by Algorithms? How AI-Generated and Human-Written Advice Shape (Dis)Honesty' (2024) 134(658) The Economic Journal 766, doi:10.1093/ej/uead056.

26 Kevin Williams, 'Volkswagen Executives Get Prison Time in "Dieselgate" Scandal' (*QUARTZ*, 27 May 2025) <https://qz.com/dieselgate-sentences-handed-down-1851782440> accessed 5 July 2025.

27 Brian Judge, Mark Nitzberg and Stuart Russell, 'When Code Isn't Law: Rethinking Regulation for Artificial Intelligence' (2025) 44(1) Policy and Society 85, doi:10.1093/polsoc/puae020.

28 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) (Text with EEA relevance) [2024] OJ L 144/1 <http://data.europa.eu/eli/reg/2024/1689/oj> accessed 5 July 2025.

29 Angus Nurse, 'Law Enforcement', *Oxford Research Encyclopedia of Criminology* (OUP, 17 April 2024) <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-760> accessed 5 July 2025.

standards of diligence, transparency and accountability. These systems will be monitored before market entry and throughout their lifecycle. The law allows individuals to file complaints with national authorities regarding the use of AI systems, aiming to make AI systems safer and more trustworthy.

In the United States, President Biden signed Executive Order 14110 on 30 October 2023,[30] establishing a regulatory framework for the safe and secure development of AI. Although the order applies mainly to federal government agencies, it also includes important rules for AI companies.

Section 4 creates new standards for AI safety and security. Section 4.1 requires NIST to make guidelines within 270 days. These guidelines include standards for "red-team testing" of AI systems.[31] Section 4.2 requires powerful AI companies to share safety test results with the government. Companies must report within 90 days if they develop dual-use foundation models. They must also report the large computing clusters they own. Section 4.5 requires watermarking of AI-generated content. Section 7 focuses on preventing discrimination in criminal justice systems. Section 9 protects privacy rights from AI risks. The order balances AI benefits with safety concerns. It covers many areas, including healthcare, education, and national security. The government aims to lead global AI development while ensuring its safety.

Uzbekistan's new AI law introduces several important features for regulating artificial intelligence.[32] One of its key features is the mandatory labelling of all AI-generated content uploaded to the internet. This means that individuals must clearly disclose when content has been created using AI technology. The law also prohibits using AI to create systems that violate basic human rights. These rights include life, health, freedom, and human dignity. The law introduces penalties for illegal processing of personal data using AI systems. Individuals who illegally process or distribute personal data using AI may face confiscation of their tools, up to 15 days of administrative detention, or fines of up to 37.5 million UZS. The law also prohibits distributing such data through the internet or media channels.

Another key feature is its requirement for human oversight in decision-making processes. It prohibits making decisions that affect citizens' rights and freedoms based solely on AI conclusions.[33] The law establishes liability for those who create or distribute illegal AI materials.

30 Executive Order of the US President No 14110 of 30 October 2023 'Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence' <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence> accessed 5 July 2025.

31 Zhenduo Wang and others, 'A Red Team Automated Testing Modeling and Online Planning Method for Post-Penetration' (2024) 144(11) Computers & Security 103945, doi:10.1016/j.cose.2024.103945.

32 'Uzbekistan Takes Steps to Regulate AI with New Legislation' (*KUN.UZ*, 16 April 2025) <https://kun.uz/en/news/2025/04/16/uzbekistan-takes-steps-to-regulate-ai-with-new-legislation> accessed 5 July 2025.

33 Lena Enqvist, '"Human Oversight" in the EU Artificial Intelligence Act: What, When and by Whom?' (2023) 15(2) Law, Innovation and Technology 508, doi:10.1080/17579961.2023.2245683.

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3.4. Responsibility Matrix

AI developers bear major responsibilities throughout the entire system lifecycle of an AI system.[34] Under Article 16 of the EU AI Act,[35] providers must ensure their AI systems meet specific standards and display contact information on products.

From the design phase, developers must build quality management systems. They must conduct thorough testing and validation before releasing any AI system. Before selling or using AI systems, developers must have them checked for compliance and keep detailed documents and logs of how their systems work.

These obligations do not end at deployment.[36] The EU approach imposes ongoing responsibilities on developers to monitor and maintain AI systems, ensuring their safety and continued functionality as they evolve and learn. If problems occur after release, developers must fix them promptly. They must also provide clear instructions to users about how to operate the AI system safely. These responsibilities continue throughout the lifespan of the AI system.[37]

Government agencies also play a crucial role when purchasing and utilising AI systems. AI risk must be accounted for, especially in the procurement of AI software or services.[38] Agencies must carefully choose which AI systems to purchase. They must verify that AI vendors meet all relevant legal requirements before making a purchase.

During implementation, agencies are responsible for maintaining proper oversight over AI operations. The European AI Office and authorities of Member States are responsible for implementing, supervising and enforcing the AI Act.[39] Government agencies must train their staff to use AI systems correctly. They must monitor how AI systems perform in real-world conditions. Agencies also have data management obligations, ensuring that any personal information processed by AI systems is handled lawfully and securely.

34 Carter Cousineau, Rozita Dara and Ataharul Chowdhury, 'Trustworthy AI: AI Developers' Lens to Implementation Challenges and Opportunities' (2025) 9(2) Data and Information Management 100082, doi:10.1016/j.dim.2024.100082.

35 Regulation (EU) 2024/1689 (n 28) art 16.

36 Daswin De Silva and Damminda Alahakoon, 'An Artificial Intelligence Life Cycle: From Conception to Production' (2022) 3(6) Patterns 100489, doi:10.1016/j.patter.2022.100489.

37 Maria Lillà Montagnani, Marie-Claire Najjar and Antonio Davola, 'The EU Regulatory Approach(Es) to AI Liability, and Its Application to the Financial Services Market' (2024) 53 Computer Law & Security Review 105984. doi:10.1016/j.clsr.2024.105984.

38 Michela Guida and others, 'The Role of Artificial Intelligence in the Procurement Process: State of the Art and Research Agenda' (2023) 29(3) Journal of Purchasing and Supply Management 100823, doi:10.1016/j.pursup.2023.100823.

39 Julie Myers Wood and Allison Spagnolo, 'Implementing Effective AI Compliance amid an Evolving Regulatory Landscape' (*GIR*, 7 August 2024) <https://globalinvestigationsreview.com/guide/the-guide-compliance/third-edition/article/implementing-effective-ai-compliance-amid-evolving-regulatory-landscape> accessed 5 July 2025.

There must also be a documented process in place for how third parties notify their customers in case of AI-related incidents and outages. If AI systems cause problems, agencies must investigate and take corrective action. They must also report serious incidents to higher authorities. Government agencies remain accountable for AI decisions that affect citizens' rights.[40]

End-users who operate AI systems on a daily basis have specific responsibilities.[41] Under Article 26 of the EU AI Act,[42] deployers must take appropriate technical and organisational measures as per instructions, assign human oversight, ensure input data is relevant, and monitor the system's operation.

Operators must follow all instructions provided by AI developers. They must assign qualified people to oversee AI operations. Deployers shall assign human oversight to natural persons who have the necessary competence, training and authority. Users must ensure input data is accurate and relevant to avoid wrong results. They must monitor the AI system performance during daily operations. When making decisions based on AI recommendations, operators remain accountable for final choices. If a risk is identified, the provider and relevant authorities must be informed immediately. Users must report problems quickly to developers and authorities. Deployers must also keep logs generated by the system. They must maintain proper records of AI system use. Operators cannot blame AI systems for their own poor decisions or negligent oversight.[43]

4 DISCUSSIONS

The findings show that AI is not always beneficial or harmful. It can help reduce corruption or help create new ways to do it. The outcome depends on how the AI is utilised, who controls it, and whether clear rules are in place. In some cases, AI makes systems more open and fairer.[44] This prevents bribes or secret deals. However, in weak systems with poor governance, AI can conceal corruption more effectively than humans. The UN Office on Drugs and Crime promotes AI-based anti-corruption

40 Khalifa Alhosani and Saadat M Alhashmi, 'Opportunities, Challenges, and Benefits of AI Innovation in Government Services: A Review' (2024) 4(1) Discover Artificial Intelligence 18, doi:10.1007/s44163-024-00111-w.

41 Samuli Laato and others, 'How to Explain AI Systems to End Users: A Systematic Literature Review and Research Agenda' (2022) 32(7) Internet Research 1, doi:10.1108/INTR-08-2021-0600.

42 Regulation (EU) 2024/1689 (n 28) art 26.

43 Mehdi Dastani and Vahid Yazdanpanah, 'Responsibility of AI Systems' (2023) 38 AI & SOCIETY 843, doi:10.1007/s00146-022-01481-4.

44 Emilio Ferrara, 'Fairness and Bias in Artificial Intelligence: A Brief Survey of Sources, Impacts, and Mitigation Strategies' (2023) 6(1) Sci 3, doi:10.3390/sci6010003.

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tools (AI-ACTs) for international cooperation.[45] The quality of evidence is based on the current regulations, since some reports are from government audits and others from research papers.[46] Bias may exist in countries where data is limited or hidden. Values such as fairness, cost, and trust also influence how people perceive AI. This result addresses the primary research question regarding the connection between AI and corruption. However, other factors, such as culture or politics, may also influence the result. Past research suggests that AI can either help or harm, depending on how it is managed.

AI can help public services become more open. It can show how decisions are formed and reduce secretive actions. However, without strong regulations, AI can also act unfairly. For example, it may treat certain people badly based on race, gender, or income. This can occur if the data used is biased or if the AI is poorly designed. Transparent AI systems can enhance cybersecurity by ensuring decision-making processes are understandable and verifiable.[47] Some systems deliver better service, while others produce unfair outcomes. AI is strong in promoting transparency but weaker in addressing bias when data is missing. Values such as fairness and equality matter here. If AI is trusted and fair, people are more likely to support it. If not, it can cause harm. Research shows that automated decision-making removes human gatekeepers who typically accept bribes. Transparency International defines "corrupt AI" as the abuse of public power for private gain.[48] Past research agrees that AI must be carefully controlled.

AI helps detect corruption more efficiently by identifying patterns in large datasets. For example, in Brazil, the AI system was used to uncover fraud in public spending[49] by flagging unusual payments and fake invoices. This example highlights how AI can reduce time and human error in audits. These AI tools proved effective in large-scale systems, not just small-scale tests.

45 Meryam Annouz, 'Opinion Piece: Transnational Cooperation and Artificial Intelligence Based Anti-Corruption Tools (AI-ACTs)' (*UN Office on Drugs and Crime*, 25 September 2024) <https://www.unodc.org/corruption/en/news/2024-09-25_opinion-piece_transnational-cooperation-and-artificial-intelligence-based-anti-corruption-tools-ai-acts.html> accessed 5 July 2025.

46 Naeem AllahRakha, 'Global Perspectives on Cybercrime Legislation' (2024) 8(10) Journal of Infrastructure, Policy and Development 6007, doi:10.24294/jipd.v8i10.6007.

47 'The Implications of AI for Criminal Justice: Key Takeaways From a Convening of Leading Stakeholders' (*Council on Criminal Justice*, October 2024) <https://counciloncj.org/the-implications-of-ai-for-criminal-justice/> accessed 5 July 2025.

48 Fernanda Odilla, 'Bots against Corruption: Exploring the Benefits and Limitations of AI-Based Anti-Corruption Technology' (2023) 80 Crime, Law and Social Change 353, doi:10.1007/s10611-023-10091-0.

49 Álvaro Augusto Bastos de Carvalho and Raimir Holanda Filho, 'Detecting Fraud in Public Acquisition of Brazilian Government with an Analytical Approach' (2024) 238 Procedia Computer Science 248, doi:10.1016/j.procs.2024.06.022.

However, some weaknesses exist. Often, the data used is outdated or incomplete, which can lead to missed cases of hidden fraud.[50] Additionally, AI may make mistakes if the training data is biased. Public values such as fairness, trust, and cost-saving play a significant role. When people believe AI is fair and saves money, they are more likely to support its use. Still, it is important to consider whether weak digital systems or poor record-keeping also contribute to corruption—factors beyond the AI.

Global AI regulation has been described as "an unfinished symphony, a patchwork of policies that aspire to manage a transformative force but often fall short" (Article 6 of the EU AI Act). AI sometimes replicates human biases because it learns from past decisions. To address this, the White House requires federal agencies using AI to adopt concrete safeguards by 1 December to protect Americans' rights.[51] The DOJ Criminal Division now incorporates the assessment of AI risks into its compliance evaluations.[52]

Regular AI audits can identify bias patterns before they cause harm. Technical auditing helps detect manipulation in training data or algorithmic design. Bias can arise when data reflects past unfair treatment or when systems lack transparency. Automated monitoring systems can flag unusual decision patterns in real-time. However, algorithmic opacity and lack of explainability can shield corrupt decisions, especially in public procurement or budgeting systems. South Africa's Public Procurement Act 2024[53] introduces comprehensive reforms to ensure transparent and competitive processes.[54]

AI systems are useful for detecting suspicious patterns in financial or administrative data.[55] Yet, human oversight remains essential, as fully autonomous AI systems can be manipulated through biased training data or input manipulation. NIST has identified types of cyberattacks that manipulate the behaviour of AI systems through adversarial tactics.

50 Naeem AllahRakha, 'The Legality of Reverse Engineering and the Protection of Trade Secrets in the Software Industry' (2025) 15(2) Jurisdictie: Jurnal Hukum dan Syariah 309, doi:10.18860/j.v15i2.28422.

51 Amalia Lopez Acera, 'Artificial Intelligence and the Fight against Corruption' (*Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community*, 21 November 2023) <https://www.antifraucv.es/en/artificial-intelligence-and-the-fight-against-corruption/> accessed 5 July 2025.

52 Robert Sanger, 'Artificial Intelligence and Criminal Law' (*The Colleges of Law*, 12 January 2024) <https://www.collegesoflaw.edu/blog/2024/01/12/artificial-intelligence-and-criminal-law/> accessed 5 July 2025.

53 Act of the Republic of South Africa No 28 of 2024 'Public Procurement Act' [2024] Government Gazette 50967/5051.

54 Maira Martini, 'How Transparency International Fought Corruption in 2024' (*Transparency International*, 7 May 2025) <https://www.transparency.org/en/news/how-transparency-international-fought-corruption-in-2024> accessed 5 July 2025.

55 Darko B Vuković, Senanu Dekpo-Adza and Stefana Matović, 'AI Integration in Financial Services: A Systematic Review of Trends and Regulatory Challenges' (2025) 12(1) Humanities and Social Sciences Communications 562, doi:10.1057/s41599-025-04850-8.

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However, in countries with less transparency, similar AI tools may exist but lack publicly available data to prove their success.

Legal accountability becomes unclear when AI systems commit or facilitate corruption, especially in cases lacking human traceability. There are growing concerns that individuals harmed by bad algorithmic decisions may not know whom to sue.[56] Traditional liability rules fail when AI decisions cannot be traced to specific human actions. Currently, the law holds organisations accountable for AI-generated content and decisions in the same way as it does for human employees.

The EU AI Act entered into force on 1 August 2024 and will be fully applicable two years later, on 2 August 2026.[57] On 23 January 2025, President Trump revoked Executive Order 14110 on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[58] The EU has focused on comprehensive pre-market requirements, where the US previously emphasised voluntary compliance. The EU Act establishes binding obligations for high-risk AI systems, including corruption prevention measures. However, implementation challenges persist, as different member states interpret requirements differently. The US approach, until the recent revocation, relied more on agency guidance than on binding legislation.

Uzbekistan's AI Law is still emerging and lacks clarity on corruption-specific risks and accountability mechanisms. The government drafted a Presidential Decree to improve Uzbekistan's anti-corruption framework and expand enforcement mechanisms through 2030.[59] The Anti-Corruption Agency of Uzbekistan and UNODC signed an Action Plan for joint anti-corruption initiatives for 2024-2025.[60] Current research indicates that Uzbekistan continues to focus on traditional forms of corruption rather than AI-specific risks. Its emerging AI strategy for 2021-2030 does not address algorithmic corruption prevention. Enforcement of corruption laws remains weak, with low prosecution rates. The EU AI Act and Uzbekistan's AI Law demonstrate how clear legal frameworks can define

56 Tae Wan Kim and Bryan R Routledge, 'Why a Right to an Explanation of Algorithmic Decision-Making Should Exist: A Trust-Based Approach' (2022) 32(1) Business Ethics Quarterly 75, doi:10.1017/beq.2021.3.

57 Regulation (EU) 2024/1689 (n 28).

58 Executive Order of the US President No 14179 of 23 January 2025 'Removing Barriers to American Leadership in Artificial Intelligence' <https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/> accessed 5 July 2025.

59 Resolution of the President of the Republic of Uzbekistan No RP-358 of 14 October 2024 'On the approval of the Strategy for the Development of Artificial Intelligence Technologies until 2030' <https://lex.uz/ru/docs/7159258> accessed 5 July 2025.

60 'UNODC and the Anti-Corruption Agency of Uzbekistan have signed an Action Plan for joint activities aimed at countering corruption in the country' (*UNODC Regional Office for Afghanistan, Central Asia, Iran and Pakistan*, 7 June 2024) <https://www.unodc.org/roca/en/NEWS/news_2024/june/unodc-and-the-anti-corruption-agency-of-uzbekistan-have-signed-an-action-plan-for-joint-activities-aimed-at-countering-corruption-in-the-country-.html> accessed 5 July 2025.

responsibilities for AI use in corruption prevention. The EU AI Act establishes strict guidelines for transparency and human oversight, thereby helping to reduce the misuse of AI.

This research contributes to both corruption theory and algorithmic governance frameworks by highlighting how AI can serve as a double-edged sword. The findings support principal-agent theory, which suggests corruption arises when agents (officials) have unchecked discretion. AI can reduce this discretion and increase transparency, thus supporting anti-corruption frameworks. However, the research also challenges technological determinism, which assumes that technology inherently leads to progress. Instead, it shows that AI can also enable corruption if legal safeguards and governance are weak.

Positively, this research reinforces governance-by-design theory, suggesting that embedding ethical rules, audits, and accountability into AI systems can prevent misuse. Negatively, it reveals that algorithmic opacity and lack of human traceability disrupt traditional legal theories of liability and accountability. This creates a theoretical gap where neither individual nor organisational liability is clear.

The findings may inform policy and practice in establishing AI-specific safeguards against corruption, mandating transparency, and creating liability rules for algorithmic harms. They can be used to design AI systems with built-in anti-corruption features, such as transparent decision logs, explainable algorithms, and audit trails. Such systems can help detect and prevent bribery, favouritism, and the misuse of power in public services, such as procurement, licensing, and budgeting.

The results support the adoption of risk-based AI governance, mandating independent audits and clear accountability rules for AI decision-making in high-risk sectors. Existing anti-corruption laws may need to be revised to include AI-specific clauses that ensure traceability, responsibility, and access to legal remedies when algorithms are involved in corruption. AI integrity frameworks and whistleblowing channels can be adapted for digital environments.

Governments should establish clear laws outlining who is responsible when AI systems facilitate corruption. Public agencies must adopt AI systems that are open, fair, and easy to check. Regular audits and human oversight should be required in high-risk areas like public spending and hiring. AI developers should design tools that allow people to understand and question decisions made by algorithms. Whistleblowing systems must also be equipped to handle AI-related issues.

Existing legal models should be updated to address AI risks, particularly in corruption cases. Future research should focus on real-life cases where AI has either caused or prevented corruption. Future work should also explore how different countries manage AI in public systems. Research should test ways to improve AI transparency and accountability and examine how public trust in AI evolves with better legal safeguards. More global comparisons are needed to build stronger and fairer AI laws.

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5 CONCLUSIONS

Artificial intelligence is becoming increasingly common in both the public and private sectors. This study examined the relationship between AI and corruption, exploring both its positive and negative impacts. While AI has the potential to reduce corruption, it can also introduce new risks. As AI becomes more integrated into decision-making, it is crucial to understand its impact on corruption. AI decisions impact people's lives in areas such as healthcare, public funding, law enforcement, and hiring. If misused, it can harm people and conceal unfair practices. When corruption is involved, tracing and preventing it becomes more difficult. That is why studying the legal side of AI and corruption is important. The topic aligns with the broader debate on ethics, governance, and law in the digital age.

The research shows AI can help combat corruption. For instance, it can enhance transparency in public services. In countries like the UK and Germany, AI helps reduce bribery. These countries have strong laws and regular audits. At the same time, AI can also be misused. In places like Brazil and Mexico, weak laws allow AI to facilitate corruption. AI systems can be biased or manipulated to favour certain people. A major concern is that AI decisions are often hard to explain, and this lack of transparency can conceal wrongdoing. Another issue is that humans can still control AI systems by feeding biased data or manipulating inputs. Moreover, many countries lack clear rules on legal responsibility when AI is involved in corruption. This legal uncertainty makes it hard to hold wrongdoers accountable. Furthermore, whistleblowing tools do not work well with AI related problems, making it harder to report AI-based corruption.

The findings suggest that AI is neither inherently good nor bad—its impact depends on how it is used and regulated. When supported by robust laws, audits, and human oversight, AI can reduce corruption. In the absence of these safeguards, AI can worsen corrupt practices. The central argument of this study is that AI affects corruption in both helpful and harmful ways, depending on the system of governance, the presence of legal safeguards, and the level of human oversight. Strong governance, legal clarity, and transparency are critical for ensuring the fair use of AI.

The findings indicate the need for clear rules defining who is legally responsible when AI is used. Laws like the EU AI Act and the former US Executive Order 14110 attempt to do this. However, gaps remain in their application. These laws target high-risk AI systems, but their implementation is still new, and some places apply them better than others. In Uzbekistan, for example, the AI law is still in its early stages and does not adequately address corruption risks. This suggests that many regions are prepared to address the risks associated with AI. That is why global cooperation is needed to share ideas and create common standards. This can help limit corruption and protect citizens. AI laws must also support whistleblowers and provide clear appeal options.

The study also emphasises the importance of technical audits. Independent checks can help ensure AI systems are used fairly. These audits must examine how AI systems make

decisions and whether they are biased or susceptible to manipulation. If issues are found, the system should be corrected or removed. AI systems must be explainable—people must know how and why decisions are made. This builds public trust and helps detect and stop corruption. Policies must ensure transparency in AI use. Public access to AI audits and decision-making data can improve accountability. Governments should invest in digital tools that track AI performance and flag corruption risks.

Not everyone agrees with this view. Some say AI is neutral and merely a tool, and that only humans can commit corruption. While this is partly true, the study shows that AI can be designed or used in corrupt ways. For example, biased data or secret algorithms can lead to unfair outcomes. Others believe that AI should be trusted more than humans, since machines lack personal motives. However, AI systems are built and trained by humans and can reflect human biases. The aim is not to stop AI but to ensure it is used safely and fairly.

In the future, governments can use this research to update their policies. AI can be a tool for promoting fairness, but only if the right safeguards support it. A fair and safe use of AI will benefit all of society. It can improve public services and reduce corruption—if implemented correctly. Without proper oversight, however, AI could deepen injustice and inequality.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ШІ ТА КОРУПЦІЯ:
ЮРИДИЧНА ВІДПОВІДАЛЬНІСТЬ В АЛГОРИТМІЧНОМУ ПРИЙНЯТТІ РІШЕНЬ

Наїм АллагРаха

АНОТАЦІЯ

Вступ. *Питання про те, чи можуть машини бути корумпованими, здається парадоксальним; проте воно швидко набуває актуальності у світі штучного інтелекту (ШІ) та змінює те, як приймаються рішення в державних та урядових системах. Ці системи пропонують помітні переваги, зокрема підвищену ефективність, зменшення людських помилок та здатність боротися з корупцією за допомогою виявлення шахрайства, відстеження коштів та покращення державних послуг. Він може приймати рішення на основі даних, а не особистих інтересів. Однак використання ШІ не позбавлене ризиків. Під час навчання на упереджених наборах даних системи ШІ можуть призводити до несправедливих результатів. Крім того, якщо системами ШІ навмисно маніпулювати*

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для особистої чи політичної вигоди, вони можуть підтримувати або приховувати корупційні дії. У цій статті розглядається роль ШІ в державній службі, вивчається його потенціал у запобіганні або сприянні корупції. Мета полягає в тому, щоб зрозуміти, де ШІ безпечний, а де ризикований.

Методи. *У дослідженні використовувався якісний дизайн дослідження. Дані були зібрані за допомогою огляду академічних робіт, законів та офіційних звітів. Джерела були визначені за допомогою академічних баз даних, таких як Google Scholar, з наголосом на рецензованих юридичних журналах, аналітичних звітах та офіційних урядових документах. Усі матеріали були перевірені за допомогою тесту CRAAP. Аналіз правової доктрини також використовувався як метод.*

Результати та висновки. *Результати вказують на те, що ШІ має значний потенціал для підвищення прозорості та зменшення хабарництва, якщо обмежити людський контроль в адміністративних процесах. Однак у країнах зі слабкими правовими системами може бути зловживання штучним інтелектом. Коли системам ШІ бракує прозорості або пояснень, вони можуть приховувати корупційні практики, а не викривати їх. Цей ризик яскраво виражений у сферах з високими ставками, таких як системи державних закупівель та бюджетування. Хоча деякі країни запровадили надійні правові гарантії та ефективні аудити, які знижують ризики, багатьом іншим бракує чітких правил щодо того, хто несе відповідальність, коли ШІ сприяє корупції. У багатьох випадках державні системи ШІ не мають зовнішніх перевірок, а наявні механізми повідомлення про корупцію не пристосовані для вирішення проблем, пов'язаних зі ШІ. Як наслідок, прогалини у підзвітності досі є. У дослідженні підкреслено постійну важливість людського нагляду для припинення маніпуляцій. Також було рекомендовано урядам зміцнити нормативно-правову базу, ввівши чіткі положення про підзвітність. Незалежні аудити слід додати до всіх публічних систем штучного інтелекту. Системи інформування про порушення слід оновити, щоб враховувати випадки, пов'язані зі штучним інтелектом.*

Ключові слова: *штучний інтелект (ШІ), корупція, юридична відповідальність, алгоритм, прийняття рішень за допомогою ШІ.*

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Research Article

CISG-APPLICABILITY BEFORE NATIONAL JUDICIARY IN EGYPT, BAHRAIN, QATAR AND JORDAN

Amin Dawwas

ABSTRACT

Background: *The United Nations Convention on Contracts for the International Sale of Goods (the CISG or the Convention) may apply autonomously in Arab Contracting States, such as Egypt and Bahrain. The CISG may also be applied indirectly, i.e., by virtue of the rules of private international law, whether in Arab Contracting or non-Contracting States (e.g., Qatar and Jordan). This paper discusses both situations of the CISG application in Arab states at issue as well as how Arab courts address foreign law, including the CISG.*

Methods: *A desk research methodology, as well as legal analysis and comparison, is adopted to answer the research questions. The author scrutinises a range of documents varying from national and international legal texts to academic writings and court rulings. The author analyses the two approaches prevailing in Arab academic writings and court rulings regarding the application of the designated foreign law (including the CISG), i.e. whether as a fact or as a (foreign) law. The author also compares these two approaches to show the advantages and disadvantages of each one to define which of them better serves justice and the parties' interests.*

Results and Conclusions*: The author concludes that the legislature in all Arab jurisdictions at issue, as well as the judicature in Egypt, Bahrain and Qatar, should rethink their approach to handling foreign law. In particular, the CISG should be dealt with as a matter of law, not as a matter of fact. Courts should apply the Convention and establish its content ex officio.*

1 INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter: the CISG or the Convention) is an important instrument governing international commercial contracts. To date, 97 States are party to this Convention, including eight Arab states (Egypt, Iraq, Syria, Lebanon, Bahrain, Mauritania, Palestine, and Saudi Arabia).[1]

The CISG, the cornerstone of border-crossing trade around the globe, provides a set of uniform rules for contracts on the international sale of goods. To materialise the CISG's ultimate end (i.e., unification of the sale of goods law), national courts shall interpret and apply the CISG's provisions in a uniform manner.

In general, Arab courts applied foreign law to contracts with foreign element(s). Yet, Arab courts rarely applied the CISG to such contracts. The reported cases show that only Egyptian courts dealt with the CISG on some occasions.[2] Courts in other Arab states (parties and non-parties to the CISG) may, however, be faced with the application of this Convention (when the national conflicts rule concerning contract refers to the law of a State party to the CISG).

This paper identifies when the CISG applies in some Arab Contracting (Egypt and Bahrain) and non-Contracting States (Qatar and Jordan). It also seeks to explain how courts in these jurisdictions treat foreign law, including the CISG. Do judges regard foreign law as a matter of fact or as a matter of law? Do they, by their own initiative, apply and establish the content of the designated foreign law, including the CISG? Or is the application thereof dependent upon the request of, and the submission of evidence by, the parties? Is it possible to challenge a judge's decision that wrongly applied foreign law?

This paper focuses on the treatment of foreign law (e.g., the CISG) by Egyptian, Bahraini, Qatari, and Jordanian courts only. Reference to the case law in other states will only be made when necessary. Egypt's conflict of law rule on contracts (Article 19 of the Egyptian Civil Code) served as a model for many Arab states. Besides, Egypt is a representative example of the Arab states that are parties to the CISG, particularly because Egyptian courts have

1 United Nations Convention on Contracts for the International Sale of Goods (adoption 11 April 1980) (CISG) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg> accessed 15 February 2024.

2 Available online at: *CISG Database* (Institute of International Commercial Law (IICL) 2024) <https://iicl.law.pace.edu/cisg/cisg> accessed 15 February 2024; *UNILEX on UNIDROIT Principles & CISG: International Case Law & Bibliography* <http://www.unilex.info> accessed 15 February 2024; *Arab and Foreign Court Rulings: Database* (EastLaws (IGLC) 2024) <https://www.eastlaws.com/data/ahkam/app> accessed 15 February 2024; *Court of Cassation of the Arab Republic of Egypt* <https://www.cc.gov.eg> accessed 15 February 2024; *Qarark: Your Decision System* (Jordan Bar Association 2024) <https://qarark.com> accessed 15 February 2024; *Encyclopedia of Qatari Judicial Rulings and Principles* (Supreme Judiciary Council 2024) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 15 February 2024.

already applied the CISG. This paper will demonstrate that Egyptian courts have made conflicting decisions concerning the CISG's application. On some occasions, the court applied the CISG *ex officio*; on others, the court declined the application of the CISG even when one of the parties pleaded its applicability.

Bahrain is another example of an Arab state party to the CISG. Although Bahraini courts have not yet applied the CISG, Bahrain boasts the newest, most developed conflict rules concerning contracts in the Arab world. Unlike Egyptian law, Bahrain's Law No. 6/2015 on Conflict of Laws in Civil and Commercial Matters with a Foreign Element[3] expressly entitles the parties to select "rules of law" as the governing law for their contract (Article 4).[4]

Qatar, like most other Arab states, is not a party to the CISG. Article 27 of the Qatari Civil Code resembles Article 19 of the Egyptian Civil Code.[5] Qatar's Court of Cassation generally aligns its rulings with those of Egypt. In all these jurisdictions, the applicable foreign law is dealt with as a fact; disputants must plead the applicability of foreign law and submit evidence on its provisions.

Jordan has not acceded to the CISG, either. Unlike the courts in Egypt, Bahrain, and Qatar, Jordanian courts treat the applicable foreign law as law, recognising its foreign character. The judge *ex officio* ascertains the content of this law. The author hopes Jordan and Qatar will follow Egypt (and other Arab CISG-Contracting States) by acceding to the Convention.

After stating the research methods (Part 2), this paper will address the applicability of the CISG in the aforementioned Arab jurisdictions (Part 3). Part 4 will discuss and evaluate the way in which the Egyptian, Bahraini, Qatari, and Jordanian courts treat foreign law in general. In Part 5, the focus will shift to how Egyptian courts have dealt with the CISG, as well as how the courts in Bahrain (a Contracting Arab State), Qatar, and Jordan (non-Contracting Arab States) should apply this Convention. Part 6 concludes with some remarks and recommendations.

3 Law of the Kingdom of Bahrain No. 6 of 2015 'On Conflict of Laws in Civil and Commercial Matters with a Foreign Element' (Bahrain Law No. 6/2015) <https://bahrainbusinesslaws.com/laws/Conflict-of-Laws-in-Civil-and-Commercial-Matters> accessed 15 February 2024.

4 In addition, unlike Egyptian law, Article 17(c) of the same Bahraini law expressly recognises *dépeçage* of contract.

5 Law of the State of Qatar No. 22 of 2004 'Regarding Promulgating the Civil Code' (Qatari Civil Code No. 22/2004) <https://www.almeezan.qa/LawPage.aspx?ID=2559&language=en> accessed 15 February 2024; Law of the Arab Republic of Egypt No. 131 of 1948 'Promulgating the Civil Code' (Egyptian Civil Code No. 131/1948) <https://www.ecolex.org/details/legislation/law-no-131-of-1948-promulgating-the-civil-code-lex-faoc212999/> accessed 15 February 2024.

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2 METHODOLOGY

A desk research methodology has been applied to the research topic. The legal analysis is used as well. The paper scrutinises a range of documents varying from national and international legal texts, academic writings and court rulings. It discusses and analyses the different stances taken by Arab courts and jurists regarding the application of the designated foreign law, including the CISG. In particular, the paper critically analyses the Egyptian court judgements applying the CISG. The comparative method is used to show the benefits and shortcomings of the two approaches to the treatment of the CISG, i.e. whether as a fact or as a (foreign) law. This method enabled the researcher to define which of these approaches better serves justice and the parties' interests.

3 CISG-APPLICABILITY IN ARAB STATES

Articles 1-6 of the CISG define the conditions for the Convention's substantive (material) and territorial (geographical) application. The CISG governs the formation of the international sale of goods contract and the rights and obligations of the parties arising therefrom.[6]

Under Article 1(1) of the CISG, the internationality of the contract should be realised when the buyer's place of business and the seller's place of business are in two different Contracting States.[7] It would not suffice if the parties have their places of business in two "different legal units of the same Contracting State".[8] The term place of business means "a permanent and regular (stable) place for the transacting of general business."[9] Article 1(2) of the CISG requires such fact to "appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract." Article 1(3) of the CISG clarifies that the nationality of the parties is irrelevant to the internationality of the contract, as is the "civil or commercial character of the parties or the contract".

However, the mere internationality of a sale of goods contract per se does not justify the application of the CISG. There must be a certain contact between such a contract and a State

6 CISG (n 1) art 4. Other aspects of such contracts, like validity of the contract are still governed by the domestic law applicable pursuant to the forum's conflicts rule.

7 ibid, art 10(b). In the absence of a place of business, reference shall be made to the related party's habitual residence.

8 Erik Jayme, 'Sphere of Application, Article 1' in C Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 30.

9 Christophe Bernasconi, 'The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)' (1999) 46(2) Netherlands International Law Review 145, doi.org/10.1017/S0165070X00002382.

Party to the Convention.[10] Article 1(1)(a) of the CISG defines two situations where the Convention applies territorially. The first, known as autonomous or direct application, occurs when both parties' places of business are situated in two different Contracting States. A State is considered a Contracting State, i.e., a Party to or Member of the CISG when it has ratified, approved, accepted or acceded to the Convention (Article 91 of the CISG).

In the second situation, the indirect one, the CISG applies when the buyer and the seller have their places of business in two different states, and the conflict of laws rule designates the law of a CISG-Contracting State as the applicable one (Article 1(1)(b)). This is because, when ratified, accepted, approved or acceded to by that State, the CISG became part of the law of that State.[11] It is of no importance here whether the buyer or the seller has their places of business in a State not party to the CISG.[12] But if both parties are based in the same state, the CISG will not apply even when the conflict of laws rule points to the law of a CISG-Contracting State.[13]

Courts in Egypt and Bahrain (States Parties to the CISG) may apply the Convention autonomously or indirectly.[14] These courts are treaty-bound[15] to apply the CISG to the contract whenever the buyer's place of business and the seller's place of business are in different Contracting States. Therefore, the forum should first check the applicability of the CISG to the given dispute. Once the requirements for the CISG application are satisfied,[16] the forum should apply this Convention automatically,[17] i.e., without recourse to national

10 ibid 148; Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25(3) International Review of Law and Economics 327, doi:10.1016/j.irle.2006.02.002; John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999) 85.

11 Bashayer Al-Mukhaizeem, 'Application of CISG in Kuwait' (2021) 35 Arab Law Quarterly 304 at 307, doi:10.1163/15730255-14030660; Bernasconi (n 9) 157; Marlene Wethmar-Lemmer, 'Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG - Analysing CISG Advisory Council Opinion 15' (2016) 49(1) De Jure 65, doi:10.17159/2225-7160/2016/v49n1a4.

12 Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in R Blanpain (gen ed), *The International Encyclopedia of Laws* (Kluwer Law International 1993) para 54; Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on International Sale of Goods* (Springer-Verlag 2009) 14, doi:10.1007/978-3-540-49992-3.

13 Ferrari (n 10) 325.

14 Eunice Chiamaka Allen-Ngbale, 'Applicability of United Nations Convention on Contract for the International Sale of Goods (CISG) on Non-Contracting States' (2019) 9(6) International Journal of Scientific and Research Publications 758, doi:10.29322/IJSRP.9.06.2019.p90109; Pilar Perales Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' (2013) 58(4) Villanova Law Review 733; Schlechtriem and Butler (n 12) 14-5.

15 Mohamed Okasha Abdelaal, *Conflict of Laws: A Comparative Study* (Alexandria University Press 2002) 57; Bernasconi (n 9) 155; Lookofsky (n 12) paras 21, 53.

16 It should be noted that applicability of the Convention may be affected by the reservations lodged by states, see CISG (n 1) arts 92–98.

17 Bernasconi (n 9) 152; Viscasillas (n 14) 739.

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conflict rules concerning contracts.[18] Indeed, the CISG replaces the uncertainty associated with the otherwise applicable national law.[19] While the latter is normally unknown to at least one of the parties,[20] the former is neutral to both parties.[21]

Courts in Egypt and Bahrain may also apply the Convention indirectly, that is to say, when the conflict-of-laws rule refers to the law of a State Party to the CISG. On one hand, Article 1(1)(b) is part of the CISG, which is effective in Egypt and Bahrain. On the other, domestic courts must take seriously the mandate of their national conflicts rule and apply the law it designates; the court should apply the CISG as part of the law designated.

Since Qatar and Jordan are not parties to the CISG, their courts are not obligated to apply the Convention directly, making recourse to indirect application important. The CISG may apply if the forum's conflicts-of-laws rule refers to the law of a Contracting State.

Although courts in Qatar and Jordan are not bound by Article 1(1)(b) of the CISG, they are bound to respect the national legislature's will, as expressed in the national conflicts rule.[22] Thus, to adjudicate the dispute, the courts should apply the law identified by their conflict-of-laws rules, including the CISG when relevant.[23]

In addition, Arab courts should apply the designated foreign law in the way in which the court, in the state of origin, would. Since the CISG is generally recognised as *lex specialis* in that state,[24] Arab courts should likewise regard it as such.

Egypt,[25] Bahrain,[26] Qatar[27] and Jordan[28] (as well as other Arab States) acknowledge party autonomy; the buyer and the seller are authorised to select the law governing the contract. Failing such a selection, the applicable law shall be determined objectively, typically based on the law of the parties' common domicile or the law of the place of contracting (the *lex loci contractus*).

18 Jayme (n 8) 28; Thomas Kadner Graziano, 'The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as you Find it' (2011) 13 Yearbook of Private International Law 166, doi:10.1515/9783866539648.165; Lookofsky (n 12) paras 21, 53; UNCITRAL, HCCH and UNIDROIT, *Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (UN Publ 2021) 9.

19 Honnold (n 10) 35.

20 ibid; Bernasconi (n 9) 150.

21 Bernasconi (n 9) 160; Schlechtriem and Butler (n 12) 16.

22 Pavel Kalensky, *Trends of Private International Law* (Štefan Luby and Otto Kunz eds, Springer Dordrecht 1971) 282-3, doi:10.1007/978-94-011-9590-4.

23 Peter Winship, 'Private International Law and the UN Sales Convention' (1988) 21(3) Cornell International Law Journal 521-2.

24 Al-Mukhaizeem (n 11) 318; Bernasconi (n 9) 161; Winship (n 23) 521.

25 Egyptian Civil Code No. 131/1948 (n 5) art 19(1).

26 Bahrain Law No. 6/2015 (n 3) arts 4 and 17.

27 Qatari Civil Code No. 22/2004 (n 5) art 27(1).

28 Law of the Hashemite Kingdom of Jordan No. 43 of 1976 'Civil Code' (Jordan Civil Code No. 43/1976) art 20(1) <https://www.wipo.int/wipolex/en/text/227215> accessed 15 February 2024.

Accordingly, a court in these jurisdictions may apply the CISG when the buyer and the seller select the application of the law of a CISG-Contracting State (e.g., the law of Bahrain, Egypt, Lebanon). As long as parties do not specifically select the national law of that State[29] (e.g., the Egyptian Trade Law 1999) or expressly exclude the application of the Convention (Article 6 of the CISG), such selection should include the application of this Convention.[30] The Egyptian Court of Cassation has affirmed that choosing the law of Egypt (a Contracting State) includes the CISG. Therefore, the court rejected a challenge to an arbitral award that applied the CISG, affirming that it is part of the Egyptian law chosen to govern the dispute.[31]

In addition, buyers and sellers may select "rules of law," such as the CISG.[32] Article 4 of the Bahrain Law No. 6/2015 acknowledges such selection, stating that "Parties may agree to choose the applicable law, and may agree to choose International Trade Law and its customs."

Other Arab States' conflict-of-laws do not include similar provisions. However, the same conclusion may be reached by the way of interpretation. Contrary to the choice by the court,[33] the conflict-of-laws rules in the aforementioned jurisdictions do not attribute the law selected by the parties to a particular State.[34] Under such a general framework, the term "law" should be given a wide connotation. The parties may choose a State law or a non-State law, meaning a certain set of "rules of law," like the Convention.[35]

In the absence of the parties' choice, whether express or implicit, the law of the parties' common domicile or the *lex loci contractus* may be the law of a CISG-Contracting State. Under these circumstances, Arab courts should apply the Convention as part of the law in that State.[36] Indeed, *vis-à-vis* national law, the CISG is the *lex specialis* governing international sales within that jurisdiction.[37]

29 Allen-Ngbale (n 14) 756; Schlechtriem and Butler (n 12) 15.

30 Francesca Ragno, 'The CISG and the Choice of Law: Two Worlds Apart?' (2020) 38(1) Journal of Law and Commerce 250, doi:10.5195/jlc.2020.188; Viscasillas (n 14) 740.

31 *Al Musawi Trading & Building Materials Co v National Port Said Steel* Case No. 601/2008 (CRCICA, 4 January 2011) <https://jusmundi.com/en/document/decision/ar-al-musawi-trading-building-materials-co-v-national-port-said-steel-hkm-mhkm-stynf-lqhr-tuesday-4th-january-2011> accessed 20 February 2024.

32 UNCITRAL, HCCH and UNIDROIT (n 18) 30-1.

33 In the absence of a choice by the parties, the court will apply the law of the parties' common domicile or else the *lex loci contractus*.

34 For instance, Article 19(1) of the Egyptian Civil Code states that, 'Contractual Obligations shall subject to the law of the domicile when such domicile is common to the contracting parties and in the absence of a common domicile to the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law.'

35 For more details, see Al-Mukhaizeem (n 11) 309-10.

36 Honnold (n 10) 36.

37 Schlechtriem and Butler (n 12) 17.

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4 TREATMENT OF APPLICABLE FOREIGN LAW BY NATIONAL JUDICIARY: IN GENERAL

There is significant controversy in legal literature and case law across the Arab States regarding the treatment of foreign law by national courts. A key question is whether courts should apply foreign law *ex officio*. More importantly, how should the content of such a law be established?[38]

Some argue that foreign law is a factual circumstance that must be pleaded and established by the parties involved. Others contend that it is a law that the judge, *ex officio*, has to ascertain, interpret and apply.[39]

4.1. Foreign Law is a Fact

Despite the opposite view prevailing in the legal doctrine in Egypt,[40] the Egyptian Court of Cassation clearly treats foreign law as a fact, making the disputants bound to plead the foreign law and provide the judge with evidence on its content. Once foreign law is pleaded and its content is established, the judge will evaluate the parties' submissions and apply foreign law accordingly.

For instance, the Egyptian Court of Cassation indicated that "relying on foreign law is just a material fact that the litigants must prove". Because the appellant did not submit the Czech Civil Code to the trial court, *inter alia*, this Court rejected the appellant's challenge.[41]

38 Jürgen Basedow, 'The Application of Foreign Law: Comparative Remarks on the Practical Side of Private International Law' in Jürgen Basedow and Knut B Pißler (eds), *Private International Law in Mainland China, Taiwan and Europe* (Mohr Siebeck 2014) 91.

39 For a detailed analysis of these opinions, see e.g., Ezz El-Din Abdallah, *Private International Law*, Pt 2: Conflict of Laws and International Court Jurisdiction (Egyptian General Commission for Books 1986) 572-93; Abdelaal (n 15) 341-63; Ghaleb Ali Al-Dawoudi, *Private International Law: Conflict of Laws, International Court Jurisdiction and enforcement of Foreign Judgments: A Comparative Study* (3rd eds, Dar Wael 2001) 159-62; Basedow (n 38) 86-8.

40 Shams El-Din Al-Wakeel, 'A Comparative Study in the Proof of the Foreign Law and the Control by the Supreme Court on its Interpretation' (1964) 12(1-2) Journal of Legal and Economic Research, Alexandria University 128-9, 'most of the Egyptian jurists argue that the foreign law retains its legal nature; in compliance with the national conflicts rules, the judge should apply it by his own motion. The judge should also ascertain the content of this law; the parties may assist the judge to do so.' See also, Abdallah (n 39) 587; Abdelaal (n 15) 355-6; Ahmed Al-Hawari, *Nutshell on the Emirati Private International Law* (University Book Shop, Ithraa Publ and Distribution 2015) 321, 369; Ahmed Abdel Karim Salameh, 'Conflict of Laws Rules in Qatari Civil Code (Articles 10-38): A Critical Comparative Study' (Qatari Civil Code in its First Decade, Conference Proceedings, College of Law Qatar University, 23-24 November 2014) 330-1.

41 Case No. 804 of judicial year 44 (Egyptian Court of Cassation, 7 April 1981) <https://ahmedazimelgamel.blogspot.com/2023/09/804-44-7-4-1981-32-1-201-1078.html> accessed 20 February 2024. In the same sense, see the following decisions of the Egyptian Court of Cassation: decision No. 541 for the judicial year 51, dated 23 December 1991; decision No. 49 for the judicial year 57, dated 25 July 1989; decision No. 27 for the judicial year 45, dated 20 January 1973; decision No. 216 for the judicial year 38, dated 17 May 1973; decision No. 8 for the judicial year 35, dated 26 July 1967. All available: *East Laws Network* <https://www.eastlaws.com> accessed 20 January 2024.

According to the same Court, one should "respond to practical considerations with which the judge is not able to become familiar with the provisions of that law".[42]

In other words, according to the Egyptian Court of Cassation, foreign law is just a material fact that the judge is generally not supposed to know. Therefore, the judge is not obligated to apply foreign law *ex officio*; rather, the parties should invoke the applicable foreign law and establish its content. The parties may resort to all means to prove this law, including the submission and translation into Arabic of its provisions, the use of academic literature and judicial rulings made in the state of origin, or the use of oral and written expertise (e.g. academics and lawyers with enough experience and knowledge of foreign law).

In addition, the party basing its claims on foreign law should plead this law and prove its provisions before the Court of First Instance that adjudicates the dispute. As a mixed defence of law and fact, the question of the (non-) application of foreign law may not be raised by the Appellant for the first time before the Court of Cassation.[43]

However, if the judge is aware of the foreign law's content, or if such knowledge by the judge is presumed (e.g., in cases in which the law applicable is an international convention[44]), the foreign law shall be treated as a law; the judge should ascertain foreign law and establish its content.[45]

The Qatari Court of Cassation treats foreign law as a fact, too. In a dispute between a Qatari company and a Spanish company, the Court indicated that

> "Foreign law is just a material fact that one must substantiate. … To determine the extent to which the Appellee's [the Spanish company's] argument is correct, recourse should be had to Spanish law regulating companies. ... Because the appellee had not provided an official copy of that law, the said argument had not been proved; … the challenge should be rejected."[46]

42 Case No. 2317 of judicial year 59 (Egyptian Court of Cassation, 8 February 1996) <https://www.eastlaws.com/data/ahkam/details/13666/50901/0/> accessed 20 January 2024.

43 Saif Al-Din Muhammad Al-Balaawi, 'The Foreign Law and its Applicability before National Judiciary: A Comparative Study' (2003) 7(1) Journal of Al-Aqsa University, Series Humanities 176, 191.

44 Case No. 2317 of judicial year 59 (n 42).

45 Case No. 9139 of judicial year 84 (Egyptian Court of Cassation, 22 June 2015) <https://www-eastlaws-com.qulib.idm.oclc.org/data/ahkam/details/373877/4286502/0/> accessed 26 May 2024.

46 Case No. 133/2014 (Qatari Court of Cassation, 17 June 2014) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024. See also: Case No. 161/2015 (Qatari Court of Cassation, 9 June 2015) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024, 'The appellant had submitted two copies of the Canadian Labour and Public Service Pensions Acts, 1991, the appellee had not disputed their texts. These laws do not include a provision on the entitlement of the appellee to end-of-service gratuity; instead, they give the employee the right to a pension. Because the challenged judgment ruled that the appellee was entitled to end-of-service gratuity in application of the Qatari Labour Law, it had violated the law and erred in its application.' In the same sense, Case No. 137/2010 (Qatari Court of Cassation, 11 January 2011) <https://encyclop.sjc.gov.qa/portal1/Menu.aspx?gcc=1> accessed 20 January 2024.

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In Bahrain, Article 6(a) of Law No. 6/2015 expressly adopts this opinion with regard to civil and commercial matters, including international contracts.[47] Shaaban states:

> "The Bahraini legislature considers foreign law as a mere material fact, as the judge is not obligated to know its content. The legislature does not assign the judge any role in the search for the foreign law's content; it puts the whole task on the shoulders of the litigants."[48]

In addition, the Bahraini Court of Cassation adopted the same view long before the Bahrain Law No. 6/2015 was enacted. In a contractual dispute between two Pakistani individuals settled in 1994, the Court indicated that the Bahraini law did not then include a conflict-of-law rule governing contracts with foreign elements. Relying on private international law principles, the Court decided to apply the selected law (in this case, Pakistani law). However, this Court expressly indicated that "because the litigants did not prove the foreign law, which is regarded as a fact, this law could not apply."[49] Instead, the Court applied Bahraini law.

Truly, unlike national law, judges are generally not presumed to have knowledge of foreign law. However, this is primarily a procedural issue and should not alter the character of foreign law.[50] Judges may acquire knowledge of foreign law either independently or with the assistance of the litigants involved in the case.[51]

The treatment of foreign law as a fact finds its roots in the thesis of the French scholar Batiffol.[52] According to Shaaban, Batiffol argues that:

> "Any legal rule consists of two elements, the first element, the mental element, means the content of the rule, i.e., that the rule is abstract and general. The second element, the order and imperative one, means the binding force of the rule, which derives from the authority of the state in which the law is made. In this way, Batiffol believes that the foreign legal rule possesses these two elements in the state in which it is made; however, by crossing the borders and moving to another state, it still retains

47 Matters of personal status with foreign elements are governed by another law, namely the Bahrain Law No. 12/1971 on civil procedures. Some jurists argue that, under this law, the judge ascertains the applicable foreign law *ex officio*. However, the judiciary considers foreign law applicable to such matters as a factual circumstance that related disputant has to establish. Hosam Shaaban, 'The Treatment of Foreign Law before Bahrain Judge- Comparative Study in Light of the New Trends of Scholars and Judicial Decisions' (2017) 19 Journal of Sharia and Law, Al-Azhar University 205-6, doi:10.2139/ssrn.3419537.

48 ibid 222.

49 Case No. 143/1994 (Bahrain Court of Cassation, 4 December 1994). In the same sense, see the following decisions of the Bahrain Court of Cassation: decision No. 158/1994, dated 4 December 1994; decision No. 2/1994, dated 27 March 1994; decision No. 133/1995, dated 11 January 1996; and decision No. 286/2001, dated 24 June 2002. All available: *Arab and Foreign Court Rulings* <https://www.eastlaws.com/> accessed 20 January 2024.

50 Kalensky (n 22) 281; Shaaban (n 47) 218.

51 Al-Balaawi (n 43) 182; Shaaban (n 47) 218.

52 Henri Batiffol, *Aspects philosiphique du droit international privé* (Dalloz 2002).

> the first element, which is the content, but it loses the second element, which is the imperative one. Thus, the foreign legal rule loses its binding legal nature and turns into a mere material fact that the litigants must prove before the national judge."[53]

According to Kalensky,

> "Batiffol proceeds from the premise that foreign law is a heterogeneous element with respect to the *lex fori* and that the judge applies it as he would …. Although foreign law arises from the will of a legislator who exercises his jurisdiction which is similar to the jurisdiction of the domestic legislator, but this jurisdiction cannot be exercised on territory which is under the jurisdiction of the domestic legislator. … the results he reaches may be defined as meaning that foreign law is to be applied as any other factual circumstance."[54]

Batiffol's arguments suggest that "foreign law is not domestic law";[55] however, this does not in any way mean that foreign law is just a factual circumstance. The treatment of foreign law as a factual circumstance would require the judge to apply it in the same way as they would apply factual evidence in a case.[56] The author cannot approve this conclusion.[57] If foreign law were generally considered a fact, a party's inability to establish this law would result in the judge rejecting their requests - as is usually the case when the facts have not been established.[58]

However, Article 6(a) of Bahraini Law No. 6/2015 compels the judge to apply Bahraini law if the litigants do not request the application of or prove the content of foreign law. In Egypt and Qatar, the doctrinal and jurisprudential prevailing view argues the same.[59] The foreign law should, therefore, be regarded as a matter of law.

Treating foreign law as a factual circumstance complicates and increases the costs for disputants seeking to establish its content, whether that involves specific legislation, case law, or legal doctrine. This problem becomes more difficult and costlier if the designated law is in a language foreign to the party invoking it.[60] In such cases, the party, at their own expense, might recruit a foreign counsellor to establish the provisions of foreign law. Still, the burden of establishing the content of foreign law lies solely with the invoking party.

53 Shaaban (n 47) 211.
54 Kalensky (n 22) 280.
55 ibid.
56 Al-Balaawi (n 43) 173.
57 See also, Wafa Mohammed Ashraf, 'Enforcement of Foreign Laws before the National Judge: A Comparative Study' (2017) 31(70) UAEU Law Journal 164-5.
58 Basem Mohamed Fathy Haroun, 'Proof of the Foreign Law before National Judiciary: A Jurisprudential, Judicial and Comparative Study in Accordance with the Rules Governing Evidence' (2015) 31 Journal of Jurisprudence and Law 88, doi:10.12816/0010925.
59 ibid.
60 Basedow (n 38) 86.

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If foreign law were regarded as a factual circumstance in the case, each party might be inclined to submit only the foreign law's provisions that favour their own interests; this would result in the falsification of the foreign law.[61] Consequently, the court would definitely apply a different law than what was anticipated by the forum's conflict-of-laws rule.

Besides, considering foreign law as a factual circumstance has significant practical implications, namely the possibility of challenging a decision where the judge has wrongly applied foreign law.[62] In Bahrain, since foreign law applicable to contracts is treated as a fact, the Court of Cassation may not review the application by the judge of the merits of this law. This Court controls the application of law only, not also facts.[63]

In Egypt, as stated earlier, contrary to the prevailing opinion in the legal doctrine, the Court of Cassation treats foreign law as a fact. Surprisingly, the same Court reviews the application by the judge of foreign law.[64] For example, this Court indicated that:

> "The judge is obliged to apply the designated foreign law, whether in the form of statutory texts or other sources; thus, the judge was correct when it applied the provisions of presumptive marriage ('*Mariage putatif*') to the fact of the case, considering the practice of tradition and judicial rulings under Byzantine law in this regard."[65]

The possibility of reviewing the application of the designated foreign law by the Egyptian Court of Cassation is welcomed. However, such an approach is inconsistent with the treatment of foreign law as a fact. The Court should clearly recognise foreign law as a law that must be interpreted and applied as a foreign one, i.e., based on the principles and concepts of this foreign law.

Moreover, viewing foreign law as a factual circumstance also ignores the binding force of the national conflict-of-laws rule concerning contracts. This rule compels judges to apply foreign law based on the national legislature's will[66] rather than the will of a foreign legislature.[67] Truly, for sovereignty considerations, the validity of foreign law is limited to the territory of the foreign state.[68] However, the national conflicts rule, which invites foreign law for application, validates foreign law within the national legal framework.[69] In effect,

61 Al-Wakeel (n 40) 88; Basedow (n 38) 92; Kalensky (n 22) 293.
62 Kalensky (n 22) 286; Shaaban (n 47) 228.
63 M Al-Soor, 'Status of Foreign Law before the National Judiciary: Jurisprudential and Judicial' (2016) 4(8) Azzaytuna University Journal of Legal Sciences 223; Shaaban (n 47) 228.
64 Al-Balaawi (n 43) 203.
65 Case No. 33 of judicial year 37 (Egyptian Court of Cassation, 12 April 1972) <https://www-eastlaws-com.qulib.idm.oclc.org/data/ahkam/details/4414/12310/0/> accessed 26 May 2024.
66 Al-Balaawi (n 43) 173.
67 Al-Wakeel (n 40) 78, 124; Ashraf (n 57) 164; Haroun (n 58) 91; Shaaban (n 47) 213-4.
68 Kalensky (n 22) 284, 292.
69 ibid 290.

this rule restores the imperative element of foreign law, which may be diminished when crossing the borders.[70]

Thus, based on the imperative of the national conflict-of-laws rule, judges are not only obligated to ascertain the existence of foreign law but also apply it and adjudicate disputes pursuant to its provisions.[71]

In a dispute between two Iraqis over a labour contract executed in Jordan, the West Amman Court of First Instance, in its Appellate Capacity, found that the contract parties had selected the Iraqi law to govern their contract. The Court concluded that:

> "This chosen law should recover its imperative element lost by crossing the boundaries of the authority that made this law; this is so because the national conflicts rule has designated this law to be applied, i.e., as foreign legal rules. The judge of the Court of First Instance must act on his own initiative and apply foreign law."[72]

4.2. Foreign Law is a Matter of Law

The prevailing view in Arab legal doctrine acknowledges the foreign character of foreign law and, consequently, treats it as a law.[73] The author supports this view, too. Simply because the foreign law is applicable in accordance with the forum's conflicts rule, such law shall remain to be a foreign law. It should not be reduced to a mere fact in the case or incorporated into domestic law.

The judge is obligated to apply its conflict-of-laws rule concerning the contract and the law it designates. The national conflict-of-laws rule is neutral; it treats national law and foreign law equally.[74] Just as this rule directs the judge to apply domestic law when indicated, so the same rule forces the judge to apply foreign law when specified. The judge must adjudicate the dispute in accordance with the provisions of the applicable law, whether domestic law or foreign law.

If the applicable law is a foreign one, the judge is obliged to actively search for the content of that law.[75] Truly, Article 79 (1) of the 1988 Jordanian Civil Procedures Law, and its Supplements,[76] states that "In case of applying a foreign law, the Court shall have the right to ask the litigants to submit their documents supported with a sworn (notarised)

70 Al-Wakeel (n 40) 78; Al-Soor (n 63) 224; Kalensky (n 22) 284.
71 Kalensky (n 22) 284-5.
72 Case No. 1842/2018 (West Amman Court of First Instance, 19 September 2018) <https://qarark.com/> accessed 20 January 2024.
73 Al-Dawoudi (n 39) 161; Al-Soor (n 63) 237; Ashraf (n 57) 169.
74 Kalensky (n 22) 284.
75 Al-Dawoudi (n 39) 161; Ashraf (n 57) 161; Haroun (n 58) 91; Shaaban (n 47) 227.
76 Law of the Hashemite Kingdom of Jordan No. 24 of 1988 'Civil Procedure Code' <https://www.moj.gov.jo/EchoBusV3.0/SystemAssets/565d97dd-9afd-4e38-b21e-8794eb4ece27.pdf> accessed 25 May 2024.

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translation." However, this text does not alter the position already taken by Jordanian courts. It merely allows the judge to seek the assistance of litigants to prove the content of foreign law by assigning them to submit the legal texts of the applicable foreign law on which they rely. Ultimately, the burden of the submission of foreign law and the establishment of its texts still lies with the judge.

Accordingly, the judge may not resort to national law simply because the party invoking the applicable foreign law has not presented proof of such law; rather, the judge must verify that the existence of this law cannot be established or its meaning cannot be determined. Like in Egypt, Qatar and Bahrain, the judge in Jordan generally applies the *lex fori* when the applicable foreign law is not ascertainable.

When applying the designated foreign law, the judge should do so in the same way as the foreign forum would,[77] considering the social environment in which this law was promulgated, constructed and applied.[78] In other words, the judge should consider the official interpretation of foreign law, its gap-filling means, its practical application and legal writing in the related state.[79] By adhering to these principles, the judge will respect the command of the national conflicts rule to apply foreign law to the disputed contract. The judge's decision to adjudicate the dispute may be challenged for the error in applying the foreign law.[80]

In addition, if the judge applies the designated foreign law in a manner, e.g., in accordance with the concepts of the judge's national law, it may lead to the distortion of the content of the foreign law.[81] This would result in the application of a (foreign) law that diverges from what was intended by the conflict-of-laws rule.

The courts in Jordan hold this view, too. In the above-mentioned case, the West Amman Court of First Instance, in its Appellate Capacity, found that, although the parties had chosen Iraqi law to govern their contract:

> "The Court of First Instance, contrary to the conflicts rule of Article 20(1) of the Jordanian Civil Code, has applied to the claim of the plaintiff (the appellee) Article 46(a) of the Jordanian Labor Law and Article 821 of the Jordanian Civil Code. The Court of First Instance has withheld itself from the matter of the applicable law, namely the Iraqi Labor Law. Especially because this issue does not relate to public policy [in Jordan], the Court *ex officio* should apply the law selected by the contract parties."[82]

77 Ashraf (n 57) 170; Kalensky (n 22) 285.

78 *Pro,* Al-Balaawi (n 43) 167. *Contra,* Al-Dawoudi (n 39) 165-6, (the judge interprets foreign law according to the principles of interpretation applicable to national law).

79 Kalensky (n 22) 286; Shaaban (n 47) 225.

80 Al-Balaawi (n 43) 186; Al-Soor (n 63) 235.

81 Shaaban (n 47) 225.

82 Case No. 1842/2018 (n 72).

Concerning the contract dispute between a Kuwaiti party and a Jordanian party, the Jordanian Court of Cassation found that the Court of Appeals applied the Kuwaiti law. The Court of Cassation concluded that "the trial court is bound to apply to the facts of the case the law it considers proper, whether such law is the Jordanian law or a foreign one."[83]

In another dispute between a Jordanian individual and the Hong Kong and Shanghai Banking Corporation Limited (HSBC), the Jordanian Court of Cassation found that the parties had selected English law to govern their contractual relationship. The appellant argued that the trial court erred in applying this law since no party requested its application. The Court of Cassation refused the appellant's claim, affirming that the judge must apply the designated foreign law by their own initiative.[84]

In Bahrain, in conformity with the prevailing doctrinal opinion,[85] Article 6(c) of Bahrain Law No. 6/2015 obligates national judges to interpret and apply foreign law in the same manner as it is interpreted and applied by the courts in the state of origin.[86] However, contrary to the predominant jurisprudential view supported by the author, Article 6(c) compels the judge to do so only if the parties have submitted evidence on such interpretation and application, including court judgments and jurisprudence from the foreign state.[87]

"If no provisions were submitted, Bahraini law may be considered as the applicable law to the subject-matter of the dispute."[88] This indicates that the judge has the authority to determine the applicable law in such situations. The judge 'may' apply Bahraini law; the judge may also apply the designated foreign law *ex officio* if they are aware of its content.[89] This scenario could occur, for instance, if the designated foreign law is the Egyptian (Civil) Law, which has served as a source of inspiration for Bahraini (Civil) Law.

In Egypt, the Court of Cassation made it clear that when the applicable law is an international convention, the judge's knowledge thereof should be presumed. The judge should, therefore, establish the content of that convention on their own motion, even if neither party requests this action. In its decision No. 3317 concerning defective goods shipped by sea, the Egyptian Court of Cassation concluded that:

> "International Conventions have become an important source of maritime law and a way to unify its provisions at the international level; legal rules of these Conventions have become international norms known to maritime courts in many States. Egypt has acceded to the International Convention for the Unification of

83 Case No, 1137/1997 (Jordan Court of Cassation, 18 March 1997) <https://qarark.com/> accessed 20 January 2024.

84 Case No. 2279/2015 (Jordan Court of Cassation, 12 October 2015) <https://qarark.com/> accessed 20 January 2024.

85 Al-Hawari (n 40) 371.

86 Shaaban (n 47) 225.

87 Bahrain Law No. 6/2015 (n 3) art 6(c).

88 ibid, art 6(a).

89 Shaaban (n 47) 223-4.

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> Certain Rules of Law Relating to Bills of Lading (The Hague Rules) signed in Brussels on 25 August 1924, which became legislation in force in Egypt by Decree-Law of 31 January 1944. The Protocol to this Convention gave Contracting States the right to implement it either by giving it the force of law or by incorporating its provisions into their national legislation. It is well known for jurists and judges that England had incorporated the provisions of the Convention for Bills of Lading 1924 into its domestic legislation (the Carriage of Goods by Sea Act 1924), and because this Convention had become legislation in force in Egypt, the judge's awareness of the content of this law should be assumed. There is no way to place the onus of proving its content on the shoulders of the disputant who invokes it."[90]

This position is criticised, as the knowledge of the designated foreign law – whether an international convention or not – is a subjective issue that differs from judge to judge, potentially resulting in a conflict of rulings. Accordingly, Article 6(a) of Bahrain Law No. 6/2015 should be amended to clarify that the judge is obligated in all cases to ascertain and apply foreign law *ex officio*.[91] The Egyptian Court of Cassation is also advised to rethink its treatment of foreign law, including international conventions. Judges should be mandated to establish the content of foreign law on their own initiative in every situation.

5 TREATMENT OF THE CISG BY NATIONAL JUDICIARY: IN PARTICULAR

In Arab states under consideration, only Egyptian courts have applied the Convention. However, courts in other Arab states – whether Parties to the Convention, like Bahrain or non-Parties, like Qatar and Jordan – may encounter situations requiring the CISG application, particularly when national conflict-of-law rules refer to the law of a CISG-Contracting State. Accordingly, this paper will examine how Egyptian courts have implemented the CISG and how courts in other Arab States under consideration should approach its application.

5.1. Treatment of the CISG by Courts in Arab Contracting States (Egypt and Bahrain)

In accordance with their public international law duty, courts in Egypt or Bahrain are obligated to apply the CISG by their own motion, whether directly or indirectly (Article 1(1) of the CISG). Courts in these jurisdictions should also respect the CISG's special nature as a uniform law.

90 Case No. 3317 of judicial year 59 (Egypt Court of Cassation, 8 February 1996) <https://www.cc.gov.eg/judgment_single?id=111123454&&ja=26369> accessed 20 January 2024.

91 See also, Shaaban (n 47) 225-6.

Vis-à-vis the national legal texts, the provisions of the CISG are special ones, particularly as regards the way they are made. Under Articles 93 and 151 of the 2014 Egyptian Constitution and 37 and 121(a) of the Bahraini Constitution, international conventions hold the force of law. However, these provisions may not be altered by local laws; they may not be cancelled or amended except through the same procedures used for their adoption. This reflects the foreign character of uniform laws made at the international level in comparison to the local laws enacted by the national legislature.

In both Egypt and Bahrain, as stated above, the judge's knowledge of the applicable international convention is presumed. Therefore, the judge should establish the provisions of such convention *ex officio*. The judge should also interpret and apply uniform laws autonomously.

5.1.1 The Court ex Officio Applies the CISG

As stated earlier, if the buyer's place of business and the seller's place of business are situated in different Contracting States, the courts in Egypt or Bahrain must apply the Convention automatically, without recourse to conflict-of-laws rules. In such cases, the court should apply the CISG by its own motion,[92] even if neither litigant has explicitly requested the court to do so.

However, due to a lack of awareness of the CISG, Egyptian courts have made conflicting decisions in this regard. Whereas some courts have applied the CISG *ex officio*, others have refused to do so, even when the parties pleaded its applicability. In one case, an Australian seller (the Australian Wheat Board, AWB) and an Egyptian buyer (the General Company for Silos & Storage, SAE) disputed the conformity of the delivered white wheat. Although the CISG was applicable – given that the buyer and the seller operated from different Contracting States (Australia and Egypt) – the South Cairo Court of First Instance and the Cairo Court of Appeals failed to apply the CISG.[93] Instead, these Courts settled the dispute based on Egyptian national law, thereby ignoring their public international law obligation to apply the Convention. This suggests that these courts are, with respect, unaware of the CISG.

As stated in the preceding part, Egyptian courts traditionally regard foreign law as a fact; the litigants should, therefore, plead this law and prove its content. Surprisingly, the South Cairo Court of First Instance (Case No. 1924 of 2003 – Commercial) did not respond to the AWB's request to apply the CISG provisions (Articles 38 and 39). On appeal, the Cairo Court of Appeals (Appeal No. 617 of Judicial Year No. 121) similarly failed to apply the CISG. It is clear, with respect, that both courts erred in ignoring the AWB's request to apply the CISG.

92 Viscasillas (n 14) 739-40.

93 For presentation and analysis of this dispute, see Marwa AlSherif, 'The Application of the CISG by the Egyptian Courts: Egypt's Court of Cassation Case No. 2490 of Judicial Year 81, Rendered on 23 June 2020' (2021) 1 Journal of Law in the Middle East 129.

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Egypt, like other Arab jurisdictions at issue, does not adhere to the principle of *stare decisis*. Nevertheless, lower courts in these jurisdictions generally resort to the rulings of higher courts for guidance. In this instance, both the South Cairo Court of First Instance and the Cairo Court of Appeals, without any justification, overlooked the above-mentioned guidance of the Egyptian Court of Cassation, which clearly states that when the applicable law is an international convention, the judge must apply it ex officio. Nor did these Courts acknowledge the automatic application of the CISG as the *lex specialis* governing the international sale of goods in Egypt. With respect, these courts should not have applied national (non-unified) Egyptian law. Rather, they were obligated to apply the CISG automatically, given that the places of business of both parties are situated in different Contracting States.

Upon the challenge by AWB before the Egyptian Court of Cassation, this Court revoked the ruling of the Court of Appeals and held the CISG as applicable. The Court reaffirmed that "the CISG was approved by the Presidential Decree No. 471/1982 and effective [in Egypt] as from 1 August 1988".

Without any reference to Article 1(1)(a) of the CISG, the Court automatically applied the Convention (e.g., Articles 31, 36, 38 and 39) to the dispute. Accordingly, the Court of Cassation reversed the challenged ruling and remanded the case to the Court of Appeals for reconsideration by a new panel.[94] By doing so, the Court fulfilled its treaty obligation to apply the Convention. The Court acknowledged this Convention as the *lex specialis* for international sales in Egypt; it gave the CISG priority over domestic (non-unified) law.

On another occasion, the Egyptian Court of Cassation *ex officio* applied the CISG, i.e., without a request by either party to do so.[95] In the dispute between a seller from Italy and a buyer from Egypt over the price of the sold marble, the South Cairo First Instance Court did not apply the CISG. The Cairo Court of Appeals affirmed the decision of the Court of First Instance. Indeed, both Courts applied Egyptian domestic (non-unified) law. Clearly, the two Courts ignored that both contract parties have their places of business in different Contracting States (Italy and Egypt). Based on Article 1(1)(a) of the CISG, the Courts, by their own motion, should apply the CISG automatically, i.e., without any recourse to conflict rules.

On 11 April 2006, the Court of Cassation, upon the challenge presented by the buyer, concluded that the Court of Appeals was mistaken in applying the Egyptian domestic (non-unified) law to the dispute. The Court of Cassation affirmed that the CISG is the applicable

94 Case No. 2490 of judicial year 81 (Egyptian Court of Cassation, 23 June 2020) <https://iicl.law.pace.edu/cisg/case/egypt-june-23-2020-court-cassation-australian-wheat-board-awb-v-general-company-silos> 20 January 2024.

95 Case No. 979 of judicial year 73 (Egyptian Court of Cassation, 11 April 2006) <https://iicl.law.pace.edu/cisg/case/egypt-april-11-2006-court-cassation> accessed 20 January 2024.

law and, therefore, referred the case to the Court of Appeals for reconsideration by a different panel. The Court made it very clear that:

> The court, upon its own initiative, should look for the governing legal rule and apply it to the relationship between the parties presented before them; the judge *ex officio* should give such relationships the correct characterisation, even if the parties did not ask the judge to do so.

Based on Article 1(1)(a) of the CISG, *inter alia*, the Court of Cassation continued to say that:

> When a sale of goods is concluded between a buyer in a State Party to the CISG and a seller in another State Party to the same Convention, the rules of this Convention shall apply to the conclusion of the contract as well as to the parties' rights and duties. One shall not consider the national [non-unified] law otherwise applicable pursuant to the forum's conflicts rule.

Obviously, because the requirements for the territorial application were met, the Court of Cassation implemented its treaty duty to apply the CISG. The Court also recognised the special nature of the CISG as the law of international sales in Egypt; it prioritised the CISG over domestic (non-unified) law.

As stated earlier, in Bahrain, both legislation and court rulings regard the designated foreign law as a fact. In accordance with their treaty duty, however, the Bahraini courts have a treaty obligation to apply the CISG automatically. When the parties involved in a sale of goods contract have their places of business in different Contracting States, the CISG should supersede the national (non-unified) law, including the Bahrain Law No. 6/2015 (with its conflict-of-laws rules on contracts). Therefore, the courts are required to apply the CISG ex officio.

Additionally, Bahrain courts (and other Arab states that are party to the CISG, such as Egypt) may apply the CISG indirectly. This occurs when the parties, e.g., under Article 4 of Bahrain Law No. 6/2015,[96] explicitly choose the CISG (or its "rules of law") as the law governing their sale contract. In such cases, the court must also apply the CISG by its own initiative; otherwise, it would override the parties' autonomy.

Such courts may face the CISG's indirect application in other situations, i.e., when the chosen law, the law of the parties' common domicile or the *lex loci contractus* is the law of a State Party to the Convention. In such cases, Bahraini courts are obligated by the command of the national conflicts rule (as per Article 17 of Bahrain Law No. 6/2015) to apply the designated law of that State, including the CISG as part of it. Consequently, the court, *ex officio*, has to apply the CISG as the *lex specialis* of international sales in that State (whose law is applicable).

96 Although other Arab states (parties to the CISG) do not expressly permit the parties to select 'rules of law' as the law governing their contract, the same conclusion had been reached under the general formula of their national conflict rules.

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If the court were to treat the CISG as merely a fact that must be established by the parties, the court would infringe its treaty obligation to apply the Convention, particularly Article 1(1)(b) of the CISG, which – under Articles 37 and 121(a) of the Bahraini Constitution – holds the same force as national law. In fact, the text of the CISG, as well as scholarly writings and case law, is more easily accessible than national (non-unified) foreign law.[97]

While Egyptian and Bahraini courts have yet to apply the CISG indirectly, non-Arab jurisdictions have successfully done so. For instance, in a dispute over the conformity of tinned cucumbers delivered by a Turkish seller (Türkiye being a non-Contracting State to the CISG)[98] to a German buyer (Germany being a CISG-Contracting State since 1 January 1991),[99] the *Oberlandesgericht Düsseldorf* [Court of Appeal] in Germany ruled that the buyer and seller had selected the German law to govern their contract. The court concluded that because Germany was a CISG-Contracting State, this contract was governed by the Convention by virtue of Article 1(1)(b) of the CISG. This Convention is part of the German law governing the international sale of goods. To put it in the words of the Court, "*CISG als innerstaatliches deutsches Recht*", i.e., the Convention is the German international law.[100] Such a practice should encourage Arab courts to apply the Convention when the conflicts rule refers to the law of a CISG-Contracting State.

5.1.2. The Court Shall Respect the Special Nature of the CISG

Whether the court in Egypt or Bahrain applied the CISG automatically or by virtue of the conflicts rule, the court should respect the special nature of this international Convention. The indirect CISG application makes no difference whether the designated law is the law of the forum or the law of another State Party to the CISG. In all events, the court is treaty obligated to apply the CISG as a sales uniform law.

To materialise the ultimate CISG's goal of unification, Article 7(1) of the CISG obliges the court to consider this Convention's international character, the need to promote uniform application and good faith in international trade. This suggests the court's reference to academic writings on CISG[101] as well as to the arbitral awards and court rulings made in other jurisdictions.[102]

97 Bernasconi (n 9) 161; Honnold (n 10) 39; Schlechtriem and Butler (n 12) 16.

98 The CISG entered into force in Türkiye on 1 August 2011. See, Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 15 February 2024.

99 ibid.

100 Case No. 17 U 82/92 (Oberlandesgericht Düsseldorf, 8 January 1993) <http://www.unilex.info/cisg/case/17> accessed 20 January 2024.

101 Viscasillas (n 14) 746.

102 UNCITRAL, HCCH and UNIDROIT (n 18) 31-2; Allen-Ngbale (n 14) 756.

In the above-cited white wheat case, the Egyptian Court of Cassation referred to the CISG-case law made in other jurisdictions to define the "reasonable time" for notice of non-conformity. The Court concluded that:

> The comparative courts' rulings applying the CISG interpret "reasonable time" as per Article 39(1) of the CISG to start at any time after the day of the goods delivery or the detection of the defect. It may be 24 hours, some days, weeks, or months that may not, in any case, exceed the period of two years.[103]

In the marble case, the Egyptian Court of Cassation referred, *inter alia*, to Articles 1(1)(a) (material and territorial sphere of CISG-application), 4(a) (contractual questions covered and those excluded from CISG application) and 7(1) CISG (purposes guiding CISG interpretation) to justify the CISG application to the dispute. It indicated that:

> Rules of good faith require the CISG application to the formation of the sale of goods contract made between a buyer in a State Party to CISG and a seller in another State Party to CISG and the rights and duties arising therefrom.[104]

In addition, in the indirect application situation, the courts in Egypt or Bahrain should respect the mandate of Article 1(1)(b) of the CISG and apply the law designated by their national conflicts rule. When the Egyptian or Bahraini conflicts rule refers to the law of a CISG-Contracting State, this reference acts as a directive to apply that law. Consequently, as part of that law, the court is obligated to apply the CISG in the same way that the forum in the state of origin would.

To fulfil its treaty obligations, the court in the state of origin must respect the special nature of the CISG and apply its provisions autonomously,[105] recognising it as a uniform law for international sales. Similarly, the courts in Egypt or Bahrain, when their conflict-of-laws rule refer to the law of a CISG-Contracting State, should follow the same approach.

Under Article 6 of Bahrain Law No. 6/2015, the court should acknowledge the foreign character of the designated foreign law, provided the parties submit the principles of interpretation and application of that law. However, if the Bahraini court limits itself to considering the CISG only when the parties establish its content, it risks applying a law that differs from the one anticipated by the buyer and seller or the one designated by the national conflict-of-laws rule.[106] This could lead to the court infringing its treaty duty to apply the CISG.

103 Case No. 2490 of judicial year 81 (n 94).
104 Case No. 979 of judicial year 73 (n 95).
105 Allen-Ngbale (n 14) 756.
106 Abdelaal (n 15) 379-80.

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Therefore, when the CISG is applicable, the Bahraini court should, by its own motion, ascertain the content of the CISG, along with any related case law and legal doctrine. Furthermore, the court should interpret and apply the CISG autonomously.

Article 95 of the CISG allows States when ratifying, accepting, approving or acceding to the CISG, to declare that they will not be bound by Article 1(1)(b). If a CISG-Contracting State, whose law is applicable, has declared such reservation (as with China or the U.S.),[107] the courts of this Reservation State will not apply the CISG.[108] Instead, they will apply the designated domestic (non-unified) law.[109] For instance, the U.S. District Court, Eastern District of Kentucky, Central Division, refused to apply the CISG pursuant to the conflicts rule because the U.S. declared a reservation to Article 1(1)(b) in accordance with Article 95.[110] On the other hand, if the conflicts rule in the Reservation State points to the application of the law of a non-Reservation State, the court should apply the CISG.[111]

The question is more debatable in non-Reservation States like Egypt and Bahrain. If the law applicable before such courts is a law of the Reservation State, should they apply the CISG or the national law of that State? Needless to say, if one of the parties is seated in a non-Reservation State and the other in a Reservation State, the CISG will directly apply by virtue of Article 1(1)(a). The question becomes crucial when one of the parties (the seller or the buyer) is seated in a third, non-Contracting State.[112] According to an opinion,

> "in the situation where State A has not taken the reservation under Article 95 and State B has done so, and where the parties have their places of business in State B and in non-Contracting State C, … a court in State A should, if it finds the law of State B to be applicable, select the domestic law of that State as the law governing the contract rather than the Convention."[113]

107 Status (n 98).

108 Honnold (n 10) 38; Lookofsky (n 12) paras 55, 331. *Jing Zhong Zi Di* No. 208 (Supreme People's Court of the People's Republic of China, 20 July 1999) <https://iicl.law.pace.edu/cisg/case/china-july-20-1999-supreme-peoples-court-zheng-hong-li-ltd-hong-kong-v-jill-bert-ltd-swiss> accessed 20 January 2024.

109 Honnold (n 10) 38-9; Lookofsky (n 12) paras 55, 331; Ferrari (n 10) 327. It should however be noted that, according to the CISG-AC Opinion No. 15, the declaration under Article 95 CISG only removes the Reservation State's treaty obligation to apply Article 1(1)(b) CISG; it does not prevent the courts in this State from applying the Convention indirectly by virtue of conflicts rules. See, CISG Advisory Council Opinion No. 15: Reservations under Articles 95 and 96 CISG (adopted 21 and 22 October 2013) 3.7 <https://cisgac.com/opinions/cisgac-opinion-no-15> accessed 20 January 2024.

110 *Princesse D'Isenbourg et CIE Ltd v Kinder Caviar, Inc and Kinder Caviar, Inc v United Airlines, Inc* No. 3: 09-29-DCR (US District Court, Eastern District of Kentucky, Central Division, 22 February 2011) <http://www.unilex.info/cisg/case/1558> accessed 20 January 2024.

111 Bernasconi (n 9) 166.

112 Honnold (n 10) 39.

113 Malcolm Evans, 'Comments on Article 95 CISG [Final Provisions: Declaration as to Art 1(1)(b)]' in C Massimo Bianca and Michael Joachim Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Giuffrè 1987) 657.

In the same sense, Schlectriem and Butler argue that:

> "The decision of a national legislature in a "reservation member state" has to be respected even if it is a foreign court whose private international law rules lead to the law of a reservation member state."[114]

Likewise, Bernasconi argues that:

> "A State's decision to file a reservation under Article 95 cannot simply be ignored by other member States; such declarations must be respected within their true limits. The real effect of an Article 95 reservation is comparable to that of a switch-signal, indicating which set of substantive rules within the designated *lex causae* is applicable."[115]

According to the author, however, since Egypt and Bahrain have not excluded the indirect application of the CISG, the courts in such jurisdictions are treaty-bound to apply Article 1(1)(b) of the CISG.[116] When the court's conflicts rule designates the law of a Reservation Contracting State (e.g., the U.S. law), whether, in accordance with the subjective or objective choice, the court should apply the CISG.[117]

Under Article 95 of the CISG, a Reservation State is still a Contracting State. According to the CISG-AC Opinion No. 15, comparing the formula of Article 95 with that of Articles 92, 93 and 94 of the CISG suggests that a Reservation State under the latter provisions becomes a non-Contracting State. In contrast, a Reservation State under the former provision remains a Contracting State for purposes of Article 1(1) of the CISG.[118] Thus, the court in Egypt or Bahrain should apply the Convention as part of the law of the Reservation State referred to by the forum's conflict-of-laws rule.[119]

A fortiori, this principle should apply when the contract parties – under Article 4 Bahrain Law – directly choose the CISG to govern the contract. Though courts in Egypt and Bahrain have yet to apply the CISG as the law chosen by the parties, other forums did. For example, in a dispute between a Dutch seller and an English buyer over the conformity of 500,000 strawberry plants, the *Rechtbank Oost-Brabant* in the Netherlands found that

114 Schlechtriem and Butler (n 12) 17.

115 Bernasconi (n 9) 168.

116 Honnold (n 10) 40.

117 *Contra,* Winship (n 23) 524-5.

118 CISG Advisory Council Opinion No. 15 (n 109) para 3.12. See also, Allen-Ngbale (n 14) 758; Wethmar-Lemmer (n 11) 69.

119 Al-Mukhaizeem (n 11) 307.

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the parties had agreed to apply the CISG. Therefore, the court held the CISG applicable by virtue of its Article 1(1)(b).[120]

According to Wethmar-Lemmer,

> "Article 1(1)(b) only requires reference to the rules of private international law of the forum to determine whether the CISG applies per se but does not rely on the rules of private international law to determine the extent to which the CISG should be applied. The rules of private international law, thus, only serve as a 'trigger' for the application of the CISG, but article 1(1)(b) 'remains the controlling provision' for the sphere of application for forums situated in non-reservation Contracting States. One then regards article 1(1)(b) as requiring the CISG to be applied '*ipso juri*' by non-reservation Contracting States."[121]

The CISG-AC Opinion No. 15 supports this conclusion, albeit with a different justification. According to this AC Opinion, the prevailing view in legal literature – that the forum should apply the designated law in the same manner as the court in the state of origin – should not be approved if it leads to the application of designated domestic (non-unified) law over the CISG.[122] The CISG-AC Opinion No. 15 further says that:

> "It is, therefore, 'this Convention' which the judge in a Contracting State has to apply when its forum's rules of private international law lead to the application of the law of a Contracting State, and *not* 'the law of a Contracting State' (that may or may not have made a declaration under Article 95). The contrary opinion instead reads the partial phrase 'lead to the application of the law of a Contracting State' as calling for the application of that state's law, thereby confusing cause and effect under Article 1(1)(b). It should, therefore, not be followed."[123]

The author supports the conclusion of this CISG-AC Opinion No. 15 but not its reasoning. The forum in a CISG-Contracting State, such as Egypt or Bahrain, is treaty obligated to apply the CISG, including Article 1(1)(b). If the conflicts rule in Egypt or Bahrain point to the application of the law of a Contracting State, and if this State is a Reservation State, the CISG (and not the national law of that State) should apply.

The courts in Egypt and Bahrain have not yet applied the CISG indirectly. However, other forums have done so. For example, in a dispute between a German party (Germany being a

120 *Rechtbank Oost-Brabant* No. C/01/322578 / HA ZA 17-428 (Rechtbank Oost-Brabant, 28 February 2018) <http://www.unilex.info/cisg/case/2162> accessed 20 January 2024. See also, *Ispat Unimetal, SA v Trenzas y Cables de Acero PSC, SL* No. 62/2004 (Audiencia Provincial de Cantabria, 5 February 2004) <http://www.unilex.info/cisg/case/1126> accessed 20 January 2024; Case No. 1 U 69/92 (Oberlandesgericht Saarbrücken, 13 January 1993) <http://www.unilex.info/cisg/case/180> accessed 20 January 2024.

121 Wethmar-Lemmer (n 11) 70-1.

122 CISG Advisory Council Opinion No. 15 (n 109) para 3.16.

123 ibid.

CISG-Contracting State) and a Turkish party (Türkiye, at the time, was a non-Contracting State), the *Oberlandesgericht* [Court of Appeal] Hamburg in Germany ruled that since Germany had not made a reservation under Article 95, Article 1 (1)(b) remained applicable. Therefore, the Court applied the Convention as part of the German law designated by the German conflicts rule.[124]

In addition, the forum must consider the mandate of its conflicts rule. Because this rule directs the court to apply the law of a Reservation Contracting State, the court must apply this law and, particularly, the CISG as part of it. The CISG forms the *lex specialis* of international sales in that Reservation Contracting State.[125]

5.2. Treatment of the CISG by Courts in Arab non-Contracting States (Qatar and Jordan)

Because Qatar and Jordan have not acceded to the CISG yet, the courts in these jurisdictions are not obligated to apply the Convention automatically.[126] To determine the law applicable to contracts, including international sales of goods, these courts must apply the national conflicts rule (i.e., Article 27(1) of the Qatari Civil Code and Article 20(1) of the Jordanian Civil Code, respectively). Therefore, the court may apply the CISG indirectly when the law chosen by the buyer and the seller, the law of their common domicile or the *lex loci contractus*, is the law of a CISG-Contracting State. This would also be the case when the buyer and the seller select the CISG or "rules of law" to govern the contract.[127]

These Arab courts have not yet applied the CISG indirectly. Nevertheless, in a dispute between a Turkish company (seller) and a Jordanian Company (buyer) over the price of delivered furniture, the seller pleaded the applicability of the CISG. Because the buyer did not fulfil its obligation to pay the whole price, the seller filed a lawsuit before

124 Case No. 13 U 54/10 (Oberlandesgericht Hamburg (Court of Appeal Hamburg) Germany, 15 July 2010) <https://iicl.law.pace.edu/cisg/case/germany-july-15-2010-oberlandesgericht-court-appeal-german-case-citations-do-not-identify> accessed 20 January 2024.

125 Bernasconi (n 9) 156; Kadner Graziano (n 18) 176.

126 Allen-Ngbale (n 14) 756; Bernasconi (n 9) 169.

127 In addition, the courts in Arab States not Parties to the CISG (like, Jordan and Qatar) may directly apply this Convention as *lex mercatoria*, i.e., without recourse to conflicts rules. Instead of applying the *lex fori* in cases in which the applicable foreign law is not ascertainable, the court could apply the CISG. See, Al-Mukhaizeem (n 11) 313, 321-2; Jayme (n 8) 33. Besides, unless prohibited by an express legal text (e.g., Article 38 of the Qatari Civil Code), such courts could apply the CISG in cases in which the foreign law applicable to sales contracts is colliding with the forum's public order. The application of the CISG, the sales uniform law, would avoid the application of the *lex fori*, the law generally applicable in such situations. The *lex fori* might have a weak connection to the forum; it is also normally familiar to one of the parties only. See, Amin Dawwas, 'Applicability of CISG to Kuwaiti Businesses' (2014) 2(7) Kuwait International Law School Journal 74-5. A detailed discussion of these issues exceeds the scope of the present paper; they need a separate study.

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the Amman Court of First Instance. This Court ruled in favour of the seller.[128] The buyer appealed this ruling before the Amman Court of Appeals, arguing, *inter alia*, that the Amman Court of First Instance wrongly excluded the applicability of the related international conventions, including the CISG (Articles 25, 26 and 36). The Court of Appeals refused this argument by saying that:

> "The appellant [buyer] did not clearly specify the violations of those conventions which the Court of First Instance had committed; only with such specification, the Court of Appeals could control the alleged violations."[129]

In his challenge before the Court of Cassation, the buyer reclaimed that "the Court erred in its conclusion because the sale was made pursuant to international conventions concerning international sales, in particular the text of Article 25 of the Vienne Convention." The Court of Cassation rejected the challenge because, among other things,

> The plaintiff's [the seller's] resort to the judiciary to claim its right to the rest of the price of the goods purchased by the defendant [the buyer] is not contrary to international conventions.[130]

In this case, where the buyer and the seller are based in different states – Jordan and Turkey – the application of the CISG in Jordan can only occur indirectly due to Jordan's status as a non-Contracting State. This means the CISG could apply if Jodan's conflicts rule designated the law of a CISG-Contracting State, such as Turkey.

However, since the courts ruled the dispute based on Jordanian law without considering the applicability of the CISG by virtue of its Article 1(1)(b), they did not err in their decision. Given that the application law in this case was Jordanian law, and Jordan is a non-Contracting State to the CISG, the courts were correct in not applying the Convention.

The Court of Cassation rightly concluded that the seller's claim for the price did not violate international conventions, including the CISG. However, the ground upon which the Court of Appeals refused to apply the CISG is questionable. If the buyer had explicitly raised the infringement of the CISG, would the Court of Appeals have controlled such a violation, given that the conditions of the CISG application were not met?

Under such conditions, the Court could apply the CISG as part of the *lex mercatoria*; the Court could also refer to provisions of international conventions to affirm the consistency of Jordanian law with these conventions. However, the Court could not apply the CISG as

128 Case No.2101/2018 (Amman Court of First Instance, 28 July 2020) <https://qarark.com/> accessed 20 January 2024.

129 Case No. 531/2021 (Amman Court of Appeals, 19 September 2021) <https://qarark.com/> accessed 20 January 2024.

130 Case No. 6325 (Jordan Court of Cassation, 20 January 2022) <https://qarark.com/> accessed 20 January 2024.

the law governing the sale because the national conflicts rule designated the law of Jordan, a non-contracting State.

Courts in other non-Arab jurisdictions have applied the CISG indirectly. For instance, in a dispute between a Belgian and an Italian over a sale of clothes, a Belgian court ruled that the CISG was applicable. However, Belgium had not yet ratified the CISG (this Convention became effective in Belgium on 1 November 1997).[131] On 13 November 1992, the *Tribunal de Commerce de Bruxelles, 11ème ch.* the buyer and the seller had expressly selected Italian law (the CISG became effective in Italy on 1 January 1988).[132] Therefore, the court applied the Convention (as part of the selected Italian law) based on Article 1(1)(b) of the CISG.[133]

In another dispute between a Belgian buyer and a Dutch seller over a sale of fashion goods, another Belgian court applied the CISG indirectly prior to its implementation in Belgium. On 1 March 1995, the *Rechtbank van Koophandel, Hasselt* ruled that the sale was subject to the CISG. The court indicated that this could be attributed to either the standard terms used by the seller, including a choice of law clause to the benefit of the Dutch law (the CISG became effective in the Netherlands on 1 January 1992)[134] or because the Belgian conflicts rule referred to the application of Dutch law.[135]

Such practice should encourage courts in Qatar and Jordan (and in all other Arab States that have not yet acceded to the CISG) to apply the Convention indirectly. If the law chosen by the buyer and the seller, expressly or implicitly, is the law of their common domicile or else the *lex loci contractus* is the law of a State Party to the CISG, the court should apply the CISG, so long as the requirements for the CISG's substantive application are met (Articles 1-6).[136] *A fortiori*, the court should do so when the buyer and the seller choose the CISG (or "rules of law") to govern the contract.

As stated earlier, the author does not approve of the approach of Qatari courts that regards foreign law as a fact to be established by litigants. Qatari courts should proactively apply the conflict-of-laws rule and the law it points at. When this law pertains to a state that is a CISG-Contracting State, the Qatari court should apply the CISG as part of that law. Furthermore, the court, *ex officio*, should ascertain the content of this Convention. The provisions of the CISG, as well as the related jurisprudence and academic writings, are more easily accessible than the designated national (non-unified) law.

131 Status (n 98).

132 ibid.

133 *Maglificio Dalmine slr v SC Covires* No. RG 4.825/91 (Tribunal de Commerce de Bruxelles, 13 November 1992) <http://www.unilex.info/cisg/case/175> accessed 20 January 2024.

134 Status (n 98).

135 *JPS BVBA v Kabri Mode BV* No. AR 3641/94 (Rechtbank van Koophandel, Hasselt, 20 January 1995) <http://www.unilex.info/cisg/case/269> accessed 20 January 2024.

136 Kadner Graziano (n 18) 176.

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Jordanian courts treat foreign law as valid, applying the conflicts rule and the law to which this rule points on their own initiative. Therefore, if the law applicable to the contract is from a CISG-Contracting State, the court should apply this Convention as part of that law.[137] Within that State whose law is applicable, the CISG includes a uniform law specifically made to govern international sales. Compared to the national (non-unified) law, the CISG is considered the *lex specialis* of international sales in that State. The CISG supersedes national (non-unified) law.

Under Article 27(1) and Article 20(1) of the Qatari and Jordanian civil codes, respectively, the law selected by the parties may be a soft law. Thus, if the parties select the CISG or "rules of law" to govern the contract, courts in Qatar or Jordan should apply the CICG as *lex mercatoria*.

Courts in Qatar or Jordan should apply the designated law in the way a court in the state of origin would apply it.[138] This so-called "origin-conform application" is a natural consequence of following the command of the forum's conflicts rule.[139] The court of the (CISG-Contracting) State, whose law is applicable, should respect its treaty obligation and give the CISG preference over its domestic sales law.[140] This court would consider the autonomous character of the CISG as a uniform law independent of the domestic (non-unified) law.[141] The court in Qatar or Jordan should do the same, too, particularly because Article 7(1) of the CISG compels an autonomous application of the CISG. Besides, the CISG is more easily accessible than domestic (non-unified) law.[142]

However, if the applicable state has made a reservation under Article 95 of the CISG to exclude its indirect application, the courts in Qatar or Jordan, whose conflicts rule designates the law of a Reservation State, should not apply the Convention.[143] In this case, Article 1(1)(b) of the CISG is not part of the court's law as it is located in a state that has not acceded to the CISG.[144] Consequently, the court should consider the command of its national conflicts rule; it should apply the designated foreign law in the manner the court in the foreign state would apply. Like the courts in the foreign state, the courts in Qatar or Jordan would then apply the domestic (non-unified) sales law of the Reservation State.[145]

In practice, the *Oberlandesgericht Düsseldorf* [Court of Appeal] in Germany found that the CISG was not effective when the disputed contract was made. Based on the national

137 ibid; Al-Mukhaizeem (n 11) 312.
138 Wethmar-Lemmer (n 11) 69; Schlechtriem and Butler (n 12) 14.
139 Wethmar-Lemmer (n 11) 69.
140 Kadner Graziano (n 18) 177.
141 Viscasillas (n 14) 746.
142 Schlechtriem and Butler (n 12) 16.
143 Al-Mukhaizeem (n 11) 312; Bernasconi (n 9) 168-9; Kadner Graziano (n 18) 177.
144 Allen-Ngbale (n 14) 758.
145 CISG Advisory Council Opinion No. 15 (n 109) para 3.18.

conflicts rule, the Court concluded that the U.S. law (namely, the law of Indiana) is applicable. Because the CISG was in effect in Indiana since 1 January 1988, the Court ruled that the CISG was applicable.[146] Obviously, the Court did not consider the reservation made by the U.S. under Article 95 of the CISG. The Court was not treaty-bound to apply Article 1(1)(b) of the CISG because Germany was not yet a Party to this Convention. The Court should have applied the designated Indiana law in the same way a court in Indiana would have, namely the American law (excluding the CISG).

Similarly, in a dispute regarding a contract made between an American party and a Japanese party, the *Tokyo Chiho Saibansho* [District Court] in Japan (a non-contracting State to the CISG) found that the applicable law was the CISG as part of the U.S. law, as designated by Japanese conflict-of-laws rule. The court ignored the U.S. reservation under Article 95 of the CISG and applied the Convention to the disputed contract.[147] However, the Court should have applied the national (non-unified) U.S. law (not the CISG) since U.S. courts – due to the Article 95 reservation that excludes the indirect CISG application of the CISG – would not apply the Convention under such conditions.

6 CONCLUSIONS

It is worth highlighting several key findings and recommendations. With the exception of Bahrain, the legislatures in the Arab states under consideration have not expressly settled the issue of how foreign law, including the CISG, should be treated by national courts. The Bahraini legislature regards foreign law applicable to contracts as a fact. Similarly, the courts in Bahrain, Egypt, and Qatar treat foreign law as a fact. Accordingly, judges are generally not bound to apply this law by their own motion; instead, the litigants should insert its application and establish the existence of its provisions.

Because foreign law is treated as a fact in these jurisdictions, the Court of Cassation should not review a decision on the ground that the court of merits wrongly applied foreign law. In reality, this is the case in Bahrain and Qatar. In Egypt, in contrast, the Court of Cassation surprisingly controls the application of foreign law by the judge of merits, thereby confusing cause and effect. To avoid such a strange result, the Egyptian Court of Cassation should clearly treat foreign law as law.

The Jordanian Court of Cassation regards foreign law as a matter of law; it also acknowledges the foreign nature of this law. Accordingly, judges of merits are required to

146 Case No. 17 U 73/93 (Oberlandesgericht Düsseldorf, 2 July 1993) <http://www.unilex.info/cisg/case/26> accessed 20 January 2024.

147 Case No. 1997-wa-19662 (Tokyo Chiho Saibansho, 19 March 1998) <https://iicl.law.pace.edu/cisg/case/japan-march-19-1998-tokyo-chiho-saibansho-district-court-nippon-systemware-kabushikigaisha> accessed 20 January 2024.

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apply foreign law on their own initiative, just as a foreign judge would apply it. Otherwise, their ruling adjudicating the dispute may be challenged on the grounds of incorrect legal application. The Court of Cassation cannot refuse challenges based on the basis that the litigants did not plead the applicability of foreign law.

As for the CISG, in particular, the Egyptian Court of Cassation (in the marble case) applied this Convention *ex officio*. This approach is welcomed. This ruling will hopefully guide lower courts in Egypt (and possibly in other Arab states) to apply the CISG, when applicable, by their own initiative. Although Egypt, along with Bahrain, Qatar and Jordan, does not adopt the principle of *stare decisis*, lower courts in these jurisdictions generally follow the guidance of the Supreme Court. In addition, since the civil codes in many Arab states (such as Bahrain, Qatar and Jordan) are influenced by the Egyptian one, the courts in these jurisdictions generally follow the guidance of the Egyptian Court of Cassation.

The author advises the legislature in all Arab jurisdictions at issue, as well as the judicature in Egypt, Bahrain and Qatar, to reconsider their method of dealing with foreign law, including the CISG. The CISG, as the law governing international sales, should be regarded as a legitimate law. Courts should apply the CISG *ex officio*, even if the litigants do not ask the court to do so. The court's decision to apply the CISG should be subject to review by the Court of Cassation.

The treatment of foreign law (including the CISG) as a fact makes it very difficult and costly for the litigants to establish its provisions, particularly when those provisions are in a foreign language. Besides, each party is likely to only be interested in proving the provisions that favour their own interests; this could result in the falsification of the foreign law. Consequently, courts may end up applying a law that differs from the one that should applied by virtue of the imperative contained in the national conflicts rule. In addition, since both Egypt and Bahrain are parties to the CISG, their courts would infringe their international duty to apply this Convention.

The courts of merits in Egypt, Bahrain and Qatar should adopt the Jordanian courts' approach concerning the treatment of foreign law, including the CISG. These courts must respect the foreign character of foreign law; they should apply this law in accordance with the principles of its interpretation and application prevailing in the state of origin. As for the CISG, in particular, Arab courts should treat this Convention, when applicable, as the *lex specialis* of international sales in the relevant state. Just as the Egyptian Court of Cassation did in the case of defective goods shipped by sea, other Arab courts should respect the CISG as a uniform law. Failing to do so would mean not adhering to their national conflict-of-laws rule, which mandates the application of the designated foreign law, including the CISG.

In addition, the treatment of the CISG as a fact would jeopardise the main purpose of the CISG, i.e., the unification of the sales law. As a result, courts in Arab CISG-Contracting States, such as Egypt and Bahrain, would infringe their treaty duty to apply the Convention.

The author strongly recommends that Arab non-Contracting States to the CISG, such as Qatar and Jordan, accede to this Convention. To broaden the scope of the territorial application of the CISG, these states should refrain from making a reservation under Article 95 of the CISG, which excludes its indirect application. This would encourage non-Arab parties to engage in sale contracts with Arab parties. Such a move would facilitate international trade and provide legal certainty to both contract parties.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАСТОСУВАННЯ CISG В НАЦІОНАЛЬНИХ СУДОВИХ ОРГАНАХ ЄГИПТУ, БАХРЕЙНУ, КАТАРУ ТА ЙОРДАНІЇ

Амін Давас

АНОТАЦІЯ

Вступ. *Конвенція ООН про договори міжнародної купівлі-продажу товарів (CISG або Конвенція) може застосовуватися автономно в арабських договірних державах, таких як Єгипет і Бахрейн. CISG також може застосовуватися опосередковано, тобто з огляду на норми міжнародного приватного права, як в арабських договірних державах, так і в тих, що не є договірними (наприклад, Катар і Йорданія). У цій статті обговорюються обидві ситуації застосування Конвенції в арабських державах, а також те, як арабські суди розглядають іноземне законодавство, зокрема CISG.*

Методи. *Для того, щоб досягти мети дослідження, було використано методологію кабінетного дослідження, а також юридичний аналіз і порівняння. Автор ретельно вивчає низку документів, починаючи від національних і міжнародних юридичних текстів до наукових праць і судових рішень. Аналізує два підходи, які переважають в арабських наукових працях і судових рішеннях щодо застосування зазначеного іноземного права (зокрема CISG), тобто як факту чи як (іноземного) права. Автор також порівнює ці два підходи, щоб показати переваги та недоліки кожного з них, щоб визначити, який із них більше сприяє здійсненню правосуддя та відповідає інтересам сторін.*

Результати та висновки. *Автор робить висновок, що законодавча влада в усіх зазначених арабських юрисдикціях, а також судова влада в Єгипті, Бахрейні та Катарі повинні переглянути свій підхід до розгляду іноземного права. Зокрема, CISG слід розглядати як предмет права, а не як факт. Суди повинні застосовувати Конвенцію та встановлювати її зміст ex officio.*

Ключові слова: *CISG, арабське право, колізійні норми, автономія волі сторін, купівля-продаж товарів.*

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Research Article

THE RIGHT TO INFORMATIONAL SELF-DETERMINATION BETWEEN LEGISLATION AND IMPLEMENTATION

Najlaa Flayyih*, Mohammed Hasson Ali, Ahmad Fadli and Khaled Aljasmi

ABSTRACT

Background*: The right to informational self-determination has emerged as a pivotal component of digital rights in the era of artificial intelligence and big data. Rooted in the broader right to privacy, this right enables individuals to control the collection, use, and dissemination of their personal data. Despite its recognition in instruments such as the General Data Protection Regulation (GDPR), a significant gap persists between the legal framework and practical implementation. The rationale of this study lies in analysing the disjunction between legislative guarantees and the realities of enforcement, with a focus on the European legal landscape. The increasing complexity of digital technologies and the emergence of new data categories—such as mental data—have challenged both legal doctrines and institutional capabilities.*

Methods*: The study employs a doctrinal legal analysis, drawing on a comprehensive examination of the GDPR provisions, judicial precedents from the Court of Justice of the European Union, national supervisory authority reports, and academic commentaries. Comparative elements are included to contextualise the European framework within broader international developments. Practical cases and regulatory enforcement patterns are used to identify gaps and assess the effectiveness of current mechanisms. The research also incorporates an analytical evaluation of algorithmic environments and their implications for consent, transparency, and individual agency.*

Results and Conclusions: *The study finds that while the GDPR offers a robust structure for personal data protection, its practical application is hindered by structural, technical, and interpretive challenges. Consent is often rendered ineffective in AI-driven contexts; individuals struggle to exercise their rights, and regulatory enforcement remains uneven across Member States. The research highlights the need for a harmonised institutional model, enhanced user interfaces, and the legal recognition of emerging data types like mental data. It concludes that bridging the legislative-implementation divide requires integrating legal, technological, and ethical tools within a cohesive framework—reaffirming the right to informational self-determination as a cornerstone of digital human dignity.*

1 INTRODUCTION

In recent decades, the digital world has witnessed a radical transformation in the relationship between individuals and digital service providers, as personal data has become the backbone of the modern digital economy.[1]

With the accelerating pace of automated processing, the widespread use of artificial intelligence, and the integration of big data technologies into various aspects of life, there has been a growing need to enhance protections for individuals against what is known as algorithmic exploitation—the invisible tracking of their digital behaviour. In response to this transformation, the right to informational self-determination has emerged as a key legal and ethical response.

This right refers to an individual's ability to control their personal data: to understand how it is used, to grant or withhold consent, and to exercise rights such as objection, correction, or deletion when necessary.

This right has acquired a prominent status in European law, particularly through the General Data Protection Regulation (GDPR), which has established a comprehensive legal framework to guarantee this right and promote its practical implementation.[2]

1.1. Significance of the Study

Practical reality has shown that legislative protection—despite its apparent strength—does not necessarily translate into effective protection on the ground, as it faces increasing technical, regulatory, and judicial challenges. The gap between legal provisions and the actual practices of data controllers, along with the ineffectiveness of oversight mechanisms, constitutes the main obstacles to the realisation of this right.

1.2. Research Problem

The European legislator has established an unprecedented framework for protecting personal data in the context of its processing. Through this framework, data subjects have been granted specific rights, while data controllers and processors have been obligated to respect those rights and adhere to a range of strict conditions during data processing.[3]

1 Viktor Mayer-Schönberger and Kenneth Cukier, Big Data: A Revolution That Will Transform How We Live, Work, and Think (Houghton Mifflin Harcourt 2013) 16.

2 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.

3 Yves Poullet and others, *Report on the Application of Data Protection Principles to the Worldwide Telecommunication Networks: Information Self-Determination in the Internet Era: Thoughts on Convention No 108 for the Purposes of the Future Work of the Consultative Committee (T-PD)* (Council of Europe 2004) 6.

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However, practical practices reveal clear gaps between the legal text and its implementation—whether at the level of data controllers or enforcement authorities. Therefore, it is essential to analyse the gap between the legal framework and actual practice.

1.3. Research Methodology

This study aims to examine the right to informational self-determination from two complementary perspectives. The first concerns its legal foundation and legislative development, while the second focuses on the challenges of its practical implementation in an evolving digital environment. To achieve this, the study analyses the provisions of the European regulation, reviewing judicial precedents, regulatory reports, and real-world practices that expose gaps in implementation. It also offers practical recommendations aimed at strengthening this right and achieving a balance between digital innovation and the protection of individuals' fundamental rights.

1.4. Study Outline

The research is divided into the following sections:

- The nature of the right to informational self-determination;
- The content of the right to informational self-determination;
- Practical challenges and ways to address them.

2 THE NATURE OF THE RIGHT TO INFORMATIONAL SELF-DETERMINATION

The right to privacy intersects with the right to informational self-determination in certain aspects, necessitating clarification of the potential confusion arising from this overlap. Therefore, this section examines the concept of the right to privacy to establish a definition of the right to informational self-determination. The section concludes by identifying the legal nature of this right.

2.1. The Concept of the Right to Privacy

The term "privacy" does not appear explicitly in most Arab constitutions; instead, they typically refer to the concept of "private life".[4] Similarly, some legal systems—such as the French Civil Code—explicitly use the term private life, but without providing a precise definition.[5]

The earliest attempt to define human privacy and the right to its protection can be traced back to a well-known definition in American jurisprudence: "the right to be let alone."[6] However, this definition is criticised for its lack of legal criteria to determine what constitutes private life or the situations in which a person must be left alone. It is essential, therefore, to establish clear standards that govern the relationship between the individual and society, which would help delineate the personal sphere that one seeks to keep out of public view.

Among the modern attempts to define the right to privacy is the notion that it encompasses "our right to retain a private domain, which includes everything that forms part of us—such as the body, home, property, thoughts, emotions, secrets, and identity. The right to privacy gives us the ability to choose which parts of this domain others may not access, and to control the extent, method, and timing of the use of any elements we decide to disclose."[7]

4 Constitution of the United Arab Emirates [1971] Official Gazette 1. Article 31 of the UAE Constitution guarantees the freedom and confidentiality of postal, telegraphic, and other forms of communication, in accordance with the law. Article 36 provides for the inviolability of homes, prohibiting their entry without the consent of their occupants except in accordance with the law and in cases specifically outlined therein.

Similar provisions can be found in Article 10 of the Jordanian Constitution, Article 57 of the Egyptian Constitution, Article 24 of the Tunisian Constitution, Article 14 of the Lebanese Constitution, Article 36 of the Syrian Constitution, Article 38 of the Kuwaiti Constitution, and Article 47 of the Algerian Constitution.

Notably, the Algerian Constitution includes an additional provision in the final paragraph of the aforementioned article concerning personal data: "The protection of natural persons in the context of processing personal data is a fundamental right guaranteed by law, and violations thereof shall be punishable." See, Constitution of the People's Democratic Republic of Algeria 1989 (rev 2020), art 47 <https://www.constituteproject.org/constitution/Algeria_2020> accessed 20 March 2025.

5 Article 9 of the French Civil Code stipulates the right of every individual to respect for their private life: "Chacun a droit au respect de sa vie privée." See, Code Civil 1970 (rev 2025), art 9 <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006419288> accessed 20 March 2025. For a detailed discussion, see: Mamdouh Khalil Al-Bahr, *Protection of Private Life in Criminal Law* (Dar Al-Nahda Al-Arabiya 2011) 39 et seq.

6 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4(5) Harvard Law Review 193, 195, doi:10.2307/1321160. 193,195.

This definition is attributed to the American judge Thomas M. Cooley. The term "privacy" in English corresponds to the Arabic term (*khususiyya*). According to the Arabic dictionary *Al-Mu'jam Al-Wasīt*, khususiyya refers to the specific or distinctive characteristic of a thing.

7 Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984) doi:10.1017/CBO9780511625138.

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This definition relies on a subjective perspective in determining the components of the right to privacy, meaning that its scope may expand or contract depending on the view of the person formulating the definition.

Some have expanded the definition of privacy to the point of equating it with the concept of freedom. One such view holds that privacy is: *"for a person to live as they please, enjoying the practice of certain private activities—even if their behavior is in plain sight—such as choosing how to dress, appearing in a way that reflects one's personal identity, or riding a motorcycle without wearing a helmet."*[8]

This definition equates privacy with an individual's freedom to make personal, intellectual, and behavioural choices in both private and public life. However, such conflation is inaccurate. There is a clear distinction between the freedom of will that allows a person to make life choices in general and the right to define a private sphere that one wishes to shield from intrusion.

This conceptual confusion—between free will, human dignity, the right to form a family, and the concept of privacy or private life—is also seen in other definitions. For example, U.S. Supreme Court Justice Douglas defined privacy as "an individual's right to choose personal conduct and behaviour in life when engaging socially with others."[9]

This view links privacy to bodily dignity and the freedom from coercion and oppression.[10]

Those who adopt this broad concept believe that the right to privacy stems from the human right to liberty and self-autonomy.[11] On the other hand, there are those who limit the right to privacy to a distinct legal right that protects the individual from both material and moral intrusions into their private life. This view holds that: "Privacy is the right to protect one's personality from intrusion, and to safeguard individual independence, dignity, and personal integrity." [12]

It is evident that arriving at a comprehensive and precise definition of the right to privacy is highly challenging.[13] There are theoretical challenges in defining privacy itself, as it is

8 John H F Shuttuck, *Rights of Privacy* (To protect these rights, National Textbook Co 1977) 12-24.

9 Luara Karman, 'The Promise and Peril of Privacy' (1994) 22(4) Reviews in American History 725, doi:10.2307/2702826; David J Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v Wade* (Macmillan 1994).

10 Alan F Westin, *Privacy and Freedom* (Atheeum 1967) 23.

11 Beate Roessler, 'Privacy as a Human Right' (2017) 117(2) Proceedings of the Aristotelian Society 187.

12 Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' in Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984) 156, doi:10.1017/CBO9780511625138.007.

13 Xueping Liu, 'Legal Dilemma and Outlet of Privacy Protection in the Era of Big Data' in Chuanchao Huang, Yu-Wei Chan and Neil Yen (eds), *2020 International Conference on Data Processing Techniques and Applications for Cyber-Physical Systems* (Advances in Intelligent Systems and Computing 1379, Springer 2021) 775, doi:10.1007/978-981-16-1726-3_95.

not a purely legal concept but rather one with intertwined psychological, social, political, and cultural dimensions. These difficulties are further compounded by the fact that the right to privacy encompasses numerous values and interests that are protected under various legal frameworks.

For this reason, some have argued[14] for the abandonment of the notion of a distinct right to privacy, asserting that the interests it protects are already safeguarded by different legal mechanisms across multiple laws. For instance: constitutions protect the right to private life by prohibiting unlawful intrusion into homes and telephone communications; criminal law protects individuals from physical assaults, unauthorized home entry, and defamation; civil law safeguards one's property rights, financial interests, and personal rights, as well as ensures peace at home through neighborhood regulations; and copyright law protects an author's right to decide when and how to publish their works. From this perspective, the interests forming the right to privacy are already protected, thereby eliminating the need to establish a separate and independent legal protection for privacy.

Most jurists,[15] however, hold a different view. They argue that the right to privacy warrants independent legal protection, based on the following considerations:

1) Existing legal provisions leave certain interests unprotected. For example, criminalising defamation and slander is intended to prevent the spread of false information, but it does not grant a person the right to prevent the dissemination of true information about themselves that they may not wish to be shared. Similarly, someone may be able to look into another person's home or its surroundings without physically entering it. Moreover, the collection of personal data such as name, phone number, address, or national ID number—without any misuse—does not necessarily constitute a violation of privacy or human dignity.

2) When dividing the right to privacy into components protected under different laws, it becomes difficult to establish appropriate rules for privacy protection that could apply to any violation. Furthermore, the scattered legal provisions across various legislations—often claimed to protect different aspects of privacy—are based on varying legislative considerations, which may not necessarily serve the interests that the right to privacy seeks to safeguard. For instance, the crime of insult or defamation mentioned earlier protects values such as dignity and honour, which are unrelated to the concept of privacy as intended here.

14 William M Beaney, 'The Right to Privacy and American Law' (1966) 31(2) Law and Contemporary Problems 253. Also see: Lee A Bygrave, *Data Protection Law: Approaching Its Rationale, Logic, and Limits* (Wolters Kluwer 2002).

15 Hamdi Abdel Rahman, *Rights and Legal Statuses* (Dar Al-Fikr Al-Arabi 1975) 17; Mahmoud Abdel Rahman Mohamed, *The Scope of the Right to Private Life (or Privacy): A Comparative Study* (Dar Al-Nahda Al-Arabiya 1994) 129; Al-Bahr (n 5) 39 et seq; Fred H Cate, *Privacy in the Information Age* (Mohamed Mahmoud Shehab tr, Al-Ahram Center for Translation and Publishing 1999) 33 et seq.

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Despite the disagreements over how to define and conceptualise the right to privacy, the protection of an individual's private information remains a common denominator among all views and perspectives. This is what necessitates an exploration of informational privacy, which constitutes the essence of the right to informational self-determination—the subject of this study.

2.2. Definition of Informational Self-Determination

The historical roots of addressing informational privacy can be traced back to the work of Alan Westin in his book *Privacy and Freedom*, where he defines informational privacy as "the right of individuals to determine for themselves when, how, and to what extent information about them is communicated to others."[16] Similarly, Arthur Miller defines informational privacy as "the ability of individuals to control the circulation of information relating to them."[17]

The term "*informational self-determination*" originates from the efforts of certain German legal scholars as they discussed the right to be forgotten (i.e., the right to request the deletion of personal data) and the possibility of establishing a constitutional or legal foundation for it. Some German scholars argue that both the German Constitution and the rulings of the German Federal Constitutional Court provide a basis for the concept of informational self-determination. This is primarily grounded in the right to personal development, as stipulated in Article 2/1 of the German Basic Law.[18]

The rights to personality and privacy also embody the notion of human dignity in the sense of autonomous self-determination. The concept of human dignity entails that every individual has the right to decide the time, place, and nature of their actions in any given situation—including decisions regarding the disclosure of any type of personal data.

Such a conceptualisation has not remained merely academic or philosophical. It has been judicially affirmed and articulated in key constitutional jurisprudence. A landmark example is found in the reasoning of the Federal Constitutional Court of Germany, which clearly linked the protection of informational self-determination with the core constitutional values of human dignity and personal autonomy: "Technological developments concerning the modern processing of data have become so complex that the average citizen is no longer capable of understanding them. The hierarchy of values enshrined in the Constitution

16 Westin (n 10) 40.

17 Arthur R Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (University of Michigan Press 1971) 33.

18 Claudia Kodde, 'Germany's "Right to be forgotten"' – between the Freedom of Expression and the Right to Informational Self-Determination' (2016) 30(1-2) International Review of Law, Computers & Technology 19, doi:10.1080/13600869.2015.1125154.

prioritises the worth and dignity of the individual as a member of a free society who determines his personal destiny. In particular, the general right of personality aims to protect this constitutional order when new threats emerge due to recent developments affecting these constitutional values."[19]

The right to informational self-determination can thus be defined as an individual's authority to control and manage their personal data in the context of digital processing arising from a contractual or legal relationship.

2.3. The Legal Nature of the Right to Informational Self-Determination

The concept of the right to privacy has served as the foundation for highlighting that the protection of personal data is a common denominator across all attempts to define the notion of privacy.

Clearly, the right to privacy is predominantly concerned with preventing others from accessing what an individual chooses to keep hidden. However, the protection of individuals in the context of processing their personal data constitutes a more interactive right. It presumes that such data is not inherently concealed but, rather, that those who process it are bound by legal obligations toward the data subject. In this sense, the right to informational self-determination arises from a legal or contractual relationship between the data subject and the entity processing the data.

Thus, despite the conceptual disagreements surrounding it, the right to privacy primarily aims to protect aspects of life that individuals wish to keep confidential, regardless of where the boundaries of such confidential aspects are drawn. It intersects with the right to informational self-determination in that one of the powers vested in the latter is the right to consent to data processing as well as the right to request data deletion. However, they diverge in terms of the interests they protect and the mechanisms of protection.

The right to privacy safeguards an individual's interest in leading a peaceful life free from external intrusion, granting the ability to keep personal facts and data confidential. It is fundamentally a negative, prohibitive right that seeks to prevent others from accessing certain areas of a person's life. In contrast, informational privacy—or the right to informational self-determination—extends protection to individuals both in a state of passivity and activity, so to speak. It empowers individuals to choose whether to disclose their personal data, to restrict its processing, or to request its deletion once the purpose for

19 ibid 30.

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processing has ceased to exist, even if the disclosure or processing of such data does not infringe on their privacy per se.

Referring to Recital 1 of the General Data Protection Regulation (GDPR), it states that: "The protection of natural persons in relation to the processing of personal data is a fundamental right."[20] This is grounded in Article 8(1) of the Charter of Fundamental Rights of the European Union (the Charter)[21] and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU), both of which affirm that "Everyone has the right to the protection of personal data concerning him or her."[22]

Everyone has the right to respect for his or her private and family life, home and communications. Public authorities shall not interfere with the exercise of this right except in accordance with the law and where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[23]

Accordingly, the right to informational self-determination, i.e., the protection of personal data, is recognised as a fundamental human right under the aforementioned legal frameworks.

3 THE CONTENT OF THE RIGHT TO INFORMATIONAL SELF-DETERMINATION

The Regulation outlines several rights to which data subjects are entitled. These include the right to access one's processed data, the right to data portability, the right to rectification, the right to erasure (the right to be forgotten), the right to restriction of processing, the right to object to data processing, and the right to prevent automated decision-making. Each of these will be discussed in turn.

20 Regulation (EU) 2016/679 (n 2) recital 1.

21 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

22 Treaty on the Functioning of the European Union of 13 December 2007 (consolidated version) [2016] OJ C 202/47.

23 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) [1955] UNTS 213/222, art 8.

3.1. Rights of the Data Subject During Processing [24]

3.1.1. The Right of Access by the Data Subject

The right of access applies to the controller who falls within the scope of the Regulation. This obligation imposed on the controller requires enabling data subjects to access their data, along with all necessary information related to the processing of such data.

This right is an effective tool that allows individuals to access vast amounts of data being processed about them by various institutions and companies.[25]

Under this right, the data subject, upon request, must be promptly informed whether their personal data is being processed by the controller or a processor acting on behalf of the controller. The data subject is not required to provide any justification for making this request.[26]

The UK Supreme Court has ruled that: "The controller is obliged to make reasonable and proportionate efforts to search for the information requested by the data subject. However, such a search must not consume all the controller's time and effort. It is not necessary—according to the Court—for the controller to leave no stone unturned' to fulfil the request."[27]

The burden of proof that a request is manifestly unfounded or excessive lies with the controller, as the data subject is exercising a legitimate right. Whoever alleges abuse or misuse of this right must bear the burden of proving it.

3.1.2. Scope of the Right

This right grants the data subject the ability to know whether their personal data is being processed or not, and whether the processing is carried out by the controller or by a

24 Here, we assume that the data processing takes place under two scenarios: first, processing based on a legitimate legal interest carried out by a public institution, in accordance with the purposes permitted by the Regulation without requiring the prior consent of the data subject; and second, processing based on prior consent, in which case the consent must be explicit, specific, informed, and based on a clear affirmative action by the user. Pre-ticked checkboxes do not constitute valid consent under the General Data Protection Regulation (GDPR) and the E-Privacy Directive.
Bundesverband der Verbraucherzentralen und Verbraucherverbande - Verbraucherzentrale Bundesverband eV v Planet49 GmbH C-673/17 [2020] 1 CMLR 25; [2019] 9 WLUK 540 (ECJ (Grand Chamber)). For more details see: Klaus Wiedemann, 'The ECJ's Decision in Planet 49 (Case C-673/17): A Cookie Monster or Much Ado About Nothing?' (2020) 51(4) International Review of Intellectual Property and Competition Law 543, doi:10.1007/s40319-020-00927-w.

25 Regulation (EU) 2016/679 (n 2) art 15.

26 *Deer v University of Oxford* [2017] EWCA (Civ) 121.

27 *Ezsias v Welsh Ministers* [2007] AII ER (D) 65. The Supreme Court applied the provisions of the UK Data Protection Act 1998, which was inspired by the previous European Directive of 1995. This directive granted individuals the right to access their processed data, particularly to ensure the accuracy of the data and the lawfulness of its processing. "….in order to verify in particular, the accuracy of the data and the lawfulness of the processing".

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processor acting on their behalf. The data subject must also be granted access to their data and informed of the relevant information concerning its processing.[28]

The rationale behind this right, as stated in the Regulation, is to ensure that the data subject is *"aware of and able to verify the lawfulness of the processing."*[29]

In *Durant v. Financial Services Authority*, the British Court of Appeal emphasised that the purpose of allowing individuals to access their personal data is to enable them to assess whether the controller's processing is unlawful or infringes upon their privacy. If that is the case, the data subject has the right to take the necessary measures to protect their rights.[30]

The data cannot be withheld from the data subject on the grounds that it is already known to them or that it was initially obtained from them.[31] The case law of the Court of Justice of the European Union affirms that the right of access to personal data must be interpreted as including, upon request by the data subject, the identification of the specific recipients to whom the personal data have been disclosed. This right may not be limited by the data controller to merely providing information about categories of recipients, except in two exceptional cases:

1. When it is physically impossible to provide information on the specific recipients, for example, if they have not yet been identified.
2. When the request is manifestly unfounded or excessive, pursuant to Article 12(5) of the General Data Protection Regulation (GDPR).

Empowering individuals to know the specific recipients of their data enhances their ability to exercise other rights—such as rectification, erasure, or objection to processing—and reinforces the principle of transparency in personal data processing.[32]

Moreover, a controller who collects data from publicly available sources must still ensure the accuracy of such data and maintain transparency toward the data subjects, even if the information is accessible to the public.[33]

28 Regulation (EU) 2016/679 (n 2) art 15, para 1 (a)-(h); Guidelines 01/2022 On Data Subject Rights - Right Of Access (adopted 28 March 2023, version 2.1) <https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-012022-data-subject-rights-right-access_en> accessed 20 March 2025.

29 Regulation (EU) 2016/679 (n 2) recital (63).

30 *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

31 The proper purpose of a subject access request is to enable a data subject to check the accuracy of the data and to see that they are being processed lawfully, see: *Dr Cécile Deer v The University of Oxford* [2017] EWCA Civ 121; *Durant v Financial Services Authority* (n 30); *Johnson v Medical Defence Union* [2007] EWCA Civ 262.

32 *RW v Österreichische Post AG* C-154/21, Opinion of Advocate General Pitruzzella (ECJ, 9 June 2022) ECLI:EU:C:2022:452.

33 Case No TD/00263/2020, Decision No R/00214/2021 (Spanish Data Protection Authority, 28 May 2021).

On the other hand, the right of access under Article 15 of the GDPR does not include a general right to inspect the files of tax authorities.[34]

When a person's data is linked to others such as information related to several tenants of a building, a report written by someone about another person in a professional capacity, or a complaint filed by one colleague against another within an institution—the controller must provide only the data pertaining to the requesting data subject, while withholding any data related to others.[35]

3.2. The Right to Data Portability

This right is closely linked to the right of access to data. It entitles the data subject to receive the personal data they have provided to the controller in a structured, commonly used, and machine-readable format, and to transmit that data to another controller. This right aims to facilitate the ability of data subjects to transfer and transmit their data from one IT system to another and to switch between service providers.[36]

The right to data portability is subject to the technical feasibility of implementation, and it does not apply when a public authority processes personal data in the performance of a task carried out in the public interest.

The technical feasibility of its implementation restricts the right to data portability. It cannot be exercised when a public authority processes personal data in the performance of a task carried out in the public interest. It is essential to strike a balance between the protection of personal data and the European Union's objective of enhancing data mobility and accessibility, which supports the achievement of the EU Data Strategy.

This requires balancing the legal standards set by the General Data Protection Regulation (GDPR)—which aim to protect data subjects—to encourage the availability, access, and reuse of data by market actors to promote sustainable growth and innovation within the data economy and society. This vision is further supported by more recent legislative instruments such as the Digital Markets Act (DMA) of 2022 and the Data Act (DA) of 2023.[37]

3.3. The Right to Rectification

The Regulation grants data subjects the right to have their personal data rectified if it is inaccurate or incomplete. This right is closely tied to the controller's and processor's obligation to take all reasonable steps to ensure the accuracy of personal data. When this right is exercised, the controller is required to inform any recipient of the data—such as employees, processors, or any third parties to whom the data has been disclosed—about the

34 Judgment No 15 K 1212/19 (Financial Court of Munich, 3 February2022).
35 Case No ROT 19/4649 (District Court Rotterdam, 22 March 2021).
36 Regulation (EU) 2016/679 (n 2) art 16.
37 Case No ROT 19/4649 (n 35).

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rectification, unless this proves impossible or involves disproportionate effort in relation to the importance of the rectification. Furthermore, the data subject must be informed about all those parties who have had access to their data. In this regard, the Court of Justice of the European Union indicated that the assessment of the accuracy and completeness of such data must be made in light of the purpose for which it was collected.[38]

3.4. The Right to Object to Data Processing

Every data subject has the right to object to the processing of their personal data in certain cases.[39] For instance, this right is absolute when the data is being processed for direct marketing purposes. In such a case, the controller who receives an objection from a data subject must cease processing the data for marketing purposes. There are no exceptions or limitations for the data subject when exercising this right in that context.

The Court of Justice of the European Union affirmed that purely commercial interests may constitute a "legitimate interest" under Article 6(1)(f) of the General Data Protection Regulation (GDPR). This ruling clarifies that such interests do not need to be explicitly defined by law to be considered legitimate. A "legitimate interest" is not confined to public, moral, or security-related matters but also encompasses objectives related to ordinary commercial activity.[40]

The data subject's right to accept or refuse the processing of their personal data intersects with competition law, as illustrated by a ruling of the German Federal Court of Justice, which upheld a decision by the Federal Cartel Office. The office had found that Facebook abused its dominant position in the German social media market by imposing terms of use requiring users to consent to the collection and merging of their data from external sources (such as Instagram, WhatsApp, and third-party websites and applications) with their Facebook profiles—without offering users a genuine option to refuse.[41]

Furthermore, the violation of a data subject's rights does not automatically entitle them to compensation unless they had suffered actual harm as a result of the violation.[42]

38 *VP v Országos Idegenrendészeti Foigazgatóság* C-247/23 [2025] 4 WL.R 50; [2025] 3 WLUK 209 (ECJ (1st Chamber)).

39 Regulation (EU) 2016/679 (n 2) art 5, para 1.

40 *Koninklijke Nederlandse Lawn Tennisbond v Autoriteit Persoonsgegevens* C-621/22 (ECJ (9th Chamber), 4 October 2024) ECLI:EU:C:2024:858.

41 The German Federal Supreme Court's interim decision in the abuse of dominance proceedings, *Bundeskartellamt v Facebook* Case KVR 69/19 (BGH, 23 June 2020). For more details: Klaus Wiedemann, 'A matter of choice: the German Federal Supreme Court's interim decision in the abuse of dominance proceedings *Bundeskartellamt v Facebook* (Case KVR 69/19)' (2020) 51(9) International Review of Intellectual Property and Competition Law 1168, doi:10.1007/s40319-020-00990-3. *UI v Österreichische Post AG* C-300/21 [2023] 1 WLR 3702; [2023] 5 WLUK 22 (ECJ (3rd Chamber)).

42 *UI v Österreichische Post AG* (n 41).

3.5. The Right to Object to Direct Marketing

This right allows the data subject to request that the controller stop using their data for direct marketing purposes. It also includes the authority to object to any profiling attempts that aim to determine the data subject's interests, preferences, and inclinations.[43]

This right covers all forms of direct marketing and any attempts to use personal data for marketing purposes across various media—whether through personal communication via regular mail or email, fax, SMS, or online advertising.

Therefore, the data subject's objection must be comprehensive and cover all forms of processing across all types of communication media. For example, it is not sufficient to object only to email messages unless the data subject clearly states that they object to all forms of processing through all media.

It is worth noting that the absence of an objection by a specific person to receiving marketing materials does not necessarily mean that sending such materials to that person is lawful.

The right applies to all personal data processed for the purposes of direct marketing. Although the Regulation does not explicitly define *direct marketing*, it is generally understood to refer to all advertising and promotional materials directed at a specific recipient.

A broad concept of direct marketing has been adopted in the United Kingdom, defining it as any purposeful communication from an organisation to an individual that conveys the goals and values of the organisation. This concept has been further expanded to include political election campaigns as well as communication from charitable organisations directed at potential donors to inform them of their activities.[44]

This right is not limited to rejecting the receipt of marketing materials but also extends to all preceding activities related to sending marketing materials, such as data collection, profiling, sorting of data, etc.[45] The right to object to the use of personal data for direct marketing purposes is absolute, with the Regulation imposing no restrictions or exceptions.

3.6. The Right to Request Erasure (Right to be Forgotten)

According to Article 17 of the Regulation, the data subject has the right to request the data controller to erase the personal data concerning him or her without undue delay. The controller is obliged to erase the personal data in the following cases:

1) If the personal data are no longer necessary for the purposes for which they were collected or otherwise processed.[46]

43 Regulation (EU) 2016/679 (n 2) art 21.

44 Peter Carey, *Data Protection: A Practical Guide to UK Law* (5th edn, OUP 2018) 141.

45 ibid 142.

46 Regulation (EU) 2016/679 (n 2) art 17, para 1 (a).

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2) If the data processing was based on the data subject's prior consent.[47]
3) If the data subject objects to the processing, and there are no overriding legal grounds to justify it.[48]
4) If the personal data were processed unlawfully.[49]
5) If the controller is under a legal obligation to erase the personal data.[50]
6) If the personal data were collected in relation to the offer of information society services as referred to in Article 8(1).[51]

The data controller is required to comply with the erasure request in the aforementioned cases, even if the continued processing does not cause harm to the data subject.

It is incumbent upon the data controller to determine the purposes for which personal data is collected and processed in a manner that is clear, legitimate, adequate, relevant, and limited to what is necessary for the purposes of processing.[52]

Accordingly, the data subject has the right to request the deletion of their data from the controller's records if the controller violates these conditions. This also applies if the period during which the data was retained exceeds what is necessary to fulfil the declared purposes of processing.

Further processing for archiving and documentation in the public interest, or for scientific, historical, or statistical research purposes, is considered one of the exceptions recognised by the Regulation.

To ensure that the purpose of the further processing is compatible with the original purpose(s) for which the data was initially processed, the controller—after fulfilling all legal requirements of the original processing—must take into account the following considerations:[53]

1) Any link between the intended further processing and the original processing.
2) The context in which the personal data was collected, particularly the reasonable expectations of the data subject based on their relationship with the controller regarding further use of the data.

47 ibid, art 17, para 1 (b).
48 ibid, art 17, para 1 (c).
49 ibid, art 17, para 1 (d).
50 ibid, art 17, para 1 (e).
51 ibid, art 17, para 1 (f).
52 According to a 2009 survey, nearly 80 percent of employers use search engines to look up job applicants, and it was found that most employers reject candidates based on what they discover in their online history. More than half of the employers reported that they would reject a candidate due to "concerns about the candidate's lifestyle," "inappropriate comments or text written by the candidate," or "inappropriate pictures, videos, or information." These results are typically generated by private companies that rank job applicants based on their social media profiles and Google search results. For more details see: Shlomit Yanisky-Ravid, 'To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to a Virtual Private Zone, and the Balloon Theory' (2014) 64(1) American University Law Review 65-6.
53 Regulation (EU) 2016/679 (n 2) art 9, para 2 (j).

3) The existence of appropriate safeguards in both the original and the subsequent processing operations.
4) Whether the processing is based on the data subject's consent or a legal basis under Union law or the law of a Member State.
5) Even if the further processing is not compatible with the original purpose, it may still be lawful if it is deemed a necessary and appropriate measure to safeguard objectives serving the public interest, provided that the principles laid down in the Regulation are observed, most importantly, the data subject's right to object.

Furthermore, it is considered lawful for the controller to indicate the likelihood of criminal activity or threats to public security, thereby justifying the transfer of personal data—whether in individual or collective cases—to a competent authority. However, such data transfers or further processing must be prohibited if they are not aligned with a legal, professional, or confidentiality obligation.[54]

When the processing is based on the data subject's consent, the controller must be able to demonstrate that the data subject has indeed given consent to the processing of their personal data.[55]

The data subject has the right to withdraw their consent at any time. Such withdrawal does not affect the lawfulness of the processing carried out prior to the withdrawal. Before giving consent, the data subject must be informed of their right to withdraw it, and the withdrawal process must be as simple as the process for granting consent.[56]

The data subject may revoke their consent to the processing of their data for a specific purpose or purposes, especially where there is no other legal basis for retaining the data under processing. The Regulation explicitly prohibits the processing of sensitive personal data, unless the data subject consents to such processing for one or more specific purposes.[57]

Where the data subject objects to the processing[58] of their personal data due to the absence of overriding legal grounds for such processing, or where the processing is aimed at

54 ibid, recital (50).

55 ibid, art 7, para 1.

56 ibid, art 7, para 4.

57 ibid, art 9, para 1. **Sensitive Date:** Sensitive personal data refers to any information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as genetic data, biometric data used for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a person's sex life or sexual orientation.

58 ibid, art 21. Pursuant to paragraph (1) of Article 21, where there are no overriding legal grounds for processing, or where the data subject has objected to processing in accordance with paragraph (2) of Article 21—which provides that the data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling.

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profiling,[59] the controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights, and freedoms of the data subject, or for the establishment, exercise, or defense of legal claims.[60]

The data controller must erase personal data in compliance with a legal obligation imposed under Union law or the law of a Member State to which the controller is subject.

If the processing is carried out in compliance with such a legal obligation or is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, such processing constitutes a lawful basis.

Processing of personal data is also considered lawful when it is necessary for the protection of vital interests of the data subject or of another natural person—such processing should, in principle, take place only when no other legal basis is available.

Processing is also deemed lawful when it is carried out for the purposes of preventing or mitigating threats to network and information system security or addressing such threats.

Where personal data are collected in relation to the direct offer of information society services to a child, such processing is lawful if the child is at least 16 years old. If the child is under the age of 16, processing is lawful only if consent is given or authorised by the holder of parental responsibility for the child.

When the controller has made personal data public and is subsequently required to erase it, the controller shall, taking into account available technology and the cost of implementation, take reasonable steps including technical measures to inform other controllers or processors processing the personal data that the data subject has requested the erasure of any links to, or copies or replications of, those personal data.

Consent of the data subject is not required for processing in the following cases:

1) When processing is carried out in the context of exercising the right to freedom of expression and information.

59 Profiling: the recording and analysis of an individual's psychological and behavioral characteristics in order to assess or predict their capabilities in a certain area, or to assist in classifying them into specific categories. See: *Oxford Reference* <https://www.oxfordreference.com/display/10.1093/oi/authority.20111123105355319> accessed 20 March 2025.

60 Regulation (EU) 2016/679 (n 2) art 6, para 1. The aforementioned points—(e) and (f) of Article 6(1)—state that processing is lawful if: it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, **or** it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, provided such interests are not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, especially where the data subject is a child.

2) When processing is required for compliance with a legal obligation imposed by Union or Member State law to which the controller is subject.
3) When processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, particularly for reasons of public interest in the area of public health.
4) When processing is carried out for archiving purposes in the public interest, or for scientific or historical research purposes, or for statistical purposes.
5) When processing is necessary for the establishment, exercise, or defence of legal claims.

4 PRACTICAL CHALLENGES AND WAYS TO ADDRESS THEM

4.1. Practical Challenges

4.1.1. The Limitations of Consent in AI and Big Data Environments

The General Data Protection Regulation (GDPR) heavily relies on explicit consent as a legal basis for data processing. However, this basis faces fundamental challenges in contexts driven by algorithms, big data, artificial intelligence, social media, and similar technologies—where individuals often lack the capacity to fully understand or effectively control all aspects of how their data is used. As a result, consent may be rendered practically meaningless.[61] Additionally, algorithmic biases and automated decisions can occur without the individual's ability to intervene or effectively object.[62]

61 See for further detail: Varda Mone and CLV Sivakumar, 'An Analysis of the GDPR Compliance Issues Posed by New Emerging Technologies' (2022) 22(3) Legal Information Management 166, doi:10.1017/S1472669622000317.

62 Regulation (EU) 2016/679 (n 2) arts 22, 13, 15. Although Article 22 of the General Data Protection Regulation (GDPR) is intended to protect individuals from decisions made without human intervention, its practical interpretation significantly narrows the scope of protection. The provision is interpreted restrictively to apply only to decisions that are fully automated and produce legal effects or similarly significant outcomes. As a result, many AI-based applications fall outside the scope of the prohibition, despite their real-world impact on individuals. Moreover, the transparency requirements set out in Articles 13 to 15 of the GDPR do not effectively guarantee what is referred to as a "meaningful explanation." The GDPR does not oblige data controllers to provide a detailed account of the logic behind automated decisions but merely requires a general description of the nature of the processing. This weakens individuals' ability to challenge outcomes or demand their correction. See for further detail: Adrienn Lukács and Szilvia Váradi, 'GDPR-Compliant AI-Based Automated Decision-Making in the World of Work' (2023) 50 Computer Law & Security Review 4, doi:10.1016/j.clsr.2023.105848.

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4.1.2. Difficulties in Exercising Individual Rights

Although individual rights are legally enshrined, their actual exercise faces several obstacles, including:

- The complexity of digital forms for submitting access or erasure requests,[63]
- The ambiguity surrounding the identity of the actual data controller, particularly in cases of joint processing.[64]

4.1.3. The Problem of Centralised Enforcement and Institutional Performance Disparities

Practical implementation reveals significant disparities in the effectiveness of data protection authorities across EU member states. Major cases, such as Schrems I and Schrems II,[65] along with regulatory reports, have highlighted occasional weaknesses in cooperation between national supervisory authorities.

4.1.4. The Protection of Mental Data and Emerging Data Patterns

With the advancement of neurotechnology and brain–computer interfaces (BCIs), a new category of data has emerged, referred to as *mental data*. This type of data originates directly from mental activity and includes emotions, beliefs, attitudes, and even intentions prior to their behavioural expression.[66]

63 See for further detail: Junkai Ding and Xiaoyan Quan, 'Legal Challenges in Protecting Personal Information in Big Data Environments' (*SSRN*, 5 March 2025) <http://dx.doi.org/10.2139/ssrn.5166908> accessed 20 March 2025.

64 See for further detail: Mone and Sivakumar (n 61) 170. For example, it is difficult to identify who is liable for harm caused to individuals whose data is used by Internet of Things (IoT) devices or through big data analytics and algorithms.

65 *Maximilian Schrems v Data Protection Commissioner* C-362/14 (ECJ (Grand Chamber), 6 October 2015) ECLI:EU:C:2015:650. Schrems, an Austrian privacy activist, filed a complaint against Facebook Ireland on the grounds that the personal data of European users was being transferred to the company's servers in the United States. This transfer was carried out under the "Safe Harbor" agreement between the European Union and the United States. Schrems argued that the U.S. does not provide an adequate level of data protection, especially in light of Edward Snowden's revelations about American surveillance programs such as PRISM. The Court of Justice of the European Union (CJEU) invalidated the Safe Harbor agreement, affirming that Member States cannot transfer citizens' data to a country that does not ensure a level of protection essentially equivalent to that guaranteed by fundamental rights such as privacy (*Data Protection Commissioner v Facebook Ireland & Maximillian Schrems Data Protection Commissioner v Facebook Ireland & Maximillian Schrems* C-311/18 (ECJ (Grand Chamber), 16 July 2020)). Following the annulment of Safe Harbor, a new agreement known as the "Privacy Shield" was established. Schrems challenged this agreement as well, arguing that U.S. surveillance practices remained in place and that EU citizens lacked effective legal remedies or avenues for complaint in the United States. The Court also invalidated the Privacy Shield, ruling that U.S. surveillance laws, such as FISA Section 702, do not provide a level of protection equivalent to that offered under EU law.

66 Marcello Ienca and Gianclaudio Malgieri, 'Mental Data Protection and the GDPR' (2022) 9(1) Journal of Law and the Biosciences lsac006, doi:10.1093/jlb/lsac006.

This emerging category raises unprecedented legal questions regarding the extent to which the General Data Protection Regulation (GDPR) applies to it, and whether existing legal instruments are sufficient to ensure its protection. It also challenges the ability of the European regulatory framework to address such data types, especially in the absence of clear legal rules governing neurotechnological measurement or direct interaction with the human mind.

While mental data may fall under the category of *sensitive data* as defined in Article 9 of the GDPR, its intangible and involuntary nature introduces novel legal challenges. A key concern is that such data are often generated and collected without the full awareness of the data subject, thereby undermining the effectiveness of consent as a legal safeguard.

These challenges demonstrate the widening gap between the legal framework and real-world practices, underscoring the need to develop regulatory, interpretive, and technological tools capable of ensuring the meaningful enforcement of the right to informational self-determination—an issue to be analysed in the following section.

4.2. Proposed Approaches to Address Implementation Gaps

4.2.1. A Critical Analysis of the Gap Between Legal Text and Practice

While the General Data Protection Regulation (GDPR) represents a qualitative leap in the field of digital rights protection, reality reveals a clear gap between the content of legal provisions and their implementation mechanisms. The texts affirm the principle of individual sovereignty over personal data, yet in practice, individuals face significant obstacles in exercising this right—whether due to technical complexity or the reluctance of data controllers. Many digital interfaces do not offer genuine options for consent or objection, instead presenting them as mere formalities.

4.2.2. A Study of Judicial and Regulatory Cases

Several cases before the Court of Justice of the European Union (CJEU) have highlighted deficiencies in application, most notably:

1) The *Schrems II* case confirmed the inadequacy of safeguards in data transfers to the United States, leading to the invalidation of the Privacy Shield framework.
2) The *Google Spain* case established the "right to be forgotten" but faced technical difficulties in enforcement.
3) Recent decisions by national supervisory authorities—such as France's CNIL and Germany's BfDI—have shown divergences in interpretation and enforcement levels.

In the context of GDPR implementation, notable disparities have emerged between national authorities in the EU, particularly between France's Commission Nationale de l'Informatique et des Libertés (CNIL) and Germany's Federal Commissioner for Data

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Protection and Freedom of Information (BfDI). CNIL adopted a strict approach early on, imposing a €50 million fine on Google in January 2019 for violating transparency principles and legal bases for processing, particularly concerning cookies.[67]

By contrast, BfDI initially demonstrated a more restrained approach, with some fines not exceeding €20,000. However, this stance shifted over time, especially in the case where BfDI imposed a fine of over €9.5 million on 1&1 Telecom due to insufficient security measures related to data access.[68]

This divergence reflects differences in the interpretation and implementation of the Regulation, as well as the discretionary power exercised by each authority. It also underscores the need for harmonised standards to ensure fair enforcement within the Digital Single Market.

4.2.3. Evaluating the Effectiveness of Oversight and Supervision

The success of the GDPR depends largely on the capacity of national supervisory authorities and the European Data Protection Board (EDPB) to operate in a coordinated and coherent manner. However, the multiplicity of entities and differences in regulatory capacities have resulted in disparities that affect fairness and effectiveness. The decentralised enforcement model, lacking binding authority at the EU level, weakens the Union's collective response to cross-border challenges.[69]

67 'The CNIL's Restricted Committee Imposes a Financial Penalty of 50 Million euros against Google LLC' (*EDPB*, 21 January 2019) <https://www.edpb.europa.eu/news/national-news/2019/cnils-restricted-committee-imposes-financial-penalty-50-million-euros_en> accessed 20 March 2025.

68 'BfDI Imposes Fines on Telecommunications Service Providers' (*EDPB*, 18 December 2019) <https://www.edpb.europa.eu/news/national-news/2019/bfdi-imposes-fines-telecommunications-service-providers_en> accessed 20 March 2025.

69 Although the European Data Protection Board (EDPB) was established under Article 68 of the General Data Protection Regulation (GDPR) as a coordinating body intended to harmonize the application of data protection rules within the Digital Single Market, the structure of the European data protection system is not based on actual executive centralization. Instead, it operates under a decentralized model, in which each national authority oversees the application of the GDPR within its own territorial jurisdiction.
This distribution results in significant disparities in interpretation, enforcement speed, and the level of strictness applied. The EDPB does not possess direct supervisory or enforcement powers over national authorities; its authority is limited to issuing non-binding guidelines or making binding decisions only in cases of cross-border processing disputes, as set out in Articles 64–65 of the Regulation.
As a consequence, the absence of a binding federal-level executive authority undermines the practical effectiveness of the GDPR—particularly in addressing cross-border challenges such as global digital platforms or data transfers outside the European Union.
See in detail: *European Data Protection Board (EDPB)* <https://edpb.europa.eu > accessed 20 March 2025; Christopher Kuner, Lee A Bygrave and Christopher Docksey, *The EU General Data Protection Regulation (GDPR): A Commentary* (CUP 2020).

4.2.4. Recommendations to Strengthen the Practical Application of the Right to Informational Self-Determination

1. Strengthen centralised enforcement within the EU by granting the EDPB quasi-judicial powers.

2. Improve user interface design to ensure genuine understanding of consent and data processing options.

3. Include mental data and emerging technologies in the category of special data under the GDPR.

4. Expand the application of Data Protection Impact Assessments (DPIAs) to advanced and automated models.

5. Require companies to review their algorithms to ensure respect for individual rights and to prevent algorithmic discrimination.

5 CONCLUSIONS

The right to informational self-determination is one of the most prominent digital rights to emerge from the profound transformations in data-driven societies. This study has demonstrated that the right is no longer merely an extension of the right to privacy, but has become a concrete expression of individual sovereignty in the digital space—a central safeguard for human dignity in the face of algorithms, automated technologies, and modern tracking systems.

The GDPR has introduced an advanced legislative structure, both in terms of its general principles and the rights it grants individuals. Yet, practical challenges in enforcement remain. From the limitations of consent mechanisms to difficulties in exercising rights and institutional disparities in enforcement, several obstacles undermine the effectiveness of the right to informational self-determination.

This research concludes that bridging the gap between legislation and implementation requires:

- Rethinking the institutional model for GDPR enforcement at the EU level.
- Updating legal provisions to keep pace with rapid technological developments, particularly concerning artificial intelligence and mental data.
- Adopting flexible regulatory tools that accommodate the dynamic nature of data processing environments.

The future of the right to informational self-determination depends on the EU's ability to combine legal rigour, technological adaptability, and societal awareness within a coherent framework that ensures this right's practical enforceability alongside its normative value.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО НА ІНФОРМАЦІЙНЕ САМОВИЗНАЧЕННЯ МІЖ ЗАКОНОДАВСТВОМ ТА ВПРОВАДЖЕННЯМ

Найлаа Флайїх*, Могаммед Гассон Алі, Агмад Фаділ та Халед Алджасмі

АНОТАЦІЯ

Вступ. *Право на інформаційне самовизначення стало ключовим компонентом цифрових прав в епоху штучного інтелекту та великих обсягів даних. Вкорінене в ширшому праві на приватність, це право дозволяє особам контролювати збір, використання та поширення своїх персональних даних. Незважаючи на його визнання в таких документах, як Загальний регламент про захист даних (GDPR), існує значний розрив між правовою базою та її практичним впровадженням. Метою цього дослідження, що зосереджене на європейському праві, є аналіз розбіжностей між законодавчими гарантіями та реаліями правозастосування. Щораз більша складність цифрових технологій та поява нових категорій даних, таких як ментальні дані, кидають виклик як правовим доктринам, так і інституційним можливостям.*

Методи. *У дослідженні використовується доктринальний правовий аналіз, що спирається на комплексне вивчення положень GDPR, судових прецедентів Суду Європейського Союзу, звітів національних наглядових органів та академічних коментарів. Елементи порівняння застосовані для контекстуалізації європейської системи в межах ширшого міжнародного розвитку. Практичні випадки та моделі нормативно-правового*

забезпечення використовуються для виявлення прогалин та оцінки ефективності чинних механізмів. Дослідження також містить аналітичну оцінку алгоритмічних середовищ та їхнього впливу на згоду, прозорість та індивідуальну діяльність.

Результати та висновки. *Дослідження показує, що хоча GDPR пропонує надійну структуру для захисту персональних даних, його практичному застосуванню перешкоджають структурні, технічні та інтерпретаційні проблеми. Згода часто є неефективною в контекстах, що керуються штучним інтелектом; люди мають труднощі з реалізацією своїх прав, а нормативно-правове забезпечення залишається нерівномірним у різних державах-членах ЄС. У дослідженні увага звертається на необхідність гармонізованої інституційної моделі, вдосконалених інтерфейсів користувача та правового визнання нових типів даних, таких як ментальні дані. Висновок дослідження полягає в тому, що подолання розриву між законодавством та впровадженням вимагає інтеграції правових, технологічних та етичних інструментів у єдину систему, підтверджуючи право на інформаційне самовизначення як наріжний камінь людської гідності в епоху цифровізації.*

Ключові слова: *захист персональних даних, інформаційне самовизначення, права суб'єкта даних, інформаційна конфіденційність, GDPR.*

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Research Article

TRACKING JUDICIAL CHANGE TOWARDS MORE LEGAL CERTAINTY THROUGH CITATION ANALYSIS: A CASE STUDY ON THE LEGAL BASIS FOR COMPENSATION RULINGS BEFORE SAUDI COMMERCIAL COURTS AFTER THE ENACTMENT OF THE CIVIL TRANSACTIONS LAW

Faisal Alsuwailem* and Zlatan Meskic

ABSTRACT

Background: *Legal certainty is a guiding principle in all European countries. One of the main tools for achieving legal certainty in Europe is the codification of law. In 2023, Saudi Arabia adopted its first codification of contractual and non-contractual obligations through the Civil Transactions Law (CTL), aiming to achieve greater legal certainty. This shift represents a major shift from a predominantly Shariah-based jurisdiction towards civil law. This research examines whether the enactment of the CTL has influenced the Saudi Commercial Court's interpretation of compensation claims.*

Methods: *A mixed-methods approach was adopted to track citation trends over time and to examine case law documents to confirm the quantitative results. Qualitative empirical analysis, specifically document analysis, was utilised to identify and extract Shariah jurists' opinions, providing depth to the statistical results. Quantitative empirical methods, including interrupted time series (ITS), were applied to assess whether the compensation provisions in the CTL led to significant shifts in compensation claims decisions. Overall, 2,913 cases decided before the enactment of the CTL and 61 decided under the CTL were analysed in this study.*

Results and conclusions: *The pre-law analysis indicates that courts cited Shariah jurists or general legal principles to establish the liability for compensation. In contrast, post-law analysis*

suggests a discernible shift, with courts increasingly citing civil law provisions directly, notably Articles 120 and 720 of the CTL. This shift is supported by an increase in overall article citations within compensation judgments, rising from 36% to 62%, supported by the examination of cases decided based on these articles. These findings indicate that the enactment of the Civil Transactions Law has contributed to enhancing the legal certainty in Saudi commercial courts.

1 INTRODUCTION

Legal certainty is a fundamental principle in all legal systems. In civil law countries, legal certainty has come to be a kind of supreme value.[1] It is a guiding principle of European legal systems.[2] According to the European Court of Human Rights (ECtHR) "The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[3] Legal certainty has also been recognized very early as a general principle of EU law by the Court of Justice of the EU (CJEU).[4] In the words of CJEU "The principle of legal certainty is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly."[5]

Traditionally, the main tool for civil law to achieve legal certainty has been the codification of law.[6] However, codification is not without its flaws. For example, it may increase the quantity and complexity of provisions; it may cause courts to focus more on legislative intent rather than their traditional role in decision-making; and it makes it easier for certain interest groups to include solutions that pursue their own agenda.[7]

1 John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition : An Introduction to the Legal Systems of Europe and Latin America* (4th edn, Stanford UP 2019) 48-55.

2 James Maxeiner, 'Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?' (2007) 15(2) Tulane Journal of International and Comparative Law 541.

3 *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) para 30 <https://hudoc.echr.coe.int/eng?i=001-61638> accessed 17 February 2025.

4 *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker* No 1/73 (CJEU, 4 July 1973) para 13 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61973CJ0001> accessed 17 February 2025.

5 *International Air Transport Association et al v Department for Transport* No C-344/04 (CJEU, 10 January 2006) para 68 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62004CJ0344> accessed 17 February 2025.

6 Mathias Seims, 'Comparative Legal Certainty: Legal Families and Forms of Measurement' in Mark Fenwick, Mathias Siems and Stefan Wrbka (eds), The Shifting Meaning of Legal Certainty in Comparative and Transnational Law (Hart Publishing 2017) 118.

7 Dru Stevenson, 'Costs of Codification' (2014) 4 University of Illinois Law Review 1132-3.

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Over the last few decades, there has been a growing demand for the law to be more flexible and responsive to an environment characterised by rapid social, technological, and economic change.[8] The movement towards value-oriented justice demands the creation of legal rules in a way that enhances legal certainty while also accounting for differences between individual applications of these rules; hence, such rules need to include a certain degree of flexibility.[9]

Judicial practices in some jurisdictions have been examined to determine whether legal rules promote predictability in transactions.[10] In this context, predictability is closely associated with the principle of legal certainty, which holds that laws—and their enforcement—must be clear and foreseeable for those affected by them. This is why courts in some jurisdictions often prioritise this principle when deciding whether to revoke granted rights.

The emphasis on predictability can be attributed to the economic value it conveys, especially in commercial transactions. When parties can anticipate which laws apply and how they will be enforced, they are better positioned to manage legal risks. However, if the legal framework is unpredictable, the principle of legal certainty gives rise to "risk costs". Individuals who are risk-averse toward unpredictable legal changes incur additional expenses to protect themselves.[11] This protection might manifest in services, such as hiring a lawyer or buying insurance.

Importantly, risk costs are not associated with the absence of written laws. Even where codified laws exist, similar risks may arise—particularly when previously unwritten norms such as customs, traditions, and judicial precedents are rigidified through codification. This rigidity can prevent such risk norms from adapting or changing over time.[12] This aspect is relevant in Shariah-based jurisdiction, where legal norms are subject to *Ijtihad* (the scholarly authority to interpret Islamic sources). Some Shariah scholars argue that codification (*Taqnin*) imposes one interpretation obligatory on

8 Mark Fenwick, Mathias Siems and Stefan Wrbka, 'The State of Art and Shifting Meaning of Legal Certainty' in Mark Fenwick, Mathias Siems and Stefan Wrbka (eds), The Shifting Meaning of Legal Certainty in Comparative and Transnational Law (Hart Publishing 2017) 17.

9 Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2(1) Legisprudence 47, doi:10.1080/17521467.2008.11424673.

10 For the EU see e.g.: Elina Paunio, 'Beyond Predictability: Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10(11) German Law Journal 1469, doi:10.1017/S2071832200018332.

11 Aurélien Portuese, Orla Gough and Joseph Tanega, 'The Principle of Legal Certainty as a Principle of Economic Efficiency' (2013) 44(1) European Journal of Legal Studies 131, doi:10.1007/s10657-014-9435-2.

12 Jonathan S Gould, 'Codifying Constitutional Norms' (2021) 109 Georgetown Law Journal 703, doi:10.2139/ssrn.3769465.

other jurists, which contradicts the established consensus that no individual opinion should be binding on others.[13]

On the other hand, legal uncertainty undermines predictability. Researchers have identified the unpredictability of court decisions as a source of legal uncertainty. Some have developed a model to illustrate how legal uncertainty affects the scale of production, suggesting that as legal uncertainty increases, production decreases.[14]

After due consideration of the advantages and disadvantages of codification, Saudi Arabia chose the path of other civil law countries by adopting its first Civil Transactions Law (CTL). The aim was to comprehensively regulate all matters related to contractual and non-contractual civil transactions.[15] The efforts of Saudi Arabia to adopt codification based on European models are not an isolated initiative in the Middle East.[16] The CTL is one of four legal instruments announced as part of the Specialised Legal Instruments Project—[17]an initiative aimed at moving away from the previous legal system by providing legal instruments that regulate legal relationships through legal norms.

While prior research in other jurisdictions has examined the impact of codification on judicial interpretation, there remains a lack of empirical studies assessing how codification affects judicial interpretation in Saudi Arabia. This gap is especially relevant given that Saudi Commercial Courts have historically relied on Shariah jurists and general principles when deciding compensation cases. The recent enactment of CTL presents the question of whether, and how, the codification of compensation provisions has influenced the interpretation of such claims by the Commercial Courts.

This research aims to investigate the impact of the codification of compensation provisions under the CTL on judicial interpretation of compensation claims in the Saudi commercial courts. The findings may contribute to the broader theoretical understanding

13 Sidra Zulfiqar, 'Islamization of Laws: Various Determinants, Modern State and Codification' (2018) 2(1-2) Islamabad Law Review 21. Published by Legal Education Support Program in Pakistan (LESP), in collaboration with Sandra Day O'Connor College of Law, Arizona State University.

14 Jiwon Lee, David Schoenherr and Jan Starmans, *The Economics of Legal Uncertaint* (Working Paper Series in Law 669, European Corporate Governance Institute 2022) doi:10.2139/ssrn.4276837.

15 Zlatan Meškić and Mohammed Al-Eissa, 'Sale of Goods Contracts in Saudi Arabia: Accession to the CISG, the Civil Transactions Act and Conflict Rules' (2025) 73(1) Anali Pravnog Fakulteta u Beogradu 12, doi:10.51204/Anali_PFBU_25101A.

16 See e.g. regarding Qatar: Mohamed Salem Abou El Farag, Tarek Gomaa Rashed and Ahmed Qatami, 'Developing a Legal Framework for Electronic Contracts in the Context of Traditional Contract Theory: An Analytical Study' (2025) 8(1) Access to Justice in Eastern Europe 166, doi:10.33327/AJEE-18-8.1-a000105. See regarding UAE, Pierre Mallet and Hala Nassar, 'Consensual Terms Modifying Contractual Liability in the Light of UAE Law: A Comparative Study with French Law' (2024) 7(4) Access to Justice in Eastern Europe 218, doi:10.33327/AJEE-18-7.4-a000107.

17 'Crown Prince Announces the Development of the Specialized Legal Instruments' (*Saudi Press Agency*, 8 February 2021) <https://www.spa.gov.sa/2187777> accessed 17 February 2025.

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that codification not only provides a clear legal ground for awarding compensation but also enhances legal certainty.

It is important to note that the CTL was issued by Royal Decree No. M/191 dated 29/11/1444H, which ratified Resolution No. 820 of the Council of Ministers dated 24/11/1444. Item (First) of the resolution approves the issuance of the Civil Transaction Law, while Item (Sixth) states: "*The provisions of the Civil Transactions Law and what is mentioned in Item (Fifth) of this resolution includes commercial transactions, without prejudice to the nature of commercial transaction, unless it is stipulated otherwise in commercial laws*". This highlights the importance of civil transactions law in commercial disputes, particularly because its compensation provisions are general and may apply in any given commercial dispute.

2 METHODOLOGY

The authors opted for a mixed-methodology approach, combining a qualitative empirical method (document analysis) to analyse case law documents, identify and extract Shariah jurist opinions, and give depth to the statistical analysis. The quantitative empirical method, including an interrupted time series (ITS) design, was employed to examine whether the introduction of compensation provisions in the law led to significant shifts in judicial decisions regarding compensation claims. Measurable indicators, such as the frequency and context of judicial citation in compensation claims, along with the outcome of the claim, serve as a measurable indicator of judicial discretion. These indicators help determine whether codification has enhanced the clarity and predictability expected under the principle of legal certainty.

The mixed-methodology approach is commonly used in the legal analysis of judicial opinions.[18] For example, Luca S. Marquard used statistical analysis to compare the enforcement percentage of liquidated damages in two jurisdictions, complementing it with qualitative analysis.

18 For example, M. A. Livermore, A. B. Riddell, D. N. Rockmore used Topic Modeling to conduct three quantitative analyses, then the authors augmented the quantitative findings with qualitative analysis. See, Michael A Livermore, Allen B Riddell and Daniel N Rockmore, 'The Supreme Court and the Judicial Genre' (2017) 59 Arizona Law Review 837, doi:10.2139/ssrn.2740126. Another example is that L. S. Marquard used statistical analysis to compare the enforcement percentage of liquidated damages in two jurisdictions and supported it with qualitative analysis. See, Luca S Marquard, 'An Empirical Study of the Enforcement of Liquidated Damages Clauses in California and New York' (2021) 94(3) Southern California Law Review 637.

2.1. Data Collection

The data consists of commercial court cases that include compensation claims before and after the enactment of the Civil Transactions Law. The primary objective of data collection is to observe judicial decisions before and after the enactment of the Law to understand how compensation claims were interpreted, identify common trends in judicial citation, and track changes in citation themes before and after the law's implementation.

To conduct the analysis, a systematic collection and categorization of case law data was carried out. This involved a careful reading of each case prior to encoding it into the dataset. The data was obtained from the **Scientific Judicial Gate** database, administered by the Ministry of Justice.[19] The search term used was **"تعويض"** (Compensation) in all commercial court decisions issued within the period 01/01/1435 Hijri (4 November 2013) to 03/06/1446 Hijri (16 December 2023). No additional filters were applied.

The initial search produced 20,152 cases; however, this count included duplicate cases, which were later identified and removed. Following 25 December 2024, the Scientific Judicial Gate transitioned to the **Legal Gate** (البوابة القانونية),[20] which included additional courts beyond the commercial court. Consequently, from that date onward, search results were filtered to exclude non-commercial court cases.

Using a database administered by the court for case law data collection is recommended as a source for empirical legal analysis.[21] Moreover, to facilitate analysis, the extracted cases were recorded in an Excel spreadsheet, with each case categorized based on the following criteria:

***Table* 1. Categorization of the dataset**

Case Number	Case Date (Hijri)	Court Region	Type of Compensation	Court Decision	Articles Cited	Citation	Post-Law	Case date (Gregorian)

Type of Compensation is classified based on the type of legal relationship and the harm involved. It is classified either as **Contractual Damage** (CD) if the claimant seeks to enforce a penalty clause or requests compensation for a breach of contract, or as **Non-Contractual Damage** (NCD) if the claimant asks for compensation for fault-based liability or unjust enrichment.

19 'Scientific Judicial Gate' (*Ministry of Justice*, 2025) <https://sjp.moj.gov.sa> accessed 17 February 2025.

20 'Legal Gate' (*Ministry of Justice*, 2025) <https://laws.moj.gov.sa/ar/JudicialDecisionsList/0> accessed 17 February 2025.

21 Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford Handbooks, OUP 2010) 1314, doi:10.1093/oxfordhb/9780199542475.001.0001.

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Court Decision is coded as follows: **Granted** if the court accepts all compensation claims, regardless of the amount granted; **Rejected** if the court rejects all compensation claims**,** or **Partial** if the court accepts some compensation claims and rejects the rest.

Citation includes the following categories:

- **(Article)+(The Law)**: If the decision is justified using a law, the article, and the law's short code is mentioned (e.g., CTL, LOC, IRCC)
- **Shariah Jurists**: If Islamic jurisprudence books/authors were referenced**.**
- **General Principles:** If the general principles of compensation or Islamic legal maxims were referenced without citation
- **Contract:** If the court cited contract articles or referenced the contract provisions without specifying the article.
- **No Citation**: Refers to cases where the court did not explicitly reference any law article, juristic opinion, or clearly articulated legal principle, such as the essential elements of compensation (fault, damage, and causation), this includes both cases that lacked any justification, and cases where the reasoning was limited to factual observations or evidence outcomes without naming or connecting to formal legal concepts. Therefore, this category reflects an absence of formal legal citation, not necessarily an absence of judicial reasoning,

Finally, **Post-Law** was included to compare trends before and after the enactment of the Civil Transactions Law -before (0) or after (1).

2.2. Data Selection and Exclusion Criteria

During data extraction, cases were scanned to determine their relevance to the research. Only law articles that directly established the rejection or approval of the compensation claim were considered; articles mentioned for other purposes (e.g., Evidence Law articles, Articles that set the ground to decide other claims, articles that establish the court jurisdiction) were not considered. If the court cited general principles without citing a specific legal provision, the case was categorised under "General Principles". If an appellate court modified a lower court's ruling, only the appellate decision was included in the dataset.

In cases involving late payments, if the compensation claim was contract-based, it was classified as Contractual Damage (CD). If no contractual provision was cited, it was Non-Contractual Damage (NCD). Cases where courts relied on expert reports without citing laws were classified as "No Citation."

Some law articles were cited incorrectly, requiring a cross-checking of other relevant provisions within the same legal code to identify the correct article that matched the court's reasoning. When multiple citations applied (e.g., a ruling based on both Shariah Jurists and general principles), both classifications were recorded (General Principles and Shariah Jurists).

The following types of cases were excluded from the dataset:

- Cases where compensation was mentioned but not claimed (e.g., cases involving arbitration ratification).
- Cases where compensation was rejected on purely procedural grounds without examining substantive elements (e.g., lack of jurisdiction, failure to meet procedural requirements).
- Cases where compensation claims were referenced but not adjudicated upon (e.g., where the primary claim was granted but the secondary compensation claim was not dropped by the claimant).
- Cases where expert expenses were shared equally between parties without a specific compensation justification.

3 CITATION TYPES

The judicial system of Saudi Arabia is unique, as its constitution is based on the Quran and the Sunnah of the Prophet (PBUH).[22] References to these sources—and to Shariah scholars—who interpret them—can be observed in many commercial courts' decisions, as will be shown in this research. Such references may also serve as a basis for appeal before the Supreme Court.[23]

Until the issuance of the Civil Transaction Law (CTL), commercial courts typically established tort liability by citing general principles of compensation and the opinions of Shariah jurists. The Civil Transactions Law Decree was issued by the Royal Decree No. M/191 on 29/11/1444H. The law is structured into three main parts, along with preliminary and concluding provisions. The first part addresses Obligations, covering its sources, its effects, the incidental characteristics, and its termination. The second part regulates Nominate Contracts, while the third part addresses provisions of Right in Rem. The concluding provisions include general rules.[24] The law introduces several provisions establishing civil liability.

In this section, the focus will be on examining citations mentioned in commercial court decisions used to establish tort liability or estimate damages. These citations may include general principles of compensation, Shariah jurists' opinions on tort liability, and formal legal provisions.

22 Royal Order No (A/90) of 1 March 1992 'Basic Law of Governance', art (1) <https://www.wipo.int/wipolex/en/legislation/details/7973> accessed 17 February 2025.

23 Royal Decree No (M/78) of 1 October 2007 'Law of the Judiciary', art (11) <https://www.wipo.int/wipolex/en/legislation/details/14616> accessed 17 February 2025.

24 Royal Decree No (M/191) of 18 June 2023 'Civil Transactions Law' <https://www.wipo.int/wipolex/en/legislation/details/22447> accessed 17 February 2025.

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3.1. General Principles

Islamic Legal Maxims (القواعد الفقهية) are general rules of Islamic law (*Fiqh*) that can be applied in particular cases.[25] One of the five universal maxims is "Harm must be eliminated" (الضرر يزال),[26] which is mentioned in Article 20 of the Mecelle.[27] The general meaning of this rule is that the harm inflicted must be removed, and it is not permissible to maintain such harm.[28]

Islamic law scholars have explained the types of harm depending on the considered perspective. For example, if the subject of its effect is considered, harm can be divided into:

- **Material**: Any harm that has a tangible impact on a person by any means of assault, or their property, or any other material damage.
- **Moral**: Any harm that has an impact on the psyche.[29]

The conditions required to apply this maxim are:

1) The harm must be real; imaginary or harm that rarely occurs does not meet this condition.

2) The removal of the harm must not cause a greater harm.

3) The harm must not serve a legitimate objective of the legislator, which excludes harm that is inflicted as a penalty.

4) The removal of the harm must not negatively affect individuals' rights.

5) The harm must not be of minor significance; it must be excessive.[30]

An application of this maxim arises when a perpetrator of a harmful act is held liable for financial loss. Here, the harm is removed through compensation and imposing a liability (ضمان).[31]

Prior to the issuance of the Civil Transactions Law, the essential elements of compensation—fault, harm, or damage, and causal relation (خطأ، ضرر، علاقة سببية)—were cited in commercial court decisions examined in this research. These were often

25 Buerhan Saiti and Adam Abdullah, 'The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance' (2016) 29(2) Journal of King Abdulaziz University: Islamic Economics 139, doi:10.4197/Islec.29-2.12.

26 Sayyed Mohamed Muhsin, Muhammad Amanullah and Luqman Zakariyah, 'Framework for Harm Elimination in Light of the Islamic Legal Maxims' (2019) 63 (2) The Islamic Quarterly 233.

27 Ya'qūb bin 'Abd al-Wahhāb Al-Bāḥisīn, *A Detailed Examination of Islamic Legal Maxims* (4th edn, Dar Al-Tadmuriyyah 2014).

28 ibid 357.

29 ibid 346.

30 ibid 345.

31 Muhsin, Amanullah and Zakariyah (n 26).

associated with the maxim "Harm must be eliminated" and the concept of "*Ḍamān*" (liability) in Islamic law.

The term "*Ḍamān*" has been used by Islamic law scholars for more than one meaning. For instance, the word is used to convey the concept of Suretyship (كفالة), or more generally, to compensation, indemnity, damages, penalty, or restoration.[32] Scholars define *Ḍamān* as the legal liability to fulfil an obligation, whether in the form of money or work.[33] Scholars explained that such liability cannot be incurred until the essential elements of *Ḍamān* had been established:

- Transgression (الاعتداء): Any harmful act that is illegitimate and without acceptable excuse.[34]
- Harm (الضرر): Any harm or damage inflicted on a person, whether to his property, body, honour, or emotions.[35]
- Causation (الإفضاء)

Causation is considered by some scholars to be a condition rather than an essential element to *Ḍamān*.[36] However, in Islamic jurisprudence, causation is determined by examining the source of the harm in question. If the harm directly results from the transgressive act without any intervening factor, it is considered a direct consequence of that act, thereby imposing liability (*Ḍamān*) on the individual responsible for the transgression. However, if an intermediate act occurs between the initial transgressive act and the harm, liability depends on the foreseeability. If the intermediate act is a probable occurrence, the person responsible for the initial act is generally not liable for the resulting harm, unless they acted wrongfully (متعدّي).[37]

Since *Ḍamān* is the establishment of liability, the distinction between "*Ta'wīḍ*" (compensation) and "*Ḍamān*" (liability) is that the former is a consequence of the latter.[38]

Another Islamic legal maxim that can be observed in some commercial court decisions is the general rule (لا يجوز لأحد أخذ مال أحد بلا سبب شرعي), which translates to "It is not permissible for anyone to take another person's property without a legitimate legal basis".

32 Abdul Basir bin Mohamad, 'Islamic Tort Law' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (Research Handbooks in Comparative Law series, Edward Elgar Publishing 2021) 489, doi:10.4337/9781789905984.00030.

33 Ali Al-Khafif, *Liability in Islamic Jurisprudence* (Dar Al-Fikr Al-Arabi 2000) 8.

34 Wahbah Al-Zuhayli, *Theory of Liability or the Rules of Civil and Criminal Responsibility in Islamic Jurisprudence* (9th edn, Dār al-Fikr al-Muʿāṣir 2012) 25.

35 ibid 29.

36 ibid 24.

37 Al-Khafif (n 33) 58.

38 Hamad bin Muhammad Al-Hajri, *Jurisprudential Rules and Principles in Financial Liability* (Dār Kunūz Ishbīliyya 2008).

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Application of this rule includes:

- If a person claims a right against another person, but it is later revealed they have no such right to what they claimed, the defendant is entitled to recover the equivalent of the settlement amount from the claimant.[39]
- A buyer who pays for an item that is later found to belong to someone else may only reclaim their payment if the seller accepts or by court decision.[40]

An example of how commercial courts cite this type of citation can be seen in Case No. 439337994, which was decided before the law entered into force. In this case, the plaintiff claimed to have entered into a purchase agreement with the defendant, under which the defendant agreed to sell refrigerators, ovens, and shelves for a total price of SAR 79,693, which was fully paid. However, the plaintiff alleged that the defendant failed to deliver the goods on time, resulting in damages including rental costs and employee wages. As a result, the plaintiff sought compensation of SAR 115,000 for the delay in delivery.

The court rejected the plaintiff's claim based on the findings that there was no evidence demonstrating that the plaintiff had experienced any harm or incurred losses as a result of the defendant's actions. Consequently, the court held that the claim for liability was invalid due to the absence of a crucial element—namely, damage. Since a valid compensation claim requires the presence of all three essential elements—fault, damage/harm, and causation—the court concluded that the absence of damage rendered the entire claim untenable.[41] In reaching this conclusion, the court explicitly relied on general principles of tort liability and established that the absence of one of these elements—the damage in this case—rendered the compensation claim invalid.

3.2. Shariah Jurists

In most commercial court cases prior to the implementation of the Civil Transactions Law, courts cited Shariah jurists' opinions to establish or deny the defendant's liability in certain types of compensation claims. Among the most frequently cited opinions is the principle that "If the debtor is capable of repayment but delays the repayment to the point where the creditor is forced to complain -file a complaint-, the expenses incurred due to the delay of repayment shall be borne by the delaying debtor, provided that such expenses are incurred in the usual manner."[42] Courts have applied this reasoning to establish liability for litigation expenses caused by unjustified delay in repayment.

39 Ali Haydar Khawaja Amin Afandi, *A Commentary on the Mejelle* (Fahmi Al-Husaini tr, Dar Al-Jil 1991) 98.

40 Muhammad Al-Zuhayli, Jurisprudential Principles and their Applications in the Four Schools of Thought (Dar Al-Fikr 2006) 560.

41 Case No 439337994 [2022] Commercial Court (KSA).

42 Ibn Taymiyyah, *Collected Fatwas of Sheikh al-Islam Ibn Taymiyyah*, vol 30 (Umar Al-Jazzar and Anwar Al-Baz eds, Dār al-Wafā' 2005) 18.

In other decisions, courts referenced Resolution No. 123 (5/13) of the International Islamic Fiqh Academy to establish the impermissibility of financial charges beyond the principal debt. It states that:

> *"If the buyer/debtor delays the payment of instalments after the specified date, it is not permissible to charge any amount in addition to his principal liability, whether it is made a pre-condition in the contract or it is claimed without a previous agreement, because it is Ribā, hence prohibited in Shariah."*[43]

Less frequently, courts have invoked Shariah principles to establish the liability of a *Muḍārib* who exceeds his authority. One commonly cited rule holds that: "If the *Muḍārib* transgresses by acting beyond his authority or purchasing something he was instructed not to buy, he shall be liable for the capital".[44]

Courts also cite Resolution No. 109 (3/12) of the International Islamic Fiqh Academy, which states:

> "*The loss, which is permissible to compensate, includes the actual financial loss suffered by the partner, any other material loss and the certainly realisable gain that he misses due to his partner's default or delay. This does not include moral prejudice."*[45]

In lease contract disputes, courts have cited the classical principle that: "*The lessee holds a trustee possession of the leased asset; if it is lost or damaged without negligence, the lessee is not liable*."[46]

An illustrative case that demonstrates the use of Shariah juristic citations is Case No. (4683) where the plaintiff claimed that he had entered into a Mudaraba Partnership contract with the defendant, wherein he contributed SAR 25,000 in capital, and the defendant was to design, operate, and manage a tea cart. The plaintiff alleged that the defendant failed to fulfil his contractual obligations under the agreement and argued that this failure deprived him of the intended benefit of the contract. To support his claim, the plaintiff referenced the view of the majority of Shariah jurists, who hold that liability arises from depriving a benefit whose cause for existence has been established, as it is deemed equivalent to a realised benefit. He further cited Ibn Taymiyyah, who stated:

43 International Islamic Fiqh Academy, Resolution No 123 (5/13) of 2001 'Qirad or Joint Muḍārabah in Financial Institutions (Investment Accounts)' *Resolutions and Recommendations of the International Islamic Fiqh Academy: Organization of Islamic Cooperation* (IIFA 2024) 256.

44 Ibn Qudamah, *Al-Mughnī* (Abdullah Al-Turki and Abdulfattah Al-Hilu eds, Dār ʿĀlam Al-Kutub 1997) vol 7, 162.

45 International Islamic Fiqh Academy, Resolution No 109 (3/12) of 2000 'Penalty Clause' *Resolutions and Recommendations of the International Islamic Fiqh Academy: Organization of Islamic Cooperation* (IIFA 2024) 226.

46 Ibn Qudamah (n 44) vol 5, 396.

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"If a worker abandons his task until the fruit spoils, he should be liable for the owner's share. An estimation should be made of what would have resulted had he worked diligently, just as he would be liable if the trees had dried up. This is because abandoning the work without terminating the contract is impermissible (haram) and entails *ġarar* (excessive uncertainty), and it directly causes the loss of the fruit, making it akin to its destruction under wrongful possession."[47]

Based on these principles, the plaintiff requested the court to issue a judgment obligating the defendant:

1) Return of the invested capital (SAR 25,000), and
2) Compensation for the lost benefit (SAR 25,000), resulting from the failure to realise the investment.

The court accepted the first request (return of the invested capital) based on evidence of payment (payment transfer) and the defendant's absence from court despite being duly notified. However, the court rejected the second claim—compensation for the lost benefit—based on the explanation that the plaintiff did not prove the existence of actual damage. The court explained that the calculation of the missed profit would be speculative, subject to ambiguity (جهالة) and *ġarar* (uncertainty), both of which are prohibited under Shariah. It also noted that commercial court precedent has established that anticipated or missed profits cannot be compensated if the loss is uncertain or unsubstantiated.

The court further invoked the Islamic legal maxim: "It is not permissible for anyone to take another person's property without a legitimate basis," and analogised the case to scholarly positions on delaying debtors. Scholars agree that it is not permissible to award compensation for lost profits arising from delay, as such profits are inherently uncertain. They have further stated that even a usurper is not liable for the presumed profit or missed opportunities. Preventing the rightful owner from accessing their property through usurpation or theft is deemed more unjust than a delay in repayment. Nevertheless, classical jurists did not require the usurper or thief to compensate for the harm caused by delay, the loss of property benefits, or the actual damage resulting from possession of the property during the period of wrongful deprivation. Thus, the rightful owner bears the consequences. The court concluded by stating that judicial rulings have established this principle.[48]

Since this case was decided before the implementation of the CTL, the court cited Shariah jurists and general principles to establish that uncertain damage or harm—described as missed profit—cannot be compensated. However, such a ruling may be revisited under

47 Ibn Taymiyyah, *Completion to the Collected of Fatwas of Sheikh al-Islam Ibn Taymiyyah*, vol 4 (Mohammad ibn Abd al-Rahman ibn Qasim ed, nd) 43.

48 Case No 4683 [2021] Commercial Court (KSA).

Article 137 CTL, which allows compensation for both actual and expected losses.[49] This reform indicates that codification might improve legal certainty by clarifying when missed profits can be compensated, thereby limiting the discretion courts had before the implementation of the law.

3.3. Laws and Regulations Articles

Before the implementation of CTL, articles cited by the Commercial Court to ground its approval or rejection of the compensation claim varied. However, Article 164 of the Implementing Regulation of the Commercial Courts Law (IRCC) dominated, accounting for 90% of the articles cited. This article sets up the standards for assessing the amount of compensation. It stipulates:

"The court shall include in its judgement on the merits, deciding on a petition for compensation for material and moral harms, including litigation expenses. The court shall, in estimating the compensation, observe the following:

a) Severity of the damage; b) Adjudged amount; c) Repeated default of the person against whom the judgment is rendered; d) Established custom or regular practice; e) Expert's opinion, when necessary."[50]

While Article 164 IRCC provides rules for compensation estimation, these rules might be generally applied as a principle or specifically applied in certain cases.[51] It also does not provide a legal basis to establish the liability for compensation. Nevertheless, it has been the most frequently applied provision in commercial court decisions. For example, in Case No. 4570263473, dated 20/6/1445 Hijri, the plaintiff requested the court to issue a judgment obligating the defendant to pay his contractual entitlements arising from a construction contract and to compensate for attorney's fees. The court obligated the defendant to pay based on the defendant's admission. Regarding attorney's fees, the court relied on general principles ("harm must be removed"), opinions of Shariah jurists, and Article 164 IRCC.[52] This reflects the most common citation structure prior to the CTL's implementation: the

49 Royal Decree No (M/191) (n 24) art (137). Article 137 of the Saudi Civil Transaction Law stipulates "The harm for which a person is liable for compensation shall be determined according to the aggrieved party's loss, whether the loss is actually incurred or in the form of lost profits, if such loss is a natural result of the harmful act. Such loss shall be deemed a natural result of the harmful act if the aggrieved party is unable to avoid such harm by exercising the level of care a reasonable person would exercise under similar circumstances."

50 Minister of Justice Resolution No 8344 of 7 June 2020 'The Implementing Regulation of the Commercial Courts Law' <https://portaleservices.moj.gov.sa/TameemPortal/TameemList.aspx> accessed 17 February 2025.

51 Mohammed Awad Saad Al-Ahmadi, *Assessment of Compensation arising from Unjust Enrichment in Saudi Civil Transactions Law* (Qadha Association 2023).

52 Case No 4570263473 [2024] Commercial Court (KSA).

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court established liability using general principles, and/or Shariah jurisprudence and relied on Article 164 to establish the court's discretion to estimate the compensation amount.

Following the implementation of CTL, several of its articles have frequently been cited in commercial court decisions. Among the most cited provisions is Article 120 CTL, which states: "Any fault causing harm to a third party shall entail liability for compensation".

This article has been interpreted to establish that the Saudi legislator recognises two types of harm: material and moral.[53] Courts also often cite Article 136 to affirm that the compensation amount, stipulating: "*Compensation shall fully cover the harm; it shall restore the aggrieved party to his original position or the position he would have been in had the harm not occurred.*"

In Case No 4571330846, dated 14/11/1445 Hijri, the plaintiff requested the court to issue a judgment obligating the defendant to pay SAR 7,544, representing the value of returned goods, in addition to compensation for attorney's fees. The plaintiff supported his claim with an invoice for the goods issued by the defendant, a return invoice for the same goods issued by the defendant, and a bank transfer for the same amount of the goods.

The defendant acknowledged the validity of the sale contract and receipt of the payment but contested the validity of the return invoice, arguing that the plaintiff had attempted to return the goods after the seven-day period and had failed to provide the original invoice.

The court, however, ruled in favour of the plaintiff. It cited Article 33 of the Civil Transactions Law, which states that an offer and acceptance may be made in any form that clearly conveys intent. Based on this, the return invoice issued by the defendant's employee constituted acceptance of the return. Regarding the compensation request, the court stated:

> *"This request falls under the category of damage compensation, as per Article 120 of the Civil Transactions Law. This law stipulates that any fault that causes harm to others obligates the perpetrator to provide compensation. Furthermore, Article 136 of the same law defines compensation as the amount that fully compensates for the harm, restoring the harmed party to their original position or the position he would have been in had the damage not occurred."*

The court found that the defendant's delay in returning the amount constituted a fault, which led the plaintiff to incur expenses, including the cost of filing the lawsuit and hiring an attorney. Therefore, the plaintiff suffered harm that warranted compensation under Article 164 of the IRCC.[54] The court established the defendant's liability by citing Articles 120 and 136 and used Article 164 to justify awarding compensation for attorney's fees.

53 Tariq Al-Samara, *Sources of Obligation in the New Saudi Civil Transactions Law and the French Civil Code: A Comparative Study* (Prince Sultan UP 2025) 184.

54 Case No 4571330846 [2024] Commercial Court (KSA).

Article 137 is another important provision, which states:

> *"The harm for which a person is liable for compensation shall be determined according to the aggrieved party's loss, whether the loss is actually incurred or in the form of lost profits, if such loss is a natural result of the harmful act. Such loss shall be deemed a natural result of the harmful act if the aggrieved party is unable to avoid such harm by exercising the level of care a reasonable person would exercise under similar circumstances."*

One commentator explained that this article establishes the basis for determining the scope of compensable harm. Compensation should be based on direct harm caused by the harmful act, including both actual losses and lost profit—whether it is material or moral, foreseeable or unforeseeable, current or future—as long as the harm is actual and constitutes a natural result of the harmful act. Direct harm can be described as a natural result of the harmful act if the aggrieved party is unable to avoid such harm.[55]

Commercial Court decisions have frequently cited Article 125 of the CTL, which states:

> *"A person shall not be liable for harm the cause of which is established to have been for a reason beyond said person's control, such as force majeure or a default committed by a third party or the aggrieved party, unless agreed otherwise."*

This article is often cited alongside Article 138 CTL, which affirms that "1. Compensation for a harmful act shall include compensation for moral harm. 2. Moral harm shall include physical or psychological harm sustained by a natural person as a result of an infringement on his body, freedom, honour, reputation, or social standing. 3. The right to compensation for moral harm may not be transferred to a third party, unless its value is determined pursuant to a legal provision, agreement, or judicial ruling. 4. The court shall assess the moral harm sustained by an aggrieved party, taking into consideration the type and nature of such harm and the person of the aggrieved party."

In Case No. 4571045157, dated 24/10/1445 Hijri, the court rejected the plaintiff's claim for compensation of attorney's fees based on Articles 125 and 138, and on the findings that the plaintiff did not make a reasonable effort to avoid the damage.[56]

Another important provision is Article 180 CTL, which provides:

> *"If the amount of compensation is not specified in a contract or a legal provision, it shall be determined by the court in accordance with the provisions of Articles 136, 137, 138, and 139 of this Law. However, if the obligation arises from the contract, the debtor who has not committed any act of fraud or gross negligence shall be liable only for compensating harm that could have been anticipated at the time of contracting*." One commentator raised the question of how compensation can be specified by legal provision and provided the theoretical background on this concept.[57]

55 Khalid al-Sayyid Muhammad Abdulmajeed Musa, *Commentary on the Provisions of the New Saudi Civil Transactions Law*, pt 1 (Dar Al-Kitab Al-Jamei for Publishing and Distribution 2025) 363-5.

56 Case No 4571045157 [2024] Commercial Court (KSA).

57 Musa (n 55) 472.

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An examination of Commercial Court decisions shows that the compensation amount is specified by legal provisions. For example, in Case No. 7653 dated 20/02/1442 Hijri, the court cited Article 15 of the Passenger Rights Protection Regulations, which stipulates:

> "…4. In case of baggage delay at the Final Destination, the passenger shall be compensated according to the following details: a. The equivalent of 148 Special Drawing Rights Units when the baggage arrives after the arrival time specified in the Reservation, for the first day. b. The equivalent of 60 Special Drawing Rights Units for each day of delay starting from the second day, with a maximum compensation of 1288 Special Drawing Rights Units…".

In Case No. 41823623 dated 16/11/1442 Hijri, the court established the carrier's liability and assessed the amount of compensation based on Articles 19 and 20 of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention). Article 19 provides that:

> "*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures*".

The compensation amount was specified according to Article 20, which stipulates that:

> *"In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4150 Special Drawing Rights."*[58]

The citing of Article 720 CTL is the second most common among CTL provisions, which states that:

> "*Without prejudice to the provisions of Article 1 of this Law, the rules set forth in this Article shall be applied in a manner not inconsistent with legal provisions, subject to their respective nature, conditions, and exceptions. Said rules shall comprise the following: … Rule 16 Harm shall be removed. Rule 17 Harm shall not be removed by a similar harm … Rule 38 What is forfeited may not be reinstated… Rule 40 A person who attempts to renege on a matter shall be estopped*".

An example can be found in Case No. 4571282058 dated 25/8/1445 Hijri, involving a purchase between the plaintiff and the defendant. The plaintiff claimed that he did not receive the goods and requested that the court issue a judgment obligating the defendant to reimburse the purchase price and compensate him for litigation expenses. As the defendant

58 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999) [2001] OJ L 194/39 <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280078e04> accessed 17 February 2025. The Montreal Convention signed by the Kingdom of Saudi Arabia on 28 May 1999, and came into force on 15 December 2003.

failed to appear before the court, the court issued its judgment in favour of the plaintiff. In support of its decision to grant compensation, the court relied on Article 120 CTL and Rule 16 of Article 720 CTL, which states that "Harm must be removed". The court then estimated the compensation amount based on Article 164 IRCC.[59]

4 ANALYSIS

The goal of this analysis is to closely examine commercial court decisions published on the **Legal Gate** website administered by the Ministry of Justice[60] to understand how the Commercial Court interprets and decides compensation claims before and after the implementation of the CTL. The analysis seeks to determine whether judicial interpretation has shifted following the implementation of the CTL.

To this end, court decisions were closely examined to identify which type of citation was used the most by courts, patterns in court citation, and whether a certain type of citation is associated with a higher rate of rejection or approval of the compensation claim, in accordance with the data collection and exclusion details mentioned above. However, it is important to note that the number of post-CTL decisions was relatively small.

4.1. Overview of the Dataset

Following the collection of data based on the prior specifications, the final number of cases issued before the CTL includes 2,913 for the period from 3 May 2016 to 10 December 2023, from 13 court regions: *Abha, Albaha, Buraydah, Dammam, Hail, Jazan, Jeddah, Madina, Makkah, Najran, Riyadh, Skaka, Tabuk.*

The total number of citations by type is as follows: **(Article)+(The Law)** – 1,056; **Shariah Jurists** – 1,153; **General Principles** – 850; **Contract** – 130; and finally, **No Citation** – 537.

***Table* 2. Pre-Law Overview of Citation Types**

Citation Type	*No. of Cases Cited*	*Percentage*
Law Articles	1,056	36%
Shariah Jurists	1,153	40%
General Principles	850	29%
Contract	130	4%
No Citation	537	18%

59 Case No 4571282058 [2024] Commercial Court (KSA).

60 Legal Gate (n 20).

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On the other hand, the total number of decided compensation cases after the implementation of the Civil Transactions Law, covering the period from 16 December 2023 to 1 April 2025, is 61 cases (Table 3).

***Table* 3. Post-Law Overview of Citation Types**

Citation Type	*No. of Cases Cited*	*Percentage*
Law Articles	38	62%
Shariah Jurists	13	21%
General Principles	11	18%
Contract	1	2%
No Citation	10	16%

4.2. Citation Trends before CTL

Commercial Court decisions published and available from 3 May 2016 to 10 December 2023 reveal common themes that can be drawn from both the data and close observation of the cases. These trends represent the Commercial Court citation standpoint before the issuance of the Civil Transactions Law and can be referenced for comparison after its issuance.

a) **Structured Citations in Attorney's Fees cases**:

Some cases include a combination of more than one citation type; 798 out of 2,913 cases mention multiple citation types, representing approximately 27% of the total. The distribution within the 27% different citation combinations is illustrated in Chart 1, which shows that Law Article + Shariah Jurists constitutes approximately 59% of these 798 cases, which is 474 cases.

The prevalence of this combination can be attributed to the fact that most compensation cases in this analysis concern attorney's fees, with the most common cited article being Article 164 IRCC, representing 90% of the articles cited.

Accordingly, the Commercial Court in attorney's fees compensation cites Shariah Jurists to establish liability (*Ḍamān)* and Article 164 IRCC to estimate the compensation amount. A noticeable trend in commercial courts' decisions is the structured judicial citation in attorney's fees and litigation expenses compensation claims.

In these cases, courts commonly follow a two-stage citation structure. First, courts establish the debtor's liability (*Ḍamān*) by citing Shariah jurists' opinion regarding unjustified delay of payment. Second, the courts estimate the compensation by citing Article 164 IRCC. This pattern is consistent across many cases and supported by qualitative examination as well as

quantitative findings. Roughly 90% of all article citations refer to Article 164 IRCC. The combination of Law Article + Shariah Jurists constitutes 59% of the overall citation combinations; considered separately, it represents 41% of all Shariah Jurists citations (1,153), and 45% of all article citations (1,056). The prevalence of this citation structure suggests that judicial interpretation of attorney's fees/litigation expenses claims was relatively consistent and based on the opinion of Shariah jurists.

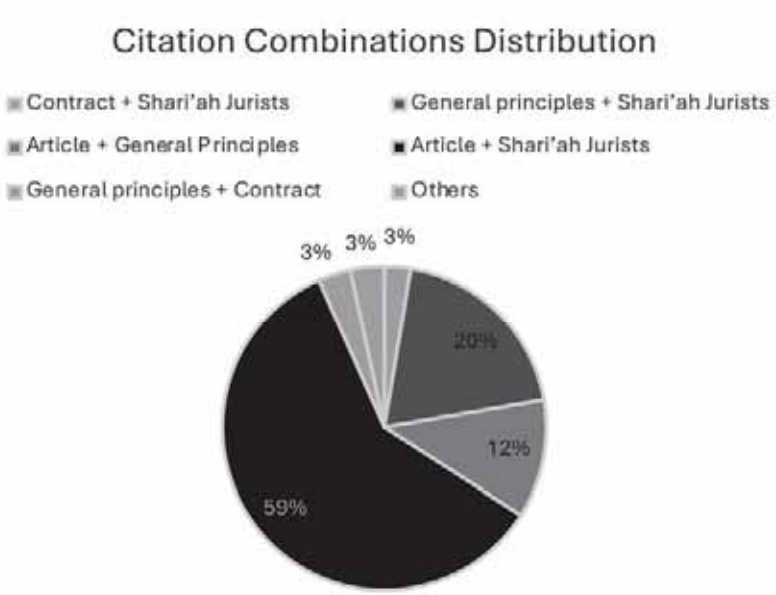

Chart 1. The combination of citation types in cases decided before the implementation of CTL

b) Rejection rates in cases citing only General Principles:

Another aspect of the dataset meriting examination concerns the approval and rejection rates for each citation type. The data indicate 1,000 out of 1,056 cases citing Articles resulted in a favourable ruling, representing roughly 95% of cases citing Articles (Table 4). This high rate of acceptance may be attributed to the fact that 90% of the Article citations refer to Article 164 IRCC, which is generally invoked subsequent to the establishment of liability. However, there are some instances where Article 164 IRCC is cited to affirm the court's discretionary power to deny compensation claims. For example, in Case No. 438524 dated 17/09/1443 Hijri, the court upheld the plaintiff's primary request to enforce contractual obligation, but rejected the secondary claim for compensation related to material damages—interpreted by the court as attorney's fees, based on Article 164 IRCC. The court stated that, regarding the attorney's fees request, since it has the discretionary power to

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estimate the compensation amount and litigation expenses under Article 164 IRCC, the plaintiff is not entitled to such a claim.[61]

That being said, cases citing Shariah Jurists also exhibit a substantial proportion of granted decisions. This observation is explicable by the 474 cases cited both Articles and Shariah Jurists, amounting to 41% of all cases referencing Shariah Jurists, in contrast to the structured citation patterns observed in cases citing Articles or Shariah jurists, cases relying exclusively on General Principles, or cases labelled as No Citation show higher rejection rates. Among cases citing only General Principles, or those categorised as having No Citation, tend to demonstrate higher rejection rates. Specifically, among cases citing General Principles, 37.8% were granted (213 out of 563), whereas cases labelled as No Citation yielded a more balanced outcome, with a grant rate of 55.6%.

These findings raise the question of whether the existence of specific legal provisions contributes to a higher grant rate. The data suggests this might be the case, for example, Article 164 IRCC provides a basis for the commercial court to determine the harm in attorney's fees compensation disputes, which represents 90% of all Article citations and is frequently granted. On the other hand, only General Principles citations appear in cases where the court expresses uncertainty regarding the extent of the harm, fault, or causation.

Such findings can be observed in commercial court decisions, for example, in Case No. 439473627 dated 9/4/1444 Hijri, the court found that the defendant (company director) breached his legal obligation under Article 152 of the Companies Law and was therefore liable for the company's obligations. However, the plaintiff's claim for compensation for material damages was rejected because the plaintiff did not specify the type and extent of harm or establish a causal link between the breach and the alleged harm.[62]

***Table* 4. Pre-Law Courts Decision Outcome by Citation Types**

Court Decision	***Articles***	***Shariah Jurists***	***General Principles***	***Contract***	***No Citation***
Granted	1000	954	395	69	297
Partial	12	25	46	19	13
Rejected	44	174	409	42	227
Total	1056	1153	850	130	537

61 Case No 438524 [2022] Commercial Court (KSA).
62 Case No 439473627 [2022] Commercial Court (KSA).

c) Tendency toward Article-based citation:

Given that the scope of the data collection covers the period from 2013 to 2024, the available and collected data span from 2016 to early 2024. Considering that the data from 2016 to 2019, along with cases dated in 2024 prior to the issuance of the CTL, are insignificant in volume—amounting to only 30 cases—they were disregarded from the time percentage increase calculation (Table 5). This calculation instead focuses on the period from 2020 to the end of 2023, and amounts to 2,884 cases.

The analysis shows an increase in court citations of codified legal texts prior to the issuance of the CTL. Specifically, 13.9% of commercial court decisions cited legal articles in 2020, rising to 49.6% by 2023. Such an increase can be attributed to the issuance of the IRCC in June 2020.

***Table* 5. Percentage of Cases Citing Articles before CTL**

Year	*Number of Cases*	*Article Citation*	*% Article Cited*
2020	*173*	*24*	*14%*
2021	*383*	*70*	*18%*
2022	*1,209*	*407*	*34%*
2023	*1,119*	*553*	*49%*

4.3. Citation Trends after CTL

The analysis of cases following the implementation of the CTL shows an increasing shift toward article-based citation. Commercial Courts relied on Articles to ground their judgments in over 62% of the cases (38 cases) after CTL (Table 3). Only 11 cases (18% of the 61 cases) featured combined citations (Chart 2), suggesting that most courts are citing Articles independently.

Out of all cases that cited Articles after CTL, a total of 70 individual citations were recorded (Chart 2). These citations were concentrated primarily on three articles:

- Article 164 IRCC with 28 citations, which represents 40% of all Article citations
- Article 120 CTL with 13 citations
- Article 720 CTL with 8 citations

These three articles represent approximately 70% of the total citations, indicating that commercial courts are increasingly adopting the compensation provisions of the Civil Transactions Law. The remaining 30% of citations are scattered across more than ten other articles.

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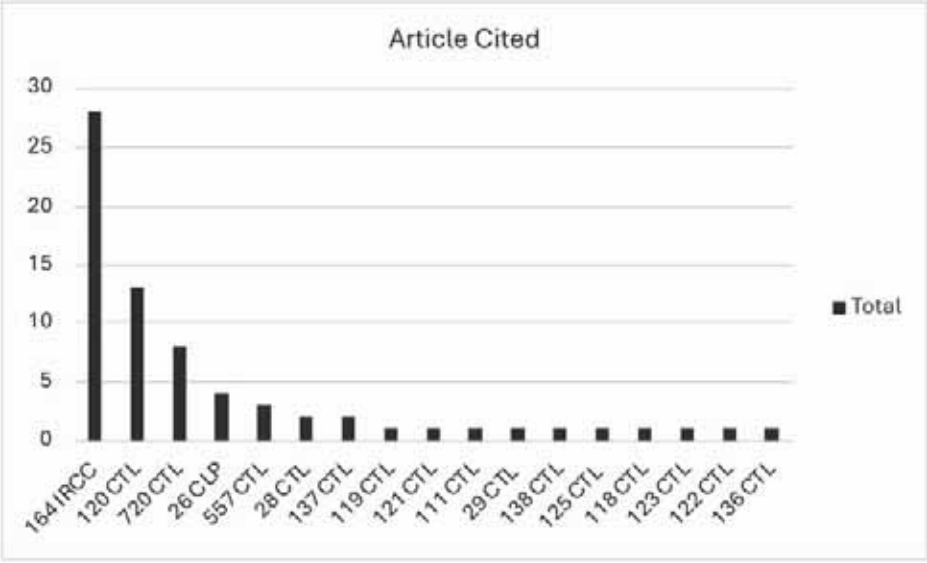

Chart 2. Distribution of the most cited legal provision after the implementation of CTL

The distribution of court decision outcomes with each citation type for cases after the law's implementation (Table 6) indicates that 30 of 38 cases citing Articles were granted, representing 79%, while only 7 cases were rejected. In contrast, cases citing General Principles or No Citation exhibit a lower rate of granted decisions.

Table 6. Post-Law Courts Decision Outcome by Citation Types

Court Decision	***Articles***	***Shariah Jurists***	***General Principles***	***Contract***	***No Citation***
Granted	30	9	4	0	4
Partial	1	0	0	0	0
Rejected	7	4	7	1	6
Total	38	13	11	1	10

5 ANALYSIS FINDINGS

Based on the results of Table 4 and Table 6, the rate of cases that cite **Article** and were **Granted** or **Partial** increased from 34.7% in the pre-law period to 50.8% in the post-law period. This upward shift is evidence for the notion that codification through judicial practice promotes legal certainty.

Furthermore, in line with the research goal of examining commercial court citations following the implementation of the Civil Transactions Law, an interrupted time series analysis (ITS) was conducted to track the judicial citations from April 2016 to November 2024. The analysis considers the month of each commercial court decision as the time unit. The point of interruption was set at January 2024, despite some cases citing CTL from 16 December 2023 to 1 January 2024, since there was at least a day when the law was not yet in effect. Prior to the implementation of CTL, the proportion of cases citing Articles showed a general upward trend, as shown in Table 5 and Chart 3.

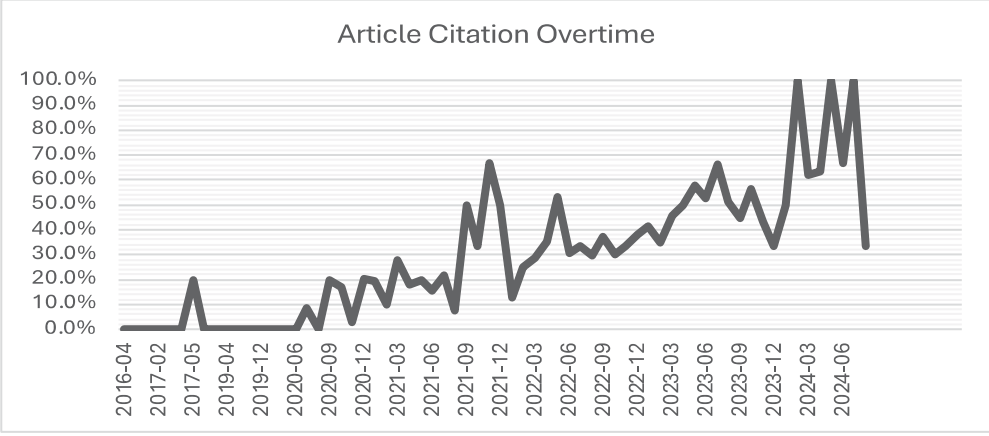

Chart 3. Article citation trend for the period (2016-2024), which covers cases that were decided before and after the implementation of CTL

However, Chart 3 also reveals a sharp increase in the proportion of articles cited following the interruption point in January 2024. This abrupt increase, together with the qualitative analysis presented above, suggests that commercial courts began to substantially rely on CTL provisions when interpreting and adjudicating compensation claims. Although the limited number of cases after the interruption point is a factor, the conclusion that commercial courts immediately adopted CTL to interpret compensation claims is supported by the close examination of the case law.

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Prior to the implementation of the law, the most common citation structure combined Articles with Shariah Jurists or General Principles, where courts cited Shariah jurists or general principles to establish or deny the defendant's civil liability. For example, in Case No.4470937079 (pre-law), compensation for attorney's fees was granted based on the court's findings that the defendant procrastinated in settling the unpaid price without any acceptable excuse. The court associated this with Islamic jurisprudence, which states that if someone incurs expenses as a result of a transgression by another person, that person is liable for such expenses. The court estimated the compensation amount based on Article 164 IRCC as 10% of the amount awarded.

In contrast, after the implementation of the CTL, in Case No. 4570707007, the court accepted the plaintiff's request for compensation after establishing the defendant's wrongful act and the causal link between his action and the plaintiff's damages, in accordance with Article 120 of the CTL. The compensation amount was then estimated based on Article 164 IRCC.

Taken together, the ITS trend and the close examination of cases indicate that commercial courts are increasingly substituting citations of General Principles and Shariah Jurists with CTL Articles, which, in essence, are derived from these two sources.

6 CONCLUSIONS

This paper explores the extent to which the adoption of the Civil Transaction Law and the shift from Shariah to civil law have contributed to legal certainty in Saudi courts. Post-law analysis suggests that commercial courts have replaced the combined reliance on general principles and Shariah jurists with Articles 120 and 720 of the Civil Transactions Law. This finding is supported by both quantitative (e.g., increase in Article citation from 36% to 62%) and qualitative examination of commercial court cases decided based on these articles.

While a limited number of cases after the implementation of the law restricts the ability to draw long-term conclusions, the available data support the hypothesis that the enactment of the CTL has led the Commercial Court to increasingly rely on codified compensation provisions contained in the law when deciding compensation claims. This shift in citation—from General Principles and Shariah Jurists to specific Articles of CTL to establish the liability for compensation—signals an increasing role for legal certainty in Saudi judicial practice.

As researchers have noted, predictable and clear laws reduce uncertainty, enhance economic efficiency, and facilitate legitimate expectations.[63] From this perspective, it can be argued that the codification of compensation provisions under the CTL contributes to economic efficiency and legal security in Saudi Arabia. Moreover, the Commercial Courts' increasing

63 Portuese, Gough and Tanega (n 11).

reliance on codified provisions, as explained in this paper, could be interpreted as an effort to promote legal certainty and reduce the economic cost of unpredictability.

Overall, it is impressive how quickly the shift toward applying civil law has been implemented by the courts, with the expectation that parties will benefit from a higher level of legal certainty in civil and commercial disputes.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВІДСТЕЖЕННЯ СУДОВИХ ЗМІН У НАПРЯМКУ БІЛЬШОЇ ПРАВОВОЇ ВИЗНАЧЕНОСТІ ЗА ДОПОМОГОЮ АНАЛІЗУ ЦИТУВАННЯ: ДОСЛІДЖЕННЯ ПРАВОВОЇ ПІДСТАВИ ДЛЯ РІШЕНЬ ЩОДО КОМПЕНСАЦІЇ В КОМЕРЦІЙНИХ СУДАХ САУДІВСЬКОЇ АРАВІЇ ПІСЛЯ ПРИЙНЯТТЯ ЗАКОНУ ПРО ЦИВІЛЬНІ УГОДИ

Файсал Алсувайлем* та Златан Мескич

АНОТАЦІЯ

Вступ. *Правова визначеність є керівним принципом у всіх європейських країнах. Одним з основних інструментів досягнення правової визначеності в Європі є кодифікація права. У 2023 році Саудівська Аравія прийняла свою першу кодифікацію договірних та недоговірних зобов'язань через Закон про цивільні угоди (CTL), прагнучи досягти більшої правової визначеності. Цей крок є суттєвим переходом від переважно шаріатської юрисдикції до цивільного права. У цьому дослідженні розглядається, чи вплинуло прийняття CTL на тлумачення Комерційним судом Саудівської Аравії позовів про відшкодування збитків.*

Методи. *Для відстеження тенденцій цитування з плином часу та вивчення документів судової практики з метою підтвердження кількісних результатів було застосовано змішаний підхід. Якісний емпіричний аналіз, зокрема аналіз документів, було використано для виявлення та виокремлення думок юристів-експертів шаріату, що забезпечило глибину статистичних результатів. Кількісні емпіричні методи, зокрема аналіз часових рядів з інтервенцією (ITS), були застосовані для оцінки того, чи призвели положення про компенсацію в Законі про компенсацію до значних змін у рішеннях щодо компенсаційних позовів. Загалом у цьому дослідженні було проаналізовано 2913 справ, розглянутих до запровадження Закону про компенсацію, та 61 справу, розглянуту відповідно до Закону про компенсацію.*

Результати та висновки. *Аналіз до прийняття закону показує, що суди посилалися на юристів-експертів шаріату або загальні правові принципи для встановлення відповідальності за компенсацію. На противагу цьому, аналіз після прийняття закону свідчить про помітні зміни: суди дедалі частіше посилаються безпосередньо на положення цивільного законодавства, зокрема на статті 120 та 720 Закону про компенсацію. Це підтверджується збільшенням загальної кількості цитувань статей у рішеннях про компенсацію з 36% до 62%, про що свідчить розгляд справ, вирішених на основі цих статей. Ці висновки свідчать про те, що прийняття Закону про цивільні угоди сприяло підвищенню правової визначеності в комерційних судах Саудівської Аравії.*

Ключові слова: *правова визначеність, Саудівська Аравія, Закон про цивільні угоди, позов про компенсацію, емпіричний правовий аналіз, судова аргументація.*

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Research Article

INTERNATIONAL AND NATIONAL LEGAL FRAMEWORKS FOR RESPONDING TO CLIMATE-DRIVEN ENVIRONMENTAL CRIMES: A FOCUS ON VIETNAM

Nguyen Kim Chi

ABSTRACT

Background: *Environmental crimes related to climate change encompass unlawful acts that harm the natural environment and worsen climate issues. However, Vietnam's legal framework faces significant limitations in addressing these offences, with many harmful acts not classified as crimes and penalties often lacking proportionality and deterrent effects. Therefore, examining Vietnamese criminal law is essential for improving the legal response to these environmental crimes.*

Methods: *The author employs various social science research methods to enhance understanding of environmental crimes. By integrating qualitative legal research, doctrinal analysis, comparative studies, and case studies, the author clarifies both international and national legal frameworks. The doctrinal approach illuminates these frameworks, while the comparative method evaluates Vietnam's laws in relation to international standards. Additionally, case studies highlight legal gaps that impede the prosecution of serious environmental harm. These combined methods provide a comprehensive analysis of the issue.*

Results and Conclusions: *This article analyses international legal instruments alongside Vietnamese criminal law pertaining to climate-driven environmental crimes. It addresses key challenges, emerging trends, and current policy responses. Ultimately, it proposes legal and institutional reforms aimed at enhancing the legislative framework and improving the effectiveness of law enforcement.*

1 INTRODUCTION

Alongside the recovery and development of the socio-economy, environmental pollution is increasing due to urbanisation, the widespread use of chemicals and pesticides, and large-scale deforestation. These factors have led to severe ecological imbalances. Deforestation, in particular, has hindered the ability to retain upstream water, resulting in floods, soil erosion and degradation. Industrial development has generated large amounts of toxic waste, while the ozone layer depletion has contributed to global warming, among other effects.

These phenomena present environmental protection as a significant challenge for most countries and the international community, including Vietnam. Of particular concern is that, alongside efforts to address environmental degradation, the deteriorating quality of the living environment continues to severely impact public health and constrain socio-economic development. Simultaneously, states are increasingly confronted with the rise of environmental crimes, including those associated with climate change.

According to a report by INTERPOL, environmental crime is growing at a rate of 5–7% per year—two to three times faster than the global economic growth rate—making it the fourth fastest growing area of organised crime worldwide.[1] The economic value of transnational environmental crimes is estimated to range from USD 91 to 258 billion annually, encompassing activities such as illegal logging, wildlife trafficking, and the trade in hazardous waste.[2] Notably, the amount of money lost due to environmental crime is more than 10,000 times greater than the amount allocated by international agencies to combat it—only USD 20–30 million.[3]

Under the UNODC's report, multiple underlying factors contribute to the rise of environmental crimes, particularly those related to climate change. The main causes include poor governance, widespread corruption, inadequate funding, lack of prosecution, limited international cooperation, and ineffective regulatory frameworks. Institutional in nature, these factors highlight the structural deficiencies of both national and international governance systems that enable and perpetuate environmental crime.[4] In responding to environmental crime in general, at the international level, states have continuously made efforts to reach global and regional agreements on this issue, such as the United Nations Convention against Transnational Organized Crime (UNTOC), the Kyoto Declaration, the

1 Christian Nellemann and others (eds), *The Rise of Environmental Crime: A Growing Threat To Natural Resources Peace, Development And Security: A UNEP–INTERPOL Rapid Response Assessment* (UN 2016) 4, 8, doi.org/10.18356/cdadb0eb-en.

2 ibid 4, 77; Rob White (ed), *Transnational Environmental Crime* (Routledge 2013).

3 'UNEP–INTERPOL Report: Value of Environmental Crime up 26%' (*United Nations Environment Programme (UNEP)*, 4 June 2016) <https://www.unep.org/news-and-stories/press-release/unep-interpol-report-value-environmental-crime-26> accessed 10 June 2025.

4 Benjamin Kurylo, 'What Is Environmental Crime?' (*Earth.Org*, 25 March 2024) <https://earth.org/explainer-what-is-environmental-crime/> accessed 10 June 2025.

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United Nations Convention on the Law of the Sea (UNCLOS) of 1982, the Convention on Biological Diversity (CBD), and the 2015 Paris Agreement on Climate Change.

As a developing country heavily affected by climate change and environmental pollution, Vietnam and its government have consistently prioritised environmental protection and prevention, as well as the strict enforcement of environmental laws, as a key strategic task to ensure the country's stability and sustainable development. Environmental crimes related to climate change are illegal acts that directly or indirectly cause harm to the natural environment, especially aggravating issues related to climate change. Such an area is increasingly focused not only on the negative impacts on the ecosystem but also on the endangered sustainable development of humanity. According to a report by the Environmental Crime Prevention Police Department, in 2024, the national force inspected, detected, and handled 26,640 cases involving 28,223 individuals who were in violation of laws related to environmental protection, natural resources, and food safety. Among these, 704 cases with 1,113 suspects were prosecuted or recommended for prosecution. In addition, 24,694 cases involving 25,977 individuals were subject to administrative penalties or proposed for administrative sanctions. These figures indicate that violations and crimes related to environmental protection, resource management, and food safety are becoming increasingly complex, with the number of cases continuing to rise.[5]

Vietnamese criminal law recognises acts considered environmental crimes related to climate change in the current Penal Code. These include the crime of causing environmental pollution (Article 235), the crime of bringing waste into Vietnam's territory (Article 239), the crime of destroying forests (Article 243), and the crime of violating regulations on the management and protection of endangered, precious and rare animals (Article 244), among others.[6]

Although certain progress has been made in both legislation and implementation, the Vietnamese legal system's handling of environmental crimes related to climate change remains limited. A highly debated argument is that environmental acts affecting the environment have not been identified as crimes, and the penalties applied to these crimes are not proportionate to achieve a higher deterrent effect. Therefore, examining the legislative framework and the provisions of current Vietnamese criminal law—alongside efforts to identify its limitations and challenges—is highly critical. This research provides a legal and empirical foundation for proposing future improvements to the law on environmental crimes related to climate change in Vietnam.

Through in-depth research, it is evident that the issue of environmental crimes, particularly related to climate change, is not a new research topic, as several authors have published

5 'Proactively Prevent and Resolutely Combat Crimes and Violations of Environmental Laws' *Public Security News* (Hanoi, 30 Decmber 2024) <https://cand.com.vn/xa-hoi/chu-dong-phong-ngua-kien-quyet-dau-tranh-voi-toi-pham-va-vi-pham-phap-luat-ve-moi-truong-i754943/> accessed 10 June 2025.

6 Law of Vietnam No 100/2015/QH13 of 27 November 2015 'Penal Code' (amended 2017) <https://vietanlaw.com/12-2017-qh14-364731/> accessed 19 June 2025.

relevant studies. However, given the complexities and evolving nature of these crimes, it is essential to build on previous findings and explore new trends in Vietnam. This article will cover several key areas: first, it will clarify theoretical issues regarding environmental crimes linked to climate change; second, it will analyse and comment on the treatment of such crimes under both international and Vietnamese law, including an assessment of Vietnam's compliance with its international commitments; third, it will identify key challenges and evaluate trends in environmental crimes in Vietnam; finally, it will offer recommendations for improving regulations on environmental crimes in Vietnamese criminal law and enhancing legal enforcement effectiveness.

2 METHODOLOGY

To achieve the research objectives of this paper, the author employs various social science research methods, including qualitative legal research, combining doctrinal legal analysis, comparative legal research, and case study methodology. Specifically, the doctrinal method is employed to clarify both the international and national legal frameworks related to environmental crimes. Subsequently, the comparative method serves as a lens through which to assess the consistency and compatibility of Vietnam's legal framework with international law regarding climate-related environmental crimes. The author acknowledges that Vietnam's legal system currently addresses environmental crimes related to climate change in a limited manner. Therefore, this paper incorporates practical illustrations—such as cases involving illegal emissions, deforestation, and unlawful exploitation of natural resources—to demonstrate how these offences have contributed to worsening climate impacts in Vietnam. The inclusion of specific cases anchors the analysis in legal practice, avoiding purely theoretical or abstract considerations, and allows for more concrete and actionable conclusions.

3 CONCEPT OF ENVIRONMENTAL CRIMES RELATED TO CLIMATE CHANGE

3.1. Definition of Environmental Crimes

Climate change, initially recognised as a primary cause of global warming and rising sea levels, is one of the major challenges facing humanity in the 21st century. *Climate change, in common sense, is identified as the phenomenon of shifts in terms of temperatures and weather patterns over a long period of time due to the impact of natural conditions and human activities, which is manifested by global warming, rising sea levels and increased extreme hydrometeorological phenomena.*[7]

7 Law of Vietnam No 90/2015/QH13 of 23 November 2015 'On Hydrometeorology', art 3, para 13 <https://thuvienphapluat.vn/van-ban/EN/Tai-nguyen-Moi-truong/Law-No-90-2015-QH13-Hydrometeorology/302898/tieng-anh.aspx> accessed 19 June 2025.

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Climate change brings multiple serious consequences affecting humans, animals, and the environment in various ways. Rising sea levels threaten low-lying areas and islands, leading to coastal flooding. Increasing global temperatures contribute to extreme heat, droughts and wildfires at a higher frequency.[8] *Extreme weather events such as storms, floods, droughts, tsunamis, and earthquakes are occurring with greater magnitude and frequency.*[9] *Biodiversity involving various species of animals and plants is also at risk of extinction.*[10] *In addition to public human impacts, climate change also poses serious risks to national and global economies, resulting in extensive critical damage and loss from natural disasters.*[11]

There are numerous reasons leading to climate change. Among them are human-caused bases such as greenhouse gas emissions, deforestation and further wrongful acts such as dumping waste into the environment, illegal hunting of animals, and so on.[12] *As a result, to protect the environment and mitigate the harmful effects of climate change, many countries have regulated human behaviours that contribute to it. These offences are increasingly classified under the category of environmental crime.*[13]

The concept of environmental crimes related to climate change has not been studied sufficiently, in contrast to the broader concept of environmental crime, which has been widely discussed over the decades. Environmental crime is a form of non-traditional crime that has only been recognised recently.[14] It was not until the 1960s—when the negative environmental impacts in the world after the industrial revolutions became more evident, along with lawsuits of victims of Agent Orange from herbicides after the war in Vietnam—[15] that the attention of the international community began to recognise the long-term and widespread environmental effects of persistent environmental pollutants. These developments brought environmental issues to the forefront for governments.

8 Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023: Synthesis Report* (Hoesung Lee and José Romero eds, IPCC 2023) <https://www.ipcc.ch/report/ar6/syr> accessed 19 June 2025.

9 United Nations Office for Disaster Risk Reduction (UNDRR), *Global Assessment Report on Disaster Risk Reduction 2022* (UN 2022) <https://www.undrr.org/gar> accessed 19 June 2025.

10 Secretariat of the Convention on Biological Diversity (SCBD), *Global Biodiversity Outlook 5* (SCBD 2020) <https://www.cbd.int/gbo5> accessed 19 June 2025.

11 Jessie Guo, Daniel Kubli and Patrick Saner, *The Economics of Climate Change: No Action Not an Option* (Paul Ronke ed, Swiss Re Institute 2021).

12 United Nations Environment Programme (UNEP), *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)* (UNEP 2023) doi:10.59117/20.500.11822/43922.

13 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment Through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L 2024/1203.

14 Yingyi Situ and David Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* (SAGE Publications 2000).

15 L Wayne Dwernychuk, 'Dioxin Hot Spots in Vietnam' (2005) 60(7) Chemosphere 998 DOI:10.1016/j.chemosphere.2005.01.052.

Since then, the research on the concept of environmental crime has received widespread attention from academics, legislators and communities.[16] Through various approaches, the concept of environmental crime is also perceived and expressed in multiple ways. For example, in terms of the perspective from the signs of environmental damage, Interpol and the United Nations Environment Programme (UNEP) define "environmental crime as a general term describing illegal activities that are harmful to environmental restoration and are intended to benefit individuals or groups/companies from the exploitation, damage, commercialization or illegal exploitation of natural resources, including, but not limited to, serious crimes and transnational organized crime".[17]

Based on this definition, Interpol and UNEP identify three characteristics of modern environmental crime: (i) the activity is illegal; (ii) these acts can harm the environment and impose illegal benefits to specific individuals and organisations; (iii) this category of crime is considered serious and transnational organised crime.

Beyond this legal-institutional perspective, the Environmental Investigation Agency (EIA) identifies the above-mentioned issue as follows: "Environmental crime is an illegal act that directly causes harm to the environment, including illegal wildlife trade, business in ozone-depleting substances (ODS), illegal trade in hazardous waste, illegal and unregulated fishing, and timber smuggling".[18]

Criminologists Lynch and Nancy Frank were the first to introduce the term "green criminology", which refers to crimes that directly harm the environment or indirectly cause damage and destruction to it.[19] Environmental crimes, under this concept, transcend national boundaries and encompass air pollution, water pollution, deforestation, wildlife loss, and the dumping of hazardous waste.[20] These are five common categories of environmental violations.

The above-mentioned concept was officially introduced at the Conference of the European Society of Criminology in Slovenia and has since been widely adopted by many other studies in the field of transnational environmental crimes and the analysis of the negative ecological impact of globalisation. Thus, amongst the concept of green criminology by Lynch and Nancy Frank and the concept of environmental crime proposed by UNEP and Interpol, there is a similarity in pointing out five abovementioned categories and theirs specific objects of impact, in which the acts are possible to directly or indirectly cause damage to the

16 European Union Agency for Criminal Justice Cooperation (Eurojust), *Report on Eurojust's Casework on Environmental Crime* (Criminal justice across borders, Eurojust 2021) doi:10.2812/439500.

17 Nellemann and others (n 1) 17.

18 Mary Rice (ed), *Environmental Crime: A Threat to Our Future* (EIA 2008).

19 Nancy K Frank and Michael J Lynch, *Corporate Crime Corporate Violence: A Primer* (Harrow & Heston 1992).

20 Rob White (ed), *Green Criminology* (Routledge 2014) 9.

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environment.[21] However, the concept of green criminology offers a broader interdisciplinary approach grounded in a criminological theory.[22]

In the European Union (EU), environmental criminal law has evolved into a distinct and autonomous legal field. The term environmental crime encompasses various areas, and whether a particular conduct is punishable as a crime may depend on whether an administrative permit permits the conduct in question.[23]

Under the Environmental Crime Directive (ECD), conduct constitutes a criminal offence if it is "unlawful", meaning:

(1) It violates EU law adopted to achieve one of the objectives in Article 191(1) TFEU.[24] This covers all EU law contributing to these objectives, *irrespective* of its legal basis.[25]
(2) It constitutes a breach of a national administrative regulation or decision, giving effect to Union environmental law.

In some cases, a specific *consequence of a conduct* must follow for the conduct to be considered criminal, and sometimes *a specific effect is also required*. A conduct constitutes a criminal offence when committed *intentionally* and, for some crimes, also when committed with *at least serious negligence*. Failure to comply with a legal duty to act can have the same negative effect on the environment and human health as active conduct. Therefore, the definition of criminal offences covers both acts and omissions, where applicable.[26]

In Vietnam, environmental crimes have been a significant concern for researchers to study since the end of the 20th century, particularly with the rapid urbanisation and industrialisation. Nevertheless, while the topic has been discussed in scientific research works, the concept has not been legalised in the Penal Code. Within the realm of Vietnamese criminal law, various interpretations of environmental crimes exist. For example, some scholars describe ecological crimes as socially dangerous acts regulated by the Penal Code that violate relations related to the protection of a favourable natural environment, connected with quality, sustainability and the stability of the environment, to the rational consumption of natural resources and the assurance of ecological security for the population.[27]

21 Nellemann and others (n 1).
22 White (n 20).
23 Christiane Gerstetter and others, *Environmental Crime and the EU: Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE)* (Ecologic Institute gGmbH 2016) 30.
24 Directive (EU) 2024/1203 (n 13) recital 9, art 3, para 1 a) and b).
25 E.g., acts adopted based on TFEU Arts. 91, 114, 168 or 192, or, under national laws, administrative regulations or decisions giving effect to that Union law.
26 Directive (EU) 2024/1203 (n 13) recitals 9 and 26, art 3.
27 Pham Van Loi (ed), *Environmental Crime: Several Theoretical and Empirical Issues* (CTQGST 2004) 95.

Another point of view defines environmental crimes as socially dangerous and wrongful acts opposed to state regulations on environmental protection, thereby causing damage to the environment.[28]

Under the concept of environmental crimes, acts related to climate change are defined as those that pose a danger to society, are unlawful, and lead to direct or indirect damage to the natural ecosystem, particularly exacerbating issues related to climate change.

Environmental crimes related to climate change include:

- Illegal acts such as wrongful exploitation of natural resources, excessive greenhouse gas emissions
- Large-scale deforestation, unlawful wildlife trade, and violations of international environmental protection regulations.
- Illegal greenhouse gas emissions, particularly from factories, vehicles, or industrial activities that demonstrate non-compliance with regulations on CO_2, CH_4, N_2O emission control;[29]
- Deforestation and illegal logging, which reduce the Earth's natural ability to absorb CO_2, contributing to increased greenhouse gas concentrations in the atmosphere;[30]
- Illegal fossil fuel exploitation and consumption, including illegal coal and oil mining, or fraudulent emissions reporting;[31]
- Illegal trading and disposal of hazardous waste, especially industrial waste that pollutes air, land and water resources.[32]

3.2. Characteristics

Firstly, environmental crimes related to climate change cause harm to specific subjects, including natural and artificial environmental factors. In recent decades, the concept of environmental crime has been raised, referring to ecological damage characterised by widespread, long-term, and serious phenomena. Environmental damage is often irreversible; in concrete terms, the degradation of the environment caused by environmental destruction is so extensive that the natural environment cannot be fully restored to its original state. It has been considered that if nature is destroyed, its

28 Nguyen Ngoc Kien (ed), *Vietnamese Criminal Law: Textbook (General Part)* (Judicial Publishing House 2020) 410.

29 INTERPOL and United Nations Environment Programme (UNEP), *Strategic Report: Environment, Peace and Security – A Convergence of Threats* (UNEP 2016) 15.

30 Food and Agriculture Organization (FAO) and United Nations Environment Programme (UNEP), *The State of the World's Forests 2020: Forests, Biodiversity and People* (FAO 2020) 34-6, doi:10.4060/ca8642en.

31 Milan Grohol and Constanze Veeh, *Study on the Critical Raw Materials for the EU 2023: Final Report* of the *European Commission* (Office of the EU 2023) doi:10.2873/725585; Environmental Investigation Agency (EIA), *Ocean. Dirty Deals: Evidencing Illegalities in the Global Plastic Waste Trade*, pt 1, 2 (EIA 2024).

32 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (adopted 22 March 1989, effective 5 May 1992) [1999] UNTS 1673/57.

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restoration is impossible and eventually human life, as well as animal and plant species, may be permanently affected.

This ideology was noted in the Stockholm Declaration of 1972,[33] which states that the natural and artificial environment are essential to social welfare and have an impact on the possession of human fundamental rights, such as the right to life. Although the classification is provided, it is essential to understand that environmental factors are interrelated and influence each other, and are not divided in numerous cases. For example, air pollution accelerates climate change and global warming, which in turn threaten biodiversity, drive phenomena like El Niño and La Niña, and lead to production stagnation and destruction of human property through natural disasters.

Secondly, environmental crimes related to climate change are inherently long-term and transnational, with consequences that cannot be contained within borders.[34] These crimes affect not only a specific area but also spread across cross-border territories and countries, with inter-regional and international elements that can impact individuals, communities, and residential areas. The consequences of environmental crimes related to climate change are difficult to identify immediately.

For example, it is such a process of research and assessment by experts in many fields to pinpoint the problem of environmental pollution causing climate change, leading ultimately to the deterioration of human living conditions. Thus, the cause of climate change is the result of a long period of natural destruction, modifying and degrading the features of the natural environment, leading to the extinction of many species of organisms as well as the human mutable habitat in a negative direction. Thus, environmental crimes related to climate change harm society as a whole, which can have adverse consequences for the economy and national security, including declines in public health, livelihoods, and property values. Based on the aforementioned analysis, it is concluded that its immediate effects are detrimental to the current lives of people, nature, and future generations.

Thirdly, environmental destruction linked to climate change is complex and varies significantly, making it challenging to assess. The degree of social danger posed by environmental crimes is reflected in the types of harmful behaviours committed. These crimes can be categorised into two main groups:

(i) Direct acts that harm the environment, such as pollution, wildlife crimes, and illegal resource exploitation
(ii) Indirect acts, often protected by government licenses, like mineral exploitation, forestry, and waste trading, complicate regulatory enforcement and can obscure the illegal nature of certain activities.[35]

33 *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)* (adopted 16 June 1972) preamble, para 1 <https://docs.un.org/en/A/CONF.48/14/Rev.1> accessed 19 June 2025.

34 Rice (n 18) 2.

35 Nguyen Van Gung, *Some Environmental Protection Issues with Economic Development in Our Country Today* (National Political Publishing House 2004) 44.

Thus, victims of environmental crimes related to climate change confront the challenge to the notion of traditional crime. Victimhood may extend to non-human entities, such as natural organisms excluding humans, environmental components and future generations.

Fourthly, the damage caused by environmental crimes related to climate change remains difficult to quantify and identify, and has adverse effects over a prolonged period.[36] Although the damage from environmental crimes linked to climate change is hard to quantify in the short term, it has significant long-term effects on humans and ecosystems. These include animal deaths, disease spread, and altered radioactive backgrounds. Long-term impacts manifest as rising global temperatures, severe heat waves, melting ice, rising sea levels causing coastal flooding, and extreme weather events leading to increased diseases and forest fires.[37] In the pursuit of economic, scientific, and technological advancement, the extensive exploitation of natural resources leads to depleted resources and severe pollution of land, water, and air, along with the extinction of various species. Such environmental encroachment damages ecosystems and disrupts their functions, making regeneration nearly impossible. While human efforts can mitigate further damage, they cannot fully restore lost environmental functions, threatening the well-being and development of present and future generations.[38]

Fifthly, the subjects of environmental crimes related to climate change are natural individuals and legal persons. The current trend in the world is to increase the criminal responsibility of legal persons in the environmental field, because the influence and expansion of multinational and transnational corporations are increasingly considerable. With this scale, there is a shift in environmental pollution behaviour from developed countries to developing and underdeveloped countries.[39] It is necessary to address this practical concern by determining the criminal responsibility of legal persons in the environmental field and considering them as the primary and fundamental subjects of environmental crimes, which differs from individuals.

It is essential to address the collective responsibility of all parties involved in environmental crimes, including the legal entities committing the offences, the business leaders, and the employees who carry out these acts. Without the benefit of legal persons, such environmental infringement would likely not occur. These acts often require the direction or approval of the leadership within the business corporation, and employees then comply by committing the violations. The abovementioned analysis demonstrates that environmental crimes typically involve elements of complicity and organised coordination among multiple actors.

36 Hoang Thu, 'Difficult to Determine the Consequences of Environmental Crimes' *Pháp luật Việt Nam* (Hanoi, 27 October 2010) <https://baophapluat.vn/post-79495.html> accessed 19 June 2025.

37 'Top 6 Consequences of Global Climate Change' (*Công Ty Cổ Phần Xây Dựng Và Công Nghệ Môi Trường Hợp Nhất*, 27 October 2022) <https://moitruonghopnhat.com/top-6-hau-qua-cua-hien-tuong-bien-doi-khi-hau-toan-cau-2466.html> accessed 19 June 2025.

38 Nellemann and others (n 1) 13.

39 Supreme Court of Japan, *Outline of Criminal Justice in Japan* (Supreme Court of Japan 2016).

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4 INTERNATIONAL REGULATIONS ON CLIMATE-RELATED ENVIRONMENTAL CRIMES AND THEIR INCORPORATION INTO THE VIETNAMESE CRIMINAL LAW

4.1. International Legal Foundation on Climate-related Environmental Crimes

International practice indicates that, although environmental crime has become a matter of common concern for the global community, it remains a legal domain where international law provides relatively limited—and even more ambiguous—regulation compared to other areas of international environmental law. Nevertheless, this does not imply that states are "ignoring" or underestimating the seriousness of the issue. Rather, it is a complex matter, closely intertwined with national sovereignty and security concerns, and therefore requires careful, multidimensional research and discussion.

4.1.1. Perspectives on the Criminalisation of Ecocide under International Criminal Law

At the international level, the term "ecocide" has yet to be consistently defined due to the existence of various competing proposals and differing requirements.[40] In addition, concerning the criminalisation of environmental crimes (ecocide), the Rome Statute of the International Criminal Court (ICC) currently does not include any provisions on this offence.

Nevertheless, several countries have put forward proposals to incorporate ecocide into the Statute, given the dangerous nature and destructive impact such crimes may have on humanity. However, some studies also indicate that the proposal to include ecocide in the Rome Statute—on par with genocide or crimes against humanity—may not be entirely appropriate and could risk overextending the concept beyond its normative boundaries. It has been argued that such an inclusion may "exacerbate the ordinary thresholds and... make it difficult to reconcile the existing anthropocentric provisions with the proposed ecocide offence".[41] Therefore, some scholars argue that, rather than pursuing international criminalisation, it may be more effective and timely for states to focus on recognising and enforcing environmental crimes within their respective domestic criminal law systems.[42]

40 Ritwik Sharma, 'Ecocide as the Fifth International Crime: Is the Rome Statute Compatible with Ecocide?' (*Völkerrechtsblog,* 16 January 2025) doi:10.17176/20250116-225415-0.

41 ibid.

42 ibid.

4.1.2. The International Obligations of States in Responding to Environmental Crime in General

In reality, the international legal system does not yet have a single, comprehensive instrument governing environmental crimes in general. However, the issue has been addressed in several key international legal instruments, which place particular emphasis on the international obligations of states in responding to such crimes. Specifically:

Although UNCLOS does not contain explicit provisions on climate-related environmental crimes, it does incorporate clauses addressing marine pollution, as evidenced by its dedicated section (Part XII), which outlines various approaches to the prevention, reduction, and control of marine environmental pollution—particularly from Article 192 onwards.[43] Article 192 stipulates that "States have the obligation to protect and preserve the marine environment".[44] In particular, with regard to the obligation to prevent pollution, including greenhouse gas emissions, Article 194 of UNCLOS provides that:

> *"States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment"; and that*
>
> *"The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment…"*[45] *and may potentially constitute environmental crimes.*

These obligations were further reiterated in the 2011 Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS), which affirmed that the protection of the marine environment is a legal obligation of States. The Tribunal emphasised that States must take active measures to protect the marine environment, including adopting preventive actions, conducting environmental impact assessments, and developing and enforcing domestic legislation in conformity with UNCLOS and relevant international regulations.[46]

Overall, these provisions have established legal obligations for States in the protection of the marine environment and serve as a legal basis for preventing violations of marine environmental law by States. In particular, Article 235 of UNCLOS may be regarded as a legal foundation for determining State responsibility in improving domestic criminal legislation to protect and preserve the marine environment.

43 Luisa Cortat Simonetti Goncalves and Michael Gerbert Faure, 'International Law Instruments to Address the Plastic Soup' (2019) 43(3) *William & Mary Environmental Law and Policy Review* 871, 893, doi:10.2139/ssrn.3405968; Nguyen Thi Hong Yen and Nguyen Phuong Dung, 'Marine Pollution Management in Response to Plastic Waste under International Law and National Law – Challenges and Implications for Developing Countries: A Case Study of Vietnam' (2023) 26(2) *Asia Pacific Journal of Environmental Law* 162, doi:10.4337/apjel.2023.02.02.

44 United Nations Convention on the Law of the Sea (UNCLOS) (signed 10 December 1982) [1998] UNTS 1833/3, art 192.

45 ibid, art 194.

46 *Case No 17 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* (ITLOS, 1 February 2011) <https://www.itlos.org/index.php?id=109> accessed 20 May 2025.

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Although environmental crimes are not directly stipulated, these obligations are subsequently reaffirmed in several other necessary international legal instruments, such as the Convention on Biological Diversity (CBD), particularly in Articles 6, 8, and 14.[47] The 2015 Paris Agreement on Climate Change, in Articles 4, 7, 13, and 15, sets out obligations regarding emission reductions.[48]

At the regional level, Europe is considered to have relatively comprehensive and well-defined regulations concerning environmental crime. The new Environmental Crime Directive of the EU was adopted on 11 April 2024 and entered into force on 20 May 2024, supporting the protection of the environment through criminal law and replacing the 2008 Environmental Crime Directive. To address the shortcomings in the effectiveness of environmental criminal law, the new Directive establishes minimum rules regarding the definition of criminal offences and penalties to protect the environment more effectively, as well as measures to prevent and combat environmental crime.[49]

4.2. Provisions of Vietnamese Criminal Law in Relation to the Country's International Commitments on Combating Environmental Crime

In Vietnam, during the early stages following independence, environmental protection received little attention, as the country was still engaged in the struggle for national reunification and focused primarily on socio-economic development. However, since the initiation of the Đổi Mới (Renovation) policy in 1986, Vietnam has placed greater emphasis on environmental protection alongside its economic and social development goals. The country has proactively acceded to key international treaties such as the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC), the Stockholm Convention on Persistent Organic Pollutants (POPs, 2001), the Paris Agreement on Climate Change (2015), the United Nations Convention against Transnational Organized Crime (UNTOC, 2000), and the United Nations Convention against Corruption (UNCAC, 2003), among others.

To fulfil the obligations stipulated in these international treaties, Vietnam has, in recent years, made considerable efforts to incorporate these commitments into its domestic legal framework by enhancing national environmental protection laws in general and by criminalising acts related to environmental violations in its Penal Code in particular.

The National Strategy on Crime Prevention and Control for 2016-2025, signed by the Prime Minister, emphasises the need to develop and refine the legal system. It focuses on

47 Convention on Biological Diversity (CBD) (signature 5 June 1992) [1993] OJ L 309/3.
48 Paris Agreement on Climate Change (adopted 12 December 2015) [2023] UNTS 3156/79.
49 *Directive (EU) 2024/1203 (n 13).*

researching and addressing emerging socially dangerous behaviours, particularly environmental crimes, and stresses the importance of updating criminal codes and providing guidance for implementing new laws.[50] Directive No. 36/CT-TW, dated June 25 1998, of the Politburo of the 8th Party Central Committee on *Strengthening environmental protection in the period of industrialisation and modernisation of the country* stated that environmental protection is the cause of the entire Party, and the whole population. It stresses that environmental protection constitutes a fundamental and inseparable component of national guidelines, policies and socio-economic development plans, serving as an essential basis for ensuring sustainable development and for successfully achieving the goals of industrialisation and modernisation.[51]

Recognising that, alongside environmental protection, Vietnam faces challenges from climate change and natural resource management—three issues that are organically linked and interact with each other—the Central Executive Committee issued Resolution 24-NQ/TW, dated 3 June 2013, of the 11th Central Executive Committee on proactively responding to climate change, strengthening resource management and environmental protection. The resolution states that "the environment is a global issue, environmental protection is both a goal and a fundamental content of sustainable development (…)."[52]

Specifically, the 13th Congress continued to affirm that "protecting the environment and people's health is the top priority; resolutely eliminating projects that cause environmental pollution, ensuring the quality of the living environment, protecting biodiversity and ecosystems; building a green economy, a circular economy, and being environmentally friendly."[53]

To meet the requirements of crime prevention and combat in the new situation, ensure consistency with the international conventions that Vietnam has signed, and align with the changes in specialised environmental law regulations in the third codification, the Penal Code 2015 (amended and supplemented in 2017) has been refined to continue inheriting and promoting the advantages of the 1985 Penal Code and the 1999 Penal Code. In

50 Decision of the Prime Minister of Vietnam No 623/QD-TTg of 14 April 2016 'Approving the National Strategy for Crime Prevention and Control for the 2016-2025 Period and Orientation Towards 2030' <https://lawnet.vn/4B6B5/quyet-dinh-623-qd-ttg/tag.html> accessed 19 June 2025.

51 *Directive* of the Politburo of the Communist Party of Vietnam *No 36/1998/CT-TW of 25 June 1998 'On Strengthening Environmental Protection During the Period of Industrialization and Modernization of the Country'*, ch I(A) <https://m.thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Chi-thi-36-1998-CT-TW-tang-cuong-cong-tac-bao-ve-moi-truong-thoi-ky-cong-nghiep-hoa-hien-dai-hoa-dat-nuoc-47395.aspx> accessed 19 June 2025.

52 *Resolution of the* Central Executive Committee *of the* Communist Party of Vietnam *No 24-NQ/TW of 3 June 2013 'On Proactively Responding to Climate Change, Strengthening Resource Management and Environmental Protection'* <https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Nghi-quyet-24-NQ-TW-nam-2013-ung-pho-bien-doi-khi-hau-bao-ve-moi-truong-194312.aspx> accessed 19 June 2025.

53 Communist Party of Vietnam, *Documents of the 13th National Congress of Delegates*, vol 1, (National Political Publishing House 2021) 117.

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Vietnam, the Penal Code is currently the primary legal document governing the handling of environmental crimes.[54]

4.2.1. The criminalisation of environmental offences under Vietnam's criminal law

Although the 2015 Vietnamese Penal Code (amended in 2017) includes a separate chapter on environmental crimes, it does not yet define any environmental offence as one related to climate change.[55] The current legal framework has yet to quantify the climate change impact of environmental criminal acts. In practice—such as in cases of deforestation in Tay Nguyen or illegal disposal of hazardous waste—the prosecution of criminal responsibility remains inadequate due to the lack of legal grounds to establish consequences such as "causing climate change."[56] As a result, many acts that have the potential to cause long-term damage to the climate are still dealt with lightly or go unpunished. Nevertheless, the gradual criminalisation of environmental protection violations is also regarded as a result of Vietnam's efforts, laying the groundwork and legal foundation for the future inclusion of climate-related environmental crimes.

The current Vietnamese Penal Code, based on the inheritance and development of previous versions, has stipulated 12 environmental crimes in Chapter XIX from Article 235 to Article 246 (Table 1).[57]

***Table* 1. Environmental crimes under the Penal Code of Vietnam**

Name of Crime	*Penal Code*
Crime of causing environmental pollution	Article 235
Crime of violating regulations on hazardous waste management	Article 236
Crime of violating regulations on prevention, response and remediation of environmental incidents	Article 237
Crime of violating regulations on protecting the safety of irrigation works, dykes and preventing and combating natural disasters; violating regulations on protecting river banks and beaches	Article 238
Crime of bringing waste into the territory of Vietnam	Article 239
Crime of spreading dangerous infectious diseases to humans	Article 240

54 Law of Vietnam No 100/2015/QH13 (n 6).

55 Ibid, ch XIX.

56 Chinh Cuong, 'How Did 16 People Destroy Forests in Yok Don National Park?' [2018] Kiemsat <https://kiemsat.vn/16-doi-tuong-pha-rung-o-vuon-quoc-gia-yok-don-nhu-the-nao-49233.html> accessed 17 July 2025.

57 Law of Vietnam No 100/2015/QH13 (n 6) ch XIX, arts 235–246.

Crime of spreading dangerous epidemics to animals and plants	Article 241
Crime of destroying aquatic resources	Article 242
Crime of destroying forests	Article 243
Crime of violating regulations on management and protection of endangered, precious and rare animals	Article 244
Crime of violating regulations on management of nature reserves	Article 245
Crime of importing and spreading invasive alien species	Article 246

Therefore, this chapter sets out twelve distinct environmental offences. Among these, based on their consequences and their underlying contribution to climate change, the offences that may be categorised as climate-related environmental crimes include: Environmental Pollution (Article 235), Violations of Regulations on the Management of Hazardous Waste (Article 236), and Forest Destruction (Article 243). These offences illustrate the range of offences contributing to environmental degradation and climate change.

The consequences of environmental crimes related to climate change, in addition to causing climate change, can also lead to property damage, including actual damage and the costs of remedying the consequences that have occurred. Several crimes even cause harm to human life and health.

In terms of mens rea, environmental crimes related to climate change are committed intentionally, which means the offender is aware that their behaviour is dangerous to society, as well as foresees the consequences, whether with the intent to happen or, although not intending to, consciously allows them to happen.

The subjects of environmental crimes related to climate change include individuals or legal persons. For an individual to be subject to criminal liability for an environmental crime, they must be a specific person aged 16 or older, as defined in the Penal Code. Legal persons must meet four conditions for liability: the crime must be committed in the name of the entity, for its benefit, with its direction or approval, and within the statute of limitations. The legal person must act as an independent entity, committing defined crimes that harm the environment, under its management.

4.2.2. Recognition and Scope of Criminal Liability of Commercial Legal Entities for Environmental Violations

In Vietnam, as in other jurisdictions, the subjects of criminal violations in the field of the environment are highly diverse. These include enterprises, industrial production establishments, service businesses, resource exploitation and processing, as well as individuals participating in agricultural, forestry and fishery production, service businesses, waste collection and transportation, mineral exploitation and processing. It

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can be seen that the subjects of environmental crime, in addition to individuals, also include legal persons. These subjects may be intentional or unintentional, but they mostly share the commonality that they intentionally commit illegal acts that harm the environment to achieve their interests.

According to the United Nations Interregional Crime and Justice Research Institute (UNICRI), the subject of environmental crime should be understood in a broader sense—extending beyond individuals and legal persons to include state legal persons and, in some cases, even states themselves.[58]

Acts committed by commercial legal entities during business and production activities that result in environmental pollution constitute violations of environmental law, as well as other relevant legal provisions. These include prohibited conduct such as burying hazardous waste in soil, covering or discharging toxic substances into land and water environments, and releasing factory waste into water bodies and the atmosphere—particularly when the volume or nature of the discharge exceeds legally permitted limits or is outright banned. Such actions alter the composition of the environment and harm human health and ecosystems. During their operations, commercial legal entities may engage in conduct prohibited under Article 7 of the 2014 Law on Environmental Protection.[59]

The 2015 Penal Code of Vietnam, as amended in 2017, is the first legal instrument to formally recognise the criminal liability of commercial legal entities for violations of environmental protection obligations committed in the course of business and production activities. Under this Code, the types of legal liability applicable to commercial legal entities for acts causing environmental pollution during business and production activities include civil liability, administrative liability, and criminal liability. In particular, regarding criminal liability, the Vietnamese Penal Code stipulates that commercial legal entities may be held criminally responsible for environmental offences, such as causing environmental pollution (Article 235) and violating regulations on environmental incident prevention, response, and remediation (Article 237), among others. According to the same law, the legal consequences imposed on commercial legal entities that violate environmental protection regulations may include principal penalties such as fines, temporary suspension of operations, or permanent cessation of operations. In addition to these principal penalties, supplementary penalties may also be applied, including prohibition from conducting business, prohibition from operating in certain sectors, prohibition from raising capital, and fines (in cases where a fine is not applied as a principal penalty).[60]

58 Ragnhild Sollund, Christoph H Stefes and Anna Rita Germani (eds), *Fighting Environmental Crime in Europe and Beyond: The Role of the EU and Its Member States* (Palgrave Macmillan 2016) 4, doi:10.1057/978-1-349-95085-0.

59 Doan Trung Kien and Nguyen Thanh Mai, 'Legal Liability for Commercial Legal Entities Causing Environmental Pollution' [2020] Dân chủ và pháp luật <https://danchuphapluat.vn/trach-nhiem-phap-ly-doi-voi-phap-nhan-thuong-mai-gay-o-nhiem-moi-truong-4045.html> accessed 17 July 2025.

60 Law of Vietnam No 100/2015/QH13 (n 6).

5 EMERGING TRENDS IN ENVIRONMENTAL CRIMES DRIVEN BY CLIMATE CHANGE IN VIETNAM

Climate change has intensified natural disasters, particularly storms, floods, and droughts, making them increasingly severe. This has led to adverse environmental changes and ecological crises, thereby posing a threat to national security.

According to the Global Climate Risk Index 2016, Vietnam ranks as the seventh country globally in terms of long-term climate risks. Data from the Institute of Meteorology, Hydrology and Climate Change further indicate that, over the past 30 years, natural disasters in Vietnam have resulted annually in an average of approximately 500 deaths, thousands of injuries, and economic losses of up to 1.5% of GDP.[61] In recent years, the situation of environmental crimes and violations of environmental laws has become very complicated and widespread in many areas of social life. Such crimes have led to the depletion of natural resources, exacerbated climate change, and degraded environmental quality, with significant consequences for public health and the country's sustainable development. In some areas and fields, criminal activities and violations of environmental laws have complicated the security and order situation. The likely trajectory of climate change-related environmental crimes can be anticipated in several key aspects, as outlined below:

Firstly, environmental crime is expected to become increasingly complex and prevalent in the near future, potentially impacting various environmental fields, including climate change. According to the EIA, environmental crime is among the most profitable forms of crime activity, with annual profits estimated to be in the tens of billions of dollars.[62] The sudden increase of environmental crimes related to climate change is also due to the characteristics of this type of crime; unlike other violent crimes, transactions and behaviours that are dangerous to society are often mistaken, and their social consequences are underestimated. In the coming years, environmental pollution, climate change, biodiversity loss, land degradation, and the depletion of water resources, as well as the impact on the marine environment, will continue to be global issues, altering natural ecosystems and affecting economic and social life around the world. Environmental crimes related to climate change are becoming increasingly diverse, especially in the fields of chemical and heavy metal pollution, electronic waste pollution, and air pollution due to climate change—and may give rise to new forms of environmental crime of an international nature requiring prevention.

Secondly, in Vietnam, environmental crimes related to climate change are becoming increasingly sophisticated and difficult to detect. This sophistication is often facilitated by

61 'Climate Change Threatens Environmental Security' *Báo Nông Nghiệp và Môi trường* (Hanoi, 28 November 2018) <https://baotainguyenmoitruong.vn/bien-doi-khi-hau-de-doa-an-ninh-moi-truong-241796.html> accessed 21 February 2025.

62 Nellemann and others (n 1); Rice (n 18).

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the fact that it can be concealed through legal forms, such as mineral exploitation licenses, goods import licenses, fake customs documents, as well as collusion between criminals and competent persons in state agencies through acts of corruption. Corruption can be considered one of the reasons why environmental crimes related to climate change are becoming more sophisticated and challenging to detect, as it allows those in positions of authority to suppress or withhold critical information. If properly assessed, these crimes could be effectively mitigated or prevented from occurring. Failure to act enables offenders to reap greater benefits, amass wealth, and take advantage of illicit funds to bribe and obstruct environmental law enforcement agencies.

A joint report by INTERPOL and the United Nations covering 70 countries around the world focused on the global environmental crime connection, estimated worth up to USD 258 billion annually, with other types of crime.[63] The report found that 60% of countries identified environmental crime as a newly emerging and increasingly sophisticated phenomenon with transnational links, while 84% reported connections between environmental crime and other serious offences, including corruption, counterfeiting, drug trafficking, cybercrime and financial crimes.

Thirdly, environmental crimes related to climate change with foreign elements are on the increase, and Vietnam has increasingly become a transit country for some types of transnational environmental crime.[64] In recent years, the country's national international economic integration policy has been more open and created more favourable conditions for foreigners to enter Vietnam for investment, tourism, and business. While this has brought economic benefits, it has also contributed to the growing seriousness and complexity of crimes involving foreign actors, including environmental crime. The EIA notes that environmental crime is inherently cross-border in nature and has evolved into an international criminal syndicate.[65] In an era of global free trade, the ease of communication, goods transportation, and money transfer has created favourable conditions for such criminal groups to operate. As a developing country, Vietnam cannot avoid these impacts. Environmental crime with foreign elements in Vietnam includes industrial waste treatment, the import of outdated machinery, equipment, and scrap, the trafficking of rare and wild animals, and illegal mineral exploitation.[66]

Fourthly, globalisation significantly affects environmental protection and the issue of environmental crime related to climate change. Researchers have long highlighted its negative aspects. This phenomenon is unavoidable–no country is immune to its influence. Globalisation often prompts multinational companies to relocate operations from

63 Nellemann and others (n 1) 4.

64 United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impact* (UNODC 2019); Environmental Investigation Agency (EIA), *Wildlife. Vietnam's Footprint in Africa: An Analysis of the Role of Vietnamese Criminal Groups in Wildlife Trafficking* (EIA 2021).

65 Rice (n 18) 1.

66 Nellemann and others (n 1).

developed to developing countries, where labour is cheaper and environmental regulations are weaker. Consequently, countries may face environmental degradation as a short-term cost of economic development. While globalisation brings both opportunities and challenges, its interconnectedness intensifies challenges such as disease spread, trade issues, terrorism, and pollution—particularly greenhouse gas emissions. These factors lead to shared health and environmental risks that must be addressed collaboratively.

From the above analysis, it can be seen that the trend of Education for Nature – Vietnam (ENV) environmental crimes related to climate change in the coming period will focus on the following issues:

i) A potential increase in environmental crimes related to climate change, with the emergence of numerous new acts of environmental infringement associated with sophistication, making it more difficult to assess the social and environmental dangers, as well as their harmful consequences.
ii) The development of more organised and professional transnational environmental crime networks, with the participation of many individuals and organisations in the country as well as abroad.
iii) Increasing complexity in domestic environmental crimes related to climate change, particularly those involving commercial legal entities and other organisations related to national policy institutions.

Environmental crimes related to climate change are viewed as non-traditional offences—a relatively new type of crime that is challenging to identify and control due to its complex nature, evolving developments, and long-term, inter-regional, and inter-territorial implications. While forecasting trends in such crimes has partly controlled the increase of this new type of non-traditional crime, significant challenges remain for prevention, detection, and enforcement in the years ahead.

6 SUGGESTIONS

From the above analysis, the author proposes the following specific suggestions and recommendations:

Firstly, Vietnam's criminal law on environmental crimes related to climate change should be further developed in the following respects. In light of the primary approach, it is necessary to continue supplementing and internalising violations of environmental law related to climate change in international law into the chapter on environmental crimes in the current Penal Code. This reflects the international legal principle of *pacta sunt servanda*, which underscores the duty of good faith and commitment in the performance of international agreements. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer explicitly identifies specific ozone-depleting substances and obliges States

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Parties to incorporate corresponding measures into their domestic legal systems to restrict or prohibit activities that harm the ozone layer.[67] These framework obligations require States to take effective action to protect atmospheric integrity, public health, and the environment—potentially through a range of legal instruments, including criminal law. In this context, the author recommends the criminalisation of the illegal trade in ozone-depleting substances as a necessary step to enhance compliance and enforcement under international environmental law.

Similarly, the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement[68] set out obligations for States to reduce greenhouse gas emissions and recognise violations of these commitments. Accordingly, the author recommends that excessive greenhouse gas emissions be incorporated into domestic legislation by criminalising such conduct under Articles 235 and 236 of the current Penal Code.

Current research indicates that while the Penal Code's environmental crime provisions have improved over time, they remain incomplete and incomprehensive. Notably, certain violations that have the potential to directly harm the environment and exacerbate the impacts of climate change on humans and ecosystems have not yet been clearly regulated. Examples include pollution from traditional craft villages due to untreated discharges, or air pollution caused by activities such as open burning of waste, coal, and the handling of brick kiln waste in rural areas.[69]

One of the reasons is that these acts are often carried out on a small scale and do not yet meet the threshold of "causing serious consequences" to warrant criminal prosecution. In addition, Vietnam's criminal law does not currently provide for specific offences addressing violations of international climate obligations, such as fraud in greenhouse gas emissions reporting, concealment of information on transboundary environmental pollution, acts of trafficking in ozone-depleting substances, illegal trading of hazardous wastes, illegal fishing and exploitation of natural resources, violations of biosafety regulations, and improper handling of hazardous wastes. Addressing these legal gaps is essential to establishing a comprehensive and adequate legal framework for prosecuting emerging environmental crimes.

Secondly, the penalties for environmental crimes related to climate change should be significantly increased. Such crimes cause long-term harm to ecosystems and human health, with remediation costs often far exceeding the immediate economic losses. Currently, the handling of environmental offences is mainly limited to administrative sanctions; few criminal cases are brought to trial, despite the fact that environmental damage is often severe

67 Montreal Protocol on Substances that Deplete the Ozone Layer (signed 16 September 1987) [1989] UNTS 1522/28.

68 United Nations Framework Convention on Climate Change (UNFCCC) (signed 9 May 1992) [1994] UNTS 1771/164; Paris Agreement (n 48).

69 Cao Ngoc Anh and Tanya Wyatt, 'A Green Criminological Exploration of Illegal Wildlife Trade in Vietnam' (2013) 8(2) *Asian Journal of Criminology* 129, doi:10.1007/s11417-012-9154-y.

and long-lasting.[70] The case of C.P. Vietnam Corporation (Dong Nai) illustrates this shortcoming: the company failed to conduct an environmental impact assessment, causing serious harm to human health and the environment. Yet the company was only subjected to an administrative fine of VND 790 million (approximately USD 31,000) and was not criminally prosecuted.[71]

For frequent and large-scale violations, especially by major corporations, administrative sanctions alone are insufficient. These cases should also be subject to criminal prosecution for environmental offences to uphold the seriousness and deterrent effect of the law against intentional violations. Clearly and specifically codifying these offences in national legislation not only ensures legal clarity but also aligns with the international legal principle of *nullum crimen sine lege*. This is consistent with the basis for criminal liability under Vietnamese Criminal Law, which states: "Only those who commit an act that is defined as a crime in the Criminal Code shall bear criminal responsibility."[72]

Thirdly, consideration should be given to the establishment of a specialised environmental court. In practice, the resolution of environmental disputes is often delayed due to the complex burden of proof and the need for specialised assessments of damages suffered by affected individuals—damages which may seriously impact their lives, health, and livelihoods. Therefore, the creation of a dedicated environmental court, staffed by judges with expertise in environmental law, is deemed necessary to ensure effective and comprehensive adjudication of large-scale pollution cases, particularly those that cause harm to multiple households across different regions.[73] This would not only strengthen domestic environmental governance but also provide an opportunity for Vietnam to fulfil its international commitments to environmental protection. Such courts have already been adopted in several jurisdictions around the world.[74]

Fourthly, state management of environmental protection should be strengthened by improving the legal system, mechanisms, and policies on environmental protection and sustainable development. Clear guidance should be issued on the application of the Penal

70 Trinh Quoc Toan, 'Perfecting Vietnam's Criminal Law in the Context of Climate Change' [2023] 1 *Tạp chí Luật học* 45.

71 Thanh Huy, 'CP Vietnam Company Was Once Fined Nearly 790 million VND for Environmental Violations' *Kinh tế & Đô thị* (Hanoi, 3 June 2025) <https://kinhtedothi.vn/cong-ty-c-p-viet-nam-tung-bi-phat-gan-790-trieu-dong-ve-vi-pham-moi-truong.723299.html> accessed 19 June 2025.

72 Law of Vietnam No 100/2015/QH13 (n 6) art 2.

73 Nguyen Thi Thu Hien, 'It is Necessary to Establish a Specialized Environmental Court in Vietnam' *Congly* (Hanoi, 7 July 2021) <https://congly.vn/can-thiet-thanh-lap-toa-an-chuyen-trach-ve-moi-truong-o-viet-nam-190742.html> accessed 19 June 2025.

74 Nguyen Thi Thu Hien and Phung Thang, 'The Current Situation of Environmental Crime Trials and the Need to Establish a Specialized Environmental Court' [2021] *Tòa án nhân dân* <https://tapchitoaan.vn/thuc-trang-xet-xu-toi-pham-ve-moi-truong-va-su-can-thiet-thanh-lap-toa-chuyen-trach-ve-moi-truong> accessed 19 June 2025.

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Code 2015 environmental crime provisions, along with regulations governing compensation for damages caused by violations of environmental protection laws.

Fifthly, international cooperation in preventing and combating environmental crimes related to climate change should be enhanced, especially for transnational environmental crimes. Vietnam should expand its role in sharing information and data related to pollution sources, thereby supporting the investigation, tracking, and prosecution of environmental crimes in general.

Finally, public awareness, legal education, and dissemination of criminal law provisions related to environmental crimes related to climate change must be intensified. Legal policies in this field should be guided by the dual objectives of environmental protection and the safeguarding of human rights, particularly the right to live in a clean environment. However, if such policies are not propagated, disseminated and implemented in practice, even if they are well-crafted provisions, they will have limited impact. Continuous and systematic legal education can cultivate legal literacy, foster positive legal motivations and behaviours as well as legal trust, thereby generating feelings of respect for the law and habits of behaving in accordance with legal regulations.

7 CONCLUSION

Environmental crime, and climate-related environmental crime in particular, has become a shared concern among nations, given the increasing frequency, complexity, and diversity of environmental violations. While the current international legal framework remains insufficiently detailed and lacks the comprehensiveness necessary to serve as a fully effective legal basis for the prevention and suppression of such crimes, its legal value cannot be denied—particularly in providing a foundation for the improvement of national criminal and environmental law systems.

As an active member in addressing common challenges of the international community, Vietnam has, in recent years, proactively participated in key international treaties aimed at combating environmental pollution, thereby establishing an international legal basis for the domestic incorporation of environmental crime regulations. The process of revising and supplementing provisions on environmental crime in the 2015 Criminal Code serves as clear evidence of this effort.

Fundamentally, the above analysis demonstrates that Vietnam's legal system already incorporates provisions that criminalise environmental offences, along with provisions concerning the responsibilities of various societal actors in protecting the environment. However, in light of the increasing prevalence, sophistication, and anticipated future development of this type of crime, such legal provisions remain limited, hindering the effective enforcement of environmental law. Therefore, beyond legislative efforts, Vietnam must adopt a comprehensive approach to combating climate-related environmental crime,

including strengthening law enforcement and application, enhancing international cooperation, and promoting awareness and education among different segments of society, so that environmental protection becomes a shared and collective responsibility.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МІЖНАРОДНІ ТА НАЦІОНАЛЬНІ ПРАВОВІ БАЗИ ДЛЯ БОРОТЬБИ ЗІ ЗЛОЧИНАМИ ПРОТИ ДОВКІЛЛЯ, ЩО СПРИЧИНЯЮТЬ ЗМІНУ КЛІМАТУ: ФОКУС НА В'ЄТНАМІ

Нгуєн Кім Чі

АНОТАЦІЯ

Вступ. *Злочини проти довкілля, пов'язані зі зміною клімату, охоплюють протиправні діяння, які завдають шкоди природному середовищу та поглиблюють кліматичні проблеми. Однак правова система В'єтнаму стикається зі значними обмеженнями у протидії цим правопорушенням, оскільки багато шкідливих діянь не кваліфікуються як злочини, а покарання часто не є пропорційними та не забезпечують стримувального ефекту. Тому дослідження кримінального законодавства В'єтнаму є важливим для покращення правового реагування на ці злочини проти довкілля.*

Методи. *Автор використовує різні методи соціологічних досліджень для кращого розуміння злочинів проти довкілля. Поєднання якісного правового дослідження, доктринального аналізу, порівняльних досліджень та аналізу конкретних випадків, дозволяє висвітлити як міжнародну, так і національну нормативно-правову базу. Доктринальний підхід дозволяє детально проаналізувати ці нормативні системи, тоді як порівняльний метод оцінює законодавство В'єтнаму на відповідність міжнародним*

стандартам. Крім того, тематичні дослідження виявляють правові прогалини, які перешкоджають притягненню до відповідальності за серйозну шкоду довкіллю. Ці комбіновані методи забезпечують всебічний аналіз питання.

Результати та висновки. *У цій статті аналізуються міжнародно-правові інструменти разом із кримінальним законодавством В'єтнаму щодо злочинів проти довкілля, що спричиняють зміну клімату. У ній розглядаються ключові проблеми, нові тенденції та політичні заходи реагування. Зрештою, пропонуються правові та інституційні реформи, спрямовані на вдосконалення законодавчої бази та підвищення ефективності правозастосування.*

Ключові слова: *зміна клімату, злочини проти довкілля, кримінальне право, екологічне право, В'єтнам.*

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Research Article

DISCRIMINATION AGAINST NON-MAJORITY COMMUNITIES IN KOSOVO: PRACTICAL INSIGHTS ON THE ROMA, ASHKALI AND EGYPTIAN EXPERIENCE

Adelina Rakaj, Melos Kolshi*, Aleksandra Klich and Keriman Sadikay

ABSTRACT

Background: *Despite a progressive constitutional and legal framework that guarantees equality and prohibits discrimination, Roma, Ashkali, and Egyptian communities in Kosovo continue to face systemic and multifaceted discrimination in nearly every aspect of public and private life. These communities, although constitutionally recognised and protected under both domestic and international standards—including the European Convention on Human Rights and the Framework Convention for the Protection of National Minorities—remain among the most marginalised groups in Kosovo. Legal instruments such as the Law on Protection from Discrimination and the Law on the Protection and Promotion of the Rights of Communities and their Members aim to safeguard these communities, yet the gap between legal guarantees and the practical realisation of rights remains substantial. Socioeconomic exclusion, limited access to education, health care, housing, and justice, as well as widespread prejudice and institutional neglect, contribute to the persistence of discrimination, particularly in the post-conflict and transitional governance context of Kosovo.*

Methods: *This study employs a multidisciplinary methodological approach, combining normative legal analysis with empirical data and case study evaluations. Legal analysis focuses on constitutional guarantees, statutory protections, and case law from both domestic and international courts, including the Constitutional Court of Kosovo and the European Court of Human Rights. Empirical data are drawn from the National Platform for Anti-discrimination measures, institutional reports, court verdicts, and civil society monitoring. The case study method is used to highlight documented instances of discrimination, ranging from hate speech and denial of public services to employment discrimination and violations of the right to education. Through document and content analysis of legislation, official decisions, and human rights reports, the study investigates the disjunction between law and practice, aiming to identify systemic patterns and shortcomings.*

Results and conclusions: *Findings indicate that while Kosovo's legal and institutional frameworks formally provide robust protections against discrimination, their implementation is weak and inconsistent. Marginalisation of the Roma, Ashkali, and Egyptian communities remains deeply entrenched due to inadequate enforcement of legal norms, limited institutional responsiveness, and low public awareness among the communities themselves. Case studies illustrate forms of discrimination, including housing denial for returnees, restriction of peaceful assembly, hate speech leading to violence, and institutional bias in employment. Reports reveal that fear of retaliation and lack of trust in institutions inhibit reporting, while accountability for perpetrators—particularly within public institutions and among private actors—remains rare.*

The establishment of mechanisms such as the National Platform for Anti-Discrimination measures represents a positive step, yet its reach and impact are constrained by insufficient resourcing and promotion.

The study concludes that legal guarantees must be supplemented by targeted, community-specific awareness campaigns, strengthened institutional accountability, and affirmative state measures to combat structural inequality. Without political will, sustained oversight, and inclusive policymaking, discrimination will remain a lived reality for these communities. Kosovo must transform its legal commitments into practical safeguards that ensure dignity, equality, and full participation for Roma, Ashkali, and Egyptian communities in all spheres of public life.

1 INTRODUCTION

According to the latest population census, Kosovo is home to 8,730 Roma, 16,207 Ashkali, and 10,581 Egyptians. Based on those statistics, the Roma population constitutes 0.55 per cent of the population, Ashkali 1.02 per cent, and Egyptians 0.67 per cent.[1]

From 1999 until 2007, Kosovo was governed by the UN Mission. After the declaration in 2008, Kosovo adopted and ratified its constitutional system of governance. The 2008 Kosovo Constitution includes guarantees for the protection of the rights of non-majority communities.

Chapter III of the Constitution outlines a separate normative-constitutional system for the position of ethnic groups, religious, and cultural (non-majority), which in the constitutional system of the Republic of Kosovo, are referred to as communities. Moreover, the Kosovo Constitution includes numerous provisions that guarantee safeguarding human rights as well as strong anti-discrimination principles, including non-discrimination on ethnic grounds.[2]

1 Kosovo Agency of Statistics, *Population and Housing Census in Kosovo 2024: First Final Results* (KAS 2024).

2 Constitution of the Republic of Kosovo (adopted 9 April 2008, amendment 24 February 2016) <https://www.constituteproject.org/constitution/Kosovo_2016> accessed 25 March 2025.

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Given the favourable position of constitutional and legal infrastructure for anti-discrimination measures, regardless of the specific rights of non-majority communities, Kosovo's institutions have taken proactive measures to guard the Roma, Ashkali, and Egyptian communities against discrimination. These measures include designing a national platform for anti-discrimination measures, which serves as a mechanism to report discrimination cases.[3]

This study aims to analyse the discrimination faced by these communities in Kosovo by addressing the following research questions:

1. What is the legal position of Egyptian, Ashkali, and Roma communities in Kosovo?
2. How are legal acts implemented in practice?
3. What challenges do the Egyptian, Ashkali, and Roma communities face in Kosovo?

2 METHODOLOGY

This research employs a multidisciplinary methodological approach, combining legal analysis with empirical evidence to comprehensively examine the protection and treatment of the Roma, Ashkali, and Egyptian communities in Kosovo. It integrates both normative and practical perspectives, focusing on the implementation of legal provisions in accessing services and institutional practices.

To assess the formal legal status of these communities and the guarantees provided through anti-discrimination measures, the study uses the normative legal method. This includes a detailed examination of Kosovo's constitutional and legislative framework, as well as the incorporation of international human rights standards into domestic law. The analysis focuses on identifying the general legal principles and institutional mechanisms established to safeguard the rights of non-majority communities.

In parallel, the analytical method is used to evaluate the practical application of these legal norms, critically assessing how institutions at both central and local levels respond to discrimination cases and enforce legal protections. Reports and data from the institutions monitoring human rights reflect the level of implementation and institutional engagement.

Furthermore, the case study method explores specific instances of discrimination reported by members of the Roma, Ashkali, and Egyptian communities. These cases—selected from documented complaints and court decisions—provide valuable insights into the lived experiences of these communities, revealing institutional patterns, enforcement gaps, and the responsiveness of relevant authorities.

3 Government of the Republic of Kosovo, *National Anti-Discrimination Platform for Roma, Ashkali and Egyptian Communities* (Office for Good Governance, Office of the Prime Minister 2022) <https://raportodiskriminimin.org> accessed 25 March 2025.

Complementing these approaches, the study also employs a document and content analysis, focusing on official reports, legal documents, institutional decisions, and academic literature. This method enables the identification of key trends, challenges, and policy developments related to non-majority communities in Kosovo.

This combined approach provides a robust foundation for evaluating the effectiveness of Kosovo's anti-discrimination framework and formulating recommendations for its improvement.

In alignment with the outlined methodology and the analytical context of this paper, the following methods were used:

The legal analytical method is applied when analysing the constitutional and legal framework regarding the protection of the rights of Roma, Ashkali and Egyptian non-majority communities. This method also encompasses analysis of international acts and judicial decisions of the European Court of Human Rights (ECtHR).

The comparative method is employed within the section on the elaboration of practices in European countries relating to legal policies and protection from discrimination.

The case study method entails a detailed analysis of discrimination cases of the Roma, Ashkali and Egyptian communities in Kosovo. These cases elucidate the practical manifestations of discrimination toward these non-majority communities in Kosovo and the measures that the competent institutions have taken.

The statistical method, which is applied during the presentation of concrete statistics, showing the number of cases, the number of members of the non-majority Roma, Ashkali and Egyptian communities discriminated against, the number of institutions involved in discrimination, the time at which the discrimination occurred, etc.

By combining all these methods, the study provides a clear and nuanced assessment of the extent and nature of discrimination against the Roma, Ashkali and Egyptian communities, as well as the measures taken by institutions to combat discrimination against these communities.

3 LITERATURE REVIEW

A brief overview of minorities in the Balkans—and in Kosovo in particular—reveals numerous challenges that cannot be resolved simply or simultaneously. These challenges are not necessarily linked to the status of ethnic processes or the specific differences among communities, particularly Roma, Ashkali, and Egyptians, but rather to issues of ethnogenesis and the historical development of these communities. This perspective is

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emphasised in the study *Identity Formation among Minorities in the Balkans: The Cases of Roma, Egyptians, and Ashkali in Kosovo.*[4]

Each Balkan state has established the status of non-majority communities, including the Roma, Ashkali, and Egyptian communities, with Kosovo being no exception. The constitutional position of the Roma, Ashkali, and Egyptian communities in Kosovo is generally linked to the broader framework governing non-majority communities within the country's constitutional system. The rights of non-majority communities in Kosovo stem from Chapters II and III of the Constitution, which grant these communities special rights, as highlighted by authors Bajrami and Muçaj.[5] These special rights are also afforded to the Roma, Ashkali, and Egyptian communities and are rooted in the guarantees provided by the Ahtisaari Package. The Ahtisaari Package—a document which laid the foundation for Kosovo's declaration of independence—served as a guiding framework for the content of Kosovo's Constitution, particularly regarding the rights of non-majority communities. Appropriately, the authors refer to the Ahtisaari Package, in general terms, as "Kosovo's Achilles' heel"[6] due to the significant constitutional obligations it imposes to protect non-majority communities.

As mentioned above, the Roma, Ashkali, and Egyptian communities were already recognised as constitutional communities even before Kosovo declared independence and adopted its Constitution. As highlighted by Shala, Gega, and Berisha, "the Constitution of Kosovo recognises the Framework Convention for the Protection of National Minorities (1994), the European Convention for the Protection of Fundamental Human Rights and Freedoms (1950), and the European Charter for Regional or Minority Languages (1992) as integral parts of Kosovo's legislation."[7]

Despite this comprehensive legal and institutional framework, the Roma, Ashkali, and Egyptian communities in Kosovo continue to face systemic discrimination across all spheres of life. These include inadequate education, access to health services, reconstruction of damaged property, decision-making processes, and involvement in repatriation programs.[8]

4 Elena Marushiakova and others, *Identity Formation among Minorities in the Balkans: The Cases of Roms, Egyptians and Ashkali in Kosovo* (Minority Studies Society Studii Romani 2001) 13.

5 Arsim Bajrami and Florent Muçaj, *E drejta Kushtetuese* (Universiteti i Prishtines "Hasan Prishtina" 2018).

6 Petrit Nimani and others, 'The Constitutional and Legal Position of National Minorities in Kosovo: Ahtisaari Package and the Privilege of Minorities' (2023) 6(4) Access to Justice in Eastern Europe Journal 148-50, doi:10.33327/AJEE-18-6.4-a000406.

7 Sabiha Shala, Gentiana Gega and Emirjeta Berisha, 'The Non-Majority Communities' Rights in Kosovo: Implementation of the Right to Employment and Education' (2023) 9(2) Journal of Liberty and International Affairs 531, doi:10.47305/JLIA2392716sh.

8 Mădălina Cocoşatu, 'The Role of Ethnic Minorities within the Government Systems of Kosovo' (2012) 5(1) Acta Universitatis Danubius 111.

A central concept in understanding this discrimination is anti-Gypsyism—a term that refers to the manifestation of both individual expressions and acts, as well as institutional policies and practices of marginalisation, exclusion, physical violence, devaluation of Roma cultures and ways of life. This form of racism manifests in the devaluation of Roma culture and identity, hate speech directed against Roma and other individuals or groups perceived, and social stigmatisation. It echoes a long history of persecution, including during the Nazi era and continues to today as "Gypsies." This leads to the treatment of Roma as an alleged foreign group and associates them with a series of degrading stereotypes and distorted representations, constituting a specific form of racism.[9]

Studies have revealed that anti-gypsyism, prejudices, discrimination, and cultural inferiority about the Roma, Ashkali, and Egyptian communities are still present in Kosovo. Two indicators demonstrating this are high unemployment rates and low involvement in education.[10] Based on the current situation, the Roma, Ashkali, and Egyptian communities continue to be the most vulnerable and discriminated against in Kosovo, particularly with a significant increase in hate speech against Roma.[11]

The Roma, Ashkali and Egyptian communities are discriminated against in several aspects and influenced by several factors. Regarding their limited integration into political life, it is estimated that several factors influence them, including lack of stability and unity, factions, and external influences within these parties, which prevent them from increasing community participation, integration and social-economic development.[12]

A high degree of discrimination for the Roma, Ashkali, and Egyptian communities also lies in the realisation of the right to education. This is because the non-majority communities live in bad economic conditions, which impacts their access to education, as a fundamental right for their development.[13]

9 Iulius Rostas, *Antigypsyism: Causes, Prevalence, Consequences, Possible Responses: Report of the Committee of experts on Roma and Traveller issues (ADI-ROM)* (Council of Europe 2022) 20.

10 Goran Miletić, *The Wall of Anti-Gypsyism: Roma, Ashkali AND Egyptians in Kosovo* (Civil Rights Defenders 2018) 5-6.

11 ibid 7.

12 Gezim Visoka, 'Political Parties and Minority Participation: Case of Roma, Ashkalia and Egyptians in Kosovo' in *Political Parties and Minority Participation* (Friedrich Ebert Stiftung 2008) 153.

13 Maliqe Mulolli-Jahmurataj, 'Education Policies in Pre-University Education of the Republic of Kosovo for Non-Majority Communities of Roma, Ashkali, and Egyptian' (2020) 4(1) Prizren Social Science Journal 57, doi:10.32936/pssj.v4i1.143.

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4 RESEARCH RESULTS AND DISCUSSION

4.1. Legal Framework for Anti-Discrimination Measures of the Roma, Ashkali, and Egyptian Communities in Kosovo and Its Content

The Kosovo Constitution provides advanced provisions regarding anti-discrimination measures, based on international standards.[14] Similarly, Article 22 of the Constitution of Kosovo has defined the international instruments that are directly applicable to the constitutional system of Kosovo, regardless of other constitutional provisions.[15] Even Article 57.2 of the Constitution of Kosovo determines that every member of the community has the right to be treated without discrimination.

In addition to the Kosovo Constitution, which provides a strong basis for the rights of communities and the protection of human rights, Kosovo has also adopted laws which defend the rights of communities against discrimination. One of the basic laws that serves as a core foundation for anti-discrimination measures is Law No. 05/L-021 on Protection from Discrimination, approved in 2015.[16]

Article 1.1 of the Law on Protection from Discrimination in Kosovo states that "*...the purpose of this law, among other things, is to establish a general framework for preventing and combating discrimination, including those based on ethnicity...*"[17] Additionally, the Law on Anti-discrimination measures has also defined its scope in a wide range of issues in which it is applied, including the issues regarding ethnic origin.[18]

Based on Law No. 05/L-021, the competent bodies for anti-discrimination measures are the Ombudsperson, the Courts, and the State Prosecutor when discrimination cases constitute a criminal offence.[19] The law grants all parties the right to file a complaint with the Ombudsperson if they believe they have been subjected to discriminatory treatment.

Likewise, the law provides a distinct legal pathway through a separate lawsuit dedicated to discrimination cases. These cases are brought before competent courts, with the burden of proof resting on the respondent.[20] Courts are obliged to deal with discrimination cases promptly.[21]

14 Constitution of the Republic of Kosovo (n 2) arts 7, 24.
15 ibid, art 22.
16 Law of the Republic of Kosovo No 05/L-021 'On the Protection from Discrimination' [2015] Official Gazette 16/35.
17 ibid, art 1.1.
18 ibid, art 2.
19 ibid, arts 12, 14, 16, 17.
20 ibid, arts 12, 13, 20.
21 ibid, art 16.9.

In all cases, actions resulting in discrimination that constitute criminal offences are treated in accordance with the current Criminal Code.[22] The Criminal Code of Kosovo identifies numerous criminal offences that include ethnical characteristics in their content, including inciting discord and intolerance, genocide, violation of the equal status of citizens and inhabitants of the Republic of Kosovo, etc.[23]

One of the laws that offers distinct anti-discrimination measures for the Roma, Ashkali, and Egyptian communities is the Law on the Protection and Promotion of the Rights of Communities and their members in Kosovo. This law, in Article 9.2, defines that "the Republic of Kosovo shall develop public employment programs and other initiatives, in addition to specially targeted measures, aimed at overcoming direct and indirect discrimination against persons belonging to communities. Special consideration shall be given to improving the situation of Roma, Ashkali, and Egyptian communities."[24] This law treats the Roma, Ashkali, and Egyptian communities with special consideration to protect them from discrimination.

In line with the legal framework, it is worth noting that the Kosovo Constitutional Court has addressed the issue of protection from discrimination in light of Article 24 of the Constitution of Kosovo. In this regard, the Constitutional Court's jurisprudence has already defined the meaning of this right and given the respective criteria for whether equality before the law is respected to a certain extent.

The Constitutional Court's judgment in Case No. KO203/19 has determined two criteria to validate, in each case, whether a different treatment is unequal and arbitrary when interpreting Article 24 of the Constitution of the Republic of Kosovo and Article 14 of the European Convention on Human Rights. In this regard, the Constitutional Court states that "the Court considers that, for the purposes of interpreting Art. 24 of the Constitution and the Art. 14 of the ECHR, a difference of treatment, in similar or analogous circumstances, is unequal and arbitrary if: 1) it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim, and 2) if there is not a reasonable relationship of proportionality."[25]

Regarding the discrimination against the Roma, the ECtHR, in the case of *D.H. and Others v. The Czech Republic* (Application No. 57325/00), para. 182 emphasises that the Roma, as a result of their history and constant uprooting, have become a specific type of disadvantaged and vulnerable non-majorities; therefore, they require special protection. This case

22 ibid, art 17.

23 Code No 06/L-074 'Criminal Code of the Republic of Kosovo' [2019] Official Gazette 2/1, arts 141, 142, 190.

24 Law of the Republic of Kosovo No 03/L-047 'On the Protection and Promotion of the Rights of Communities and their Members in Kosovo' [2008] Official Gazette 28/65, art 9.2.

25 Case No KO203/19 (Constitutional Court of the Republic of Kosovo, 9 July 2020) para 174 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=29923> accessed 25 March 2025.

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represents an obligation for the state of Kosovo, based on Article 53 of the Constitution, which obliges our state to interpret all actions in harmony with the decisions of the ECtHR. In fact, according to this ECtHR case, the Roma should be given special attention, both in regulatory policies and in cases of special decisions.[26]

4.2. Implementation of International Standards for Protection from Discrimination in Kosovo, Including Those of the European Union

Kosovo is a state with a consolidated democracy, which, in Article 7 of its Constitution, among other things, promotes the principle of non-discrimination as a value. The 2008 Constitution of Kosovo guarantees a strict application of international standards for the protection of human rights, incorporating nine international instruments in Article 22 that protect human rights, including the European Convention on Human Rights (ECHR), which is directly applicable in the Kosovo constitutional system.[27] Another important element in the Constitution of Kosovo is the fact that all public institutions, when it comes to human rights, must implement and interpret them, based on the decisions of the ECtHR.[28]

In terms of protecting the Roma, Ashkali, and Egyptian communities from discrimination, Kosovo's direct implementation of a considerable number of international instruments—including the ECHR and decision of the ECtHR–constitutes a value that influences the legal mechanisms for protection from discrimination of the Roma, Ashkali and Egyptian communities.

In general, discrimination against the Roma, Ashkali and Egyptian communities tends to focus on racial elements, including skin colour, which distinguishes these non-majority communities. In terms of racial discrimination, and based on the aforementioned points, Kosovo, with the application of international instruments under Article 22 of the Constitution, has solid grounds for combating this type of discrimination. In addressing racial discrimination, primary reference must be made to the International Convention on the Elimination of All Forms of Racial Discrimination, a document directly applicable in the Republic of Kosovo. Article 1 of the Convention clearly defines racial discrimination as follows:

"*Any distinction, exclusion, restriction or preference based on race, colour, descent or ethnic or national origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (emphasis added)*".[29]

26 *DH and Others v The Czech Republic* App no 57325/00 (ECtHR, 13 November 2007) para 182 <https://hudoc.echr.coe.int/fre?i=001-83256> accessed 25 March 2025.

27 Constitution of the Republic of Kosovo (n 2) art 22.

28 ibid, art 53.

29 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106 (XX)) art 1 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> accessed 25 March 2025.

With respect to racial discrimination, as the most widespread form of discrimination against the Roma, Ashkali and Egyptian communities in Kosovo, it should be noted that Kosovo also implements European Union directives. In fact, the current anti-discrimination legislation in Kosovo is based on EU Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[30]

Point 13 of the directive states:

"To this end, any direct or indirect discrimination based on racial or ethnic origin in relation to the areas covered by this Directive shall be prohibited throughout the Community. This prohibition of discrimination shall also apply to third-country nationals, but shall not cover differences of treatment based on nationality and shall be without prejudice to the provisions governing the entry and residence of third-country nationals and their access to employment and occupation".

Point 16 stresses the importance of protecting all natural persons from discrimination on the grounds of racial or ethnic origin. In the context of supplementing and amending the LPD in Kosovo, regarding the aspect of protection from discrimination on racial and ethnic grounds, it is important to highlight point 19 of the directive, which states that all persons who are victims of discrimination on racial or ethnic grounds must have access to adequate means of legal protection. To ensure effective legal protection, relevant organisations or associations must be entitled to act on behalf of the victims.[31]

Furthermore, in terms of discrimination on racial and ethnic grounds, the Recommendation of the Council of the European Union on Roma equality and participation, dated 12 March 2021, should be mentioned. Point 2 of the Recommendation states:

"Council Decision 2008/913/JHA obliges Member States to criminalise public incitement to violence or hatred based on race, colour, religion, descent or national or ethnic origin and to ensure that racist and xenophobic motivation is considered an aggravating circumstance or, alternatively, that it may be taken into account by national courts in determining fines. This Recommendation is designed to strengthen measures taken against hate speech, hate crime and violence against Roma. In line with Directive 2012/29/EU of the European Parliament and of the Council, this Recommendation also aims to promote support for Roma victims of such crimes."

In light of the specific case regarding discrimination against the Roma, Ashkali and Egyptian communities, it is important to reiterate that the case law of the ECtHR holds special significance in Kosovo, as its decisions are directly applicable under Article 53 of the Constitution.

30 Law of the Republic of Kosovo No 05/L-021 (n 16) art 1.2.

31 Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22, paras 13, 16, 19.

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In terms of international practice, in particular the ECtHR, there are several cases in which the racial aspect of discrimination has been addressed, including instances where the victims were members of the Roma community. For example, in *Burlya and Others v. Ukraine* (Application No. 3289/10), the ECtHR found that the state had failed to protect the Roma community from a planned attack on their homes by an anti-Roma mob.[32]

Similarly, in *Paketova and Others v. Bulgaria* (Applications nos. 17808/19 and 36972/19), the ECtHR found a violation of Article 14, based on discrimination, as the Roma applicants were forced to leave their homes due to marches against them.[33]

In *D.H. and Others v. The Czech Republic* (Application No. 57325/00), para. 182, the ECtHR emphasised that, due to their history, the Roma have become a particularly disadvantaged and vulnerable minority. As such, special attention must be given to their needs and distinct way of life—not only through the relevant regulatory framework but also in making special decisions for their cases, respectively, special protection.[34]

Additionally, in *Budinova and Chaprazov v. Bulgaria* (Application No. 12567/13), the ECtHR emphasised that the state had failed to fulfil its positive obligations to protect members of the Roma minority from hate speech which had resulted from the statements of a politician.[35]

These cases collectively illustrate the ECtHR's established practice in addressing discrimination against Roma individuals and should be considered when setting standards and providing legal protection for the Roma, Ashkali and Egyptian communities in Kosovo.

Regarding national practice, there have been cases in which regular courts in Kosovo have found discrimination against members of the Egyptian community. However, to date, there has been no case in which discrimination against the Roma, Ashkali and Egyptian communities has been addressed by the Constitutional Court of Kosovo.

4.3. From Discrimination to Antigypsyism - Kosovo One Step Further

The Law on Protection from Discrimination, currently in force in Kosovo, is the strongest basis for combating discrimination against the Roma, Ashkali, and Egyptian communities, in addition to the Constitution, international acts and the practice of the ECtHR.

32 *Burlya and Others v Ukraine* App no 3289/10 (ECtHR, 6 November 2018, final 06/02/2019) <https://hudoc.echr.coe.int/?i=001-187508> accessed 25 March 2025.

33 *Paketova and Others v Bulgaria* App nos 17808/19 and 36972/19 (ECtHR, 4 October 2022, final 04/01/2023) <https://hudoc.echr.coe.int/fre?i=001-219776> accessed 25 March 2025.

34 *DH and Others v The Czech Republic* (n 26).

35 *Budinova and Chaprazov v Bulgaria* App no 12567/13 (ECtHR, 16 February 2021, final 16/05/2021) <https://hudoc.echr.coe.int/eng?i=001-207928> accessed 25 March 2025.

From a comparative perspective, various democratic countries, such as Slovenia[36] and Croatia[37] have enacted general Anti-Discrimination laws. However, in comparative practice, there are also countries that have gone so far as to recognise discrimination against Roma communities even more deeply by law, addressing specific forms of discrimination faced by Roma communities, particularly antigypsyism. A notable example is Romania, which, under EU obligations, adopted Law No. 2/04.01.2021 on 4 January 2021, establishing measures to combat antigypsyism.

This law constitutes a clear commitment of the Romanian state to take concrete measures in combating hate speech and racial discrimination against the Roma minority. Point 2a of this law establishes the definition of antigypsyism as follows:

"*Perception of Roma expressed in hatred as well as verbal or physical manifestations expressed in hatred and directed against Roma, their property, Roma institutions or NGOs, traditions and the Roma language*."

Article 2(c) of the same law also defines symbols that promote and incite antigypsyism—including emblems, uniforms, slogans, greetings or any other signs associated with such propaganda. Under Article 5(3), penalties for organising propaganda activities that promote antigypsyism range from three months to ten years' imprisonment, depending on the nature and severity of the offence.[38]

This legislative development highlights Romania's commitment—under both internal policy and EU pressure—to enact a special law that protects the Roma population from hate speech and racially motivated attacks.

In Kosovo, antigypsyism is similarly manifested in various forms, including prejudices and stereotypes, hate speech and hate crimes, police violence, distrust of institutions, individual and institutional discrimination in almost all areas of public life, which are evidenced in national research. The isolation of Roma, Ashkali and Egyptian communities ("mahala"), limited access to quality education, limited access to kindergartens, the separation of Roma, Ashkali and Egyptian children from their peers, unequal access to employment and healthcare, are all manifestations of antigypsyism.

Roma, Ashkali, and Egyptians do not have the same status as other national minorities in Kosovo. While ethnic stereotypes and prejudices exist to a certain extent in every society,[39]

36 Act of the Republic of Slovenia of 21 April 2016 on Protection Against Discrimination 'Zakon o varstvu pred diskriminacijo (ZVarD)' [2016] Official Gazette 33/1427.

37 Act of the Republic of Croatia of 9 May 2008 on the Suppression of Discrimination (the Anti-Discrimination Act) [2008] Narodne Novine 85/12.

38 Iulius Rostas and Ciprian Nodis, *Antigypsyism in Romania: Lessons (not) learned : National Research Report, 17 November 2022* (CHACHIPEN 2022) 52-4 <https://antigypsyism.eu/antigypsyism-in-romania-lessons-not-learned/> accessed 25 March 2025.

39 Ann Morton Hyde and others, *National Research on Antigypsyism in Kosovo: Report* (Think - International and UBO Consulting 2022) 28.

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the systemic and structural nature of antigypsyism in Kosovo marks it as a distinct form of discrimination against these communities.

Beyond the general discrimination faced by Roma, Ashkali and Egyptian non-majority communities, a notable development occurred in 2024: Kosovo initiated the drafting of a new law on Protection from Discrimination. The first draft, drafted in 2024, is currently under review and is expected to be approved by Kosovo's Government and Parliament.

One of the main innovations of this draft law is that it recognises the category of racial discrimination on ethnic grounds, as well as antigypsyism as a specific form of discrimination against Roma, Ashkali and Egyptian communities in Kosovo.[40]

4.4. Practical Implementation of the Rights of the Roma, Ashkali, and Egyptian Communities

According to the analysis conducted in this research and the reports issued by other institutions regarding the situation of the communities, the data reflect the facts that although the Roma, Ashkali and Egyptian communities in Kosovo are, in principle, equal to other non-majority communities in Kosovo, they remain marginalised and subjected to discrimination. Research from most of the cases indicates that the Roma, Ashkali, and Egyptian communities live on the margins of society.[41]

Additionally, research shows several persistent issues, including: their low educational attainment, poor infrastructure in their residential areas, inadequate management of complaints by the central and local institutions, ongoing discrimination, lack of personal documentation, substantial challenges in accessing justice, issues with property registration due to the lack of documentation, constant complaints regarding the proceedings of their cases when they are reported to the police, prosecutor, as well as lack of response for the reported cases of discrimination.[42]

The challenges facing these communities are also highlighted in the Progress Report for Kosovo.[43] The Progress Report for Kosovo in 2021 reveals that the Roma and Ashkali communities in Kosovo continue to be the most marginalised in society. The report further

40 Draft Law of the Republic of Kosovo 'On the Protection from Discrimination' (2024) art 5, paras 13, 15.

41 Organization for Security and Co-operation in Europe, *Overview of Roma, Ashkali and Egyptian communities in Kosovo* (OSCE 2020) 4.

42 Gzim Shala and others, *Inclusion of the Roma, Ashkali, and Egyptian Communities in Decision-Making: Needs Analysis of Roma, Ashkali, and Egyptian Communities Through Open Meetings in the Municipality of Prishtina, Prizren, Peja, Gjakova, Obiliq, Ferizaj, Gjilan, Fushë Kosova, and Kamenica* (Kosovo Law Institute 2022) 15.

43 European Commission, *Commission Staff Working Document Kosovo* 2022 Report* (SWD(2022)334 final, 12 October 2022) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52022SC0334> accessed 25 March 2025.

notes that the particularly difficult circumstances of returnees from these communities and recommends that efforts be made to fight discrimination against the Roma and Ashkali communities in the education sector, particularly in universities and schools. [44]

In its report for 2022, the Ombudsperson Institution of Kosovo addressed the situation of the Roma, Ashkali, and Egyptian communities, specifically for the individuals returned by these communities. A key issue highlighted was that many individuals in Roma, Ashkali, and Egyptian communities are not even aware of the complaint mechanisms that exist in cases of discrimination. Based on complaints received in 2022, the Ombudsperson identified delays in legal procedures related to property rights as a major concern for these communities.[45]

Poor conditions were also identified in the field of education. In Ex Officio Report No. 331/2022, the Ombudsperson noted that the inclusion of Roma, Egyptian, and Ashkali students remains significantly lower than that of other communities, predominantly in preschool and upper secondary education.[46]

Despite the noted lack of awareness about complaint procedures, the Ombudsperson received a total of 25 discrimination-related cases in 2022: 13 from the Ashkali community, 10 from the Roma community, and two from the Egyptian community.[47]

Most recently, the Ombudsperson issued findings in Case No. 637/2023, concluding that the Municipality of Fushë Kosovë violated the rights to education of children from the Roma and Ashkali communities. The case report No. 637/2023 addresses concrete recommendations for competent institutions at the central and local levels.[48]

In relation to complaints submitted in 2024, the Annual Report of the Ombudsperson, published on 31 March 2025, reveals that a total of 48 complaints belong to the Roma, Ashkali, and Egyptian communities: 22 from the Ashkali community, 19 from the Roma community, and 7 from the Egyptian community.[49]

Regarding cases investigated by the Ombudsperson in 2024, disaggregated by ethnic affiliation, the institution handled 5 cases involving members of the Ashkali community,

44 European Commission, *Commission Staff Working Document Kosovo* 2021 Report* (SWD(2021)292 final, 19 October 2021) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52021SC0292> accessed 25 March 2025.

45 Ombudsperson Institution, *Annual Report 2022* (No 22, 31 March 2023) 90-1 <https://oik-rks.org/en/2023/03/31/annual-report-2022/> accessed 25 March 2025.

46 Ombudsperson Institution, *Report of the Ombudsperson, With regard to harmonization of the provisions of General Pre-University Education System of Kosovo with the rights of children in education* (Ex-officio No 331/2022, 9 November 2022) 33-7 <https://oik-rks.org/en/2022/11/10/report-of-the-ombudsperson-ex-officio-no-3312022/> accessed 30 March 2025.

47 Ombudsperson Institution, *Annual Report 2022* (n 45) 14.

48 ibid 10.

49 Ombudsperson Institution, *Annual Report 2024* (No 24, 28 March 2025) 16 <https://oik-rks.org/en/2025/03/28/annual-report-2024/> accessed 30 March 2025.

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7 cases involving members of the Roma community, and 3 cases involving members of the Egyptian community.[50]

Courts play a very crucial role in addressing and verifying instances of discrimination against these communities. A significant example is the Court of Appeal case Ac. No. 1849/20 dated 14 June 2022, in which the Court confirmed that the Directorate of Education within the Municipality of Gjakova had discriminated against the Roma, Ashkali, and Egyptian communities on the basis of race and ethnicity. Specifically, the Directorate had placed children from these communities in separate classes, which constitutes a violation of the right to qualitative and comprehensive education.[51]

It should be emphasised that this case lasted more than four years. The Court of Appeal alone took over a year and a half to reach a decision, demonstrating a lack of prioritisation.

4.5. Measures Taken and Additional Mechanisms Developed to Safeguard the Roma, Ashkali, and Egyptian Communities against Discrimination

In response to persistent discrimination against the Roma, Ashkali and Egyptian communities, Kosovo's institutions have taken important measures to create protective policies. A particularly important step was Kosovo's commitment alongside other Western Balkan states, including Kosovo, within the framework of the Berlin Process,[52] to integrate the Roma population. This commitment was made through the joint statement expressed in Poznan in 2019.[53]

Following this declaration, the Prime Minister of the Republic of Kosovo issued a decision to establish a Technical Working Group to protect the Roma, Ashkali and Egyptian

50 ibid 18.

51 Case No 1849/20 (Court of Appeal, 14 June 2022).

52 The Berlin process was set up in 2014 as a platform to increase cooperation between the Western Balkans Six and the Berlin Process host countries as well as the EU. It is first and foremost a consistent and inclusive format for all 6 Western Balkan countries. High official representatives of the Western Balkan Six (WB6) and their peers in Berlin Process host countries meet at least once a year at the Summit and preparatory Ministerial meetings. The Process also involves the EU institutions, international financial institutions and the region's civil society, youth and businesses. It provides high level political support and broad outreach and visibility to regional cooperation initiatives and respective policies, as well as to EU connectivity projects in the region. Over the years the Berlin Process continuously evolved and currently consists of the Summit itself, Ministerial Meetings (Foreign, Interior, Economy, Roma) and multiple side events (Digital Summit, Business Forum, Youth Forum, Civil Society Forum, Gender Forum, Science Conference, Purchasing Initiative of German Business and Agricultural Policy Forum). These Events are usually spread throughout the months in the run up towards the main summit. See, *Berlin process* (GIZ 2014) <https://www.berlinprocess.de> accessed 25 March 2025.

53 Democracy Plus, *Commitments from the "Berlin Process" on Rule of Law and Good Governance: Preparation for Agenda "Berlin Plus"* (Konrad-Adenauer-Stiftung (KAS) 2019) 7 <https://dplus.org/en/publications/commitments-from-the-berlin-process-on-rule-of-law-and-good-governance/5786/> accessed 30 March 2025.

communities.[54] This group became the first institutional mechanism in Kosovo dedicated to addressing cases and combating discrimination against these communities, operating within the country's existing legal and human rights framework.[55]

Within the framework of measures and mechanisms created for the anti-discrimination measures of the Roma, Ashkali, and Egyptian communities, the technical group has developed the National Platform for the Anti-discrimination Measures for the Roma, Ashkali, and Egyptian Communities.[56]

Launched in June 2022, the **National Platform for the Anti-discrimination measures of the Roma, Ashkali, and Egyptian Communities** in Kosovo aims to prevent and address discrimination by promoting institutional coordination, public awareness, and inclusive policymaking. Its key tasks include monitoring cases of discrimination, advising government bodies, facilitating dialogue among stakeholders, and empowering communities through participation and advocacy. Its core activities include collecting data, issuing reports, organising consultations, conducting training for public servants, and raising awareness to combat stereotypes and hate speech. The Platform serves as a national mechanism to advance equality and protect the rights of these communities in line with Kosovo's anti-discrimination legal framework and international human rights standards.[57]

This platform functions as an additional measure to empower the Roma, Ashkali, and Egyptian communities in Kosovo to report cases of discrimination.[58]

By 31 December 2024, the Platform had been operational for 30 months, functioning as both a preventive and responsive tool. It also acts as an additional affirmative measure to ensure equal treatment for all citizens in the Roma, Ashkali, and Egyptian communities.[59]

The establishment of the Technical Working Group and the development of the National Platform for Anti-discrimination measures reflect Kosovo's institutional efforts to address systemic discrimination faced by Roma, Ashkali, and Egyptian communities, particularly in the context of regional commitments like the Poznan Declaration under the Berlin Process.

These initiatives signify a shift from passive legal guarantees to active institutional engagement, aiming to provide accessible and community-focused mechanisms for reporting and addressing discrimination. By creating the first dedicated institutional

54 Decision of the Prime Minister of the Republic of Kosovo No 139/2020 of 11 September 2020.

55 Ombudsperson Institution, *Annual Report 2024* (n 49) 16.

56 Government of the Republic of Kosovo, *National Anti-Discrimination Platform* (n 3).

57 Office of the Prime Minister, *Protection against Discrimination: A comprehensive overview of the year-long efforts of the National Platform for Protection from Discrimination of Egyptian, Ashkali, and Roma communities (2022-2023)* (Office for Good Governance 2023).

58 Office of the Prime Minister, *Report on the Implementation of the Law on the Protection from Discrimination Based on Cases Reported to the National Platform for Protection against Discrimination for the Roma, Ashkali and Egyptian Communities* (Office for Good Governance 2023).

59 Office of the Prime Minister, *Report Implementation of the Strategy for the Advancement of the Rights of the Roma and Ashkali Communities in the Republic of Kosovo for 2022-2026 as Well Action Plan 2022-2024 for 2023* (Office for Good Governance 2024) 43-5.

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structure for these communities, Kosovo acknowledges the need for tailored responses to the specific vulnerabilities they face. However, while these measures represent positive steps, their effectiveness depends on sustained political will, adequate resourcing, active promotion within communities, and the institutions' capacity to follow up on complaints with concrete actions and accountability.

4.6. Data of Cases Reported to the National Platform for Anti-Discrimination Measures of the Roma, Ashkali and Egyptian Communities in Kosovo

The National Platform for Anti-Discrimination measures of the Roma, Ashkali, and Egyptian communities, established in June 2022, recorded 23 cases against discrimination up to June 2023. [60]

Figure 1[61] presents the cases according to the ethnic belonging of the communities: 9 cases were reported by members of the Egyptian community, 3 cases by the Ashkali community, and 7 by the Roma community. Additionally, 4 cases did not state which community they belonged to when submitting their cases on the national platform. The exact reason for the lack of community declaration is unknown.

Interestingly, out of 23 cases presented in Figure 1, 11 were reported anonymously, while 8 reporters agreed to reveal their identity.[62] The reluctance to disclose identity in cases of discrimination from the Roma, Ashkali and Egyptian communities can also be related to the conclusion of the People's Advocate in its annual report, which emphasised that citizens often do not report discrimination because they are afraid.

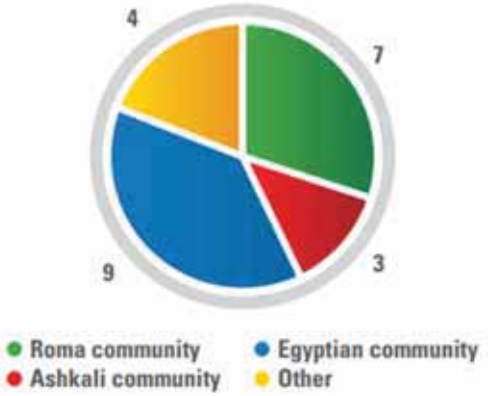

Figure 1. Classification of cases by ethnic belonging

60 Office of the Prime Minister, *Protection against Discrimination* (n 57) 6.
61 ibid 6.
62 ibid 10.

Figure 2[63] displays the reported cases of discrimination among non-majority communities based on their educational level. The data shows that nine reporters have a university-level education. This reinforces the observation made by the People's Advocate, which states that the Romani, Ashkali, and Egyptian communities do not have sufficient knowledge about the procedures and mechanisms for anti-discrimination measures, also taking into account their limited access to education.

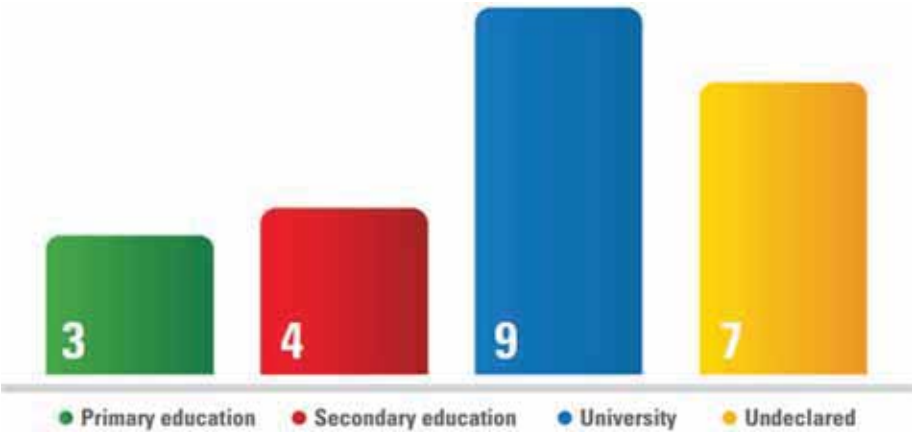

Figure 2. Classification of cases by the educational level of the reporters

On the other hand, Table 1[64] presents the cases where discrimination has occurred, respectively, based on the geographical distribution. The most reported cases were in the Municipalities of Fushë Kosovë and Prishtinë. One of the main reasons for this is that in these municipalities, the largest number of members of non-majority communities live.

Table 2[65] shows the entities responsible for discrimination against the communities. As shown, private businesses are involved in 5 cases, while public institutions are involved in 9 cases. A large number of public institutions are involved in reported cases of discrimination, which is also related to the poor practice of punishment by competent institutions to fight discrimination. This also applies to private businesses, to which the policy of punishment for discrimination is almost non-existent.

63 ibid 7.
64 ibid 9.
65 ibid 10.

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***Table* 1. Reported cases by geographical distribution**

MUNICIPALITY	NUMBER OF CASES
Ferizaj	1
Fushë Kosovë	4
Gjakovë	3
Klinë	1
Obiliq	1
Pejë	1
Prishtinë	5
Prizren	1
Not defined	6
TOTAL	**23**

***Table* 2. Institutions, legal entities, and natural persons where discrimination has occurred or is alleged to have occurred**

Institution/legal or natural persons where discrimination has occurred or is alleged to have occurred	Number of cases
Business/company	5
Medical institutions	2
Municipalities	2
Ministry of Internal Affairs	1
Ministry of Health	1
Individuals	3
Police	1
Government	1
University	1
Unidentified	6
TOTAL	**23**

4.7. Discrimination against the Roma, Ashkali, and Egyptian Communities - What Does the Practice of Reported Cases Show?

Referring to the legal framework and the creation of the National Platform for Anti-Discrimination measures, it is clear that Kosovo's institutions have established an important foundation to combat discrimination against the Roma, Ashkali, and Egyptian communities. The inclusion of anti-discrimination laws and mechanisms, such as the Ombudsperson and the courts, demonstrates a formal commitment to equality. However, the effectiveness of these measures depends on their practical implementation. By analysing cases reported to the platform, this study highlights the real-life challenges these communities face and the extent to which institutions respond to discrimination. This analysis reveals the gap between legal protections and their enforcement, offering insights into where further improvements are needed.

4.7.1. The Case of Discrimination against Returned Roma Families

This case involves two Roma families who returned from North Macedonia. Both families live in tough conditions and have purchased land in the Municipality of Obiliq. Nevertheless, the municipality has not authorised them to build houses on this land, as it is designated for agricultural use rather than construction.[66]

The legal framework requires intervention in this matter, as the safe and dignified return of refugees and displaced persons is a matter determined by the Constitution of Kosovo.[67] The Constitutional Court rejected the amendment proposal for the deletion of this article, on the grounds that its deletion diminishes the rights guaranteed by the constitution and by international documents, which Kosovo has a positive obligation to implement, such as, in particular, the right of movement and the right to property.[68]

Article 156 of the Constitution mandates that the Republic of Kosovo assist refugees and internally displaced persons in two ways: first, by promoting a safe and dignified return, and second, by providing substantial facilities to enable the return of all of those who were forced to leave Kosovo, as a result of the war and excessive violence before and after 10 June 1999.[69]

Regarding the circumstances of this case, Article 10.3 of Law No. 02/L-26 on Agricultural Land states that "Exceptionally, when no other possibility is provided and when it is required for general interest, the agricultural land respectively forestland of class 1-4 through the spatial plan respectively municipal development plan may be classified as land for other use."[70]

66 ibid 12.

67 Constitution of the Republic of Kosovo (n 2) art 156.

68 Case K038/12 (Constitutional Court of the Republic of Kosovo, 15 May 2012) paras 80-93.

69 Enver Hasani and Ivan Čukalović, *Komentar: Kushtetuta e Republikës së Kosovës* (GIZ 2013) 703.

70 Law of the Republic of Kosovo No 02/L-26 'On Agricultural Land' [2007] Official Gazette 13/52, art 10.3.

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Likewise, this law identifies "the general interest" as a reason for reclassification of the agricultural property. Also, Regulation (GRK) No. 01/2018 on the Return of Displaced Persons and Durable Solutions, in Article 15, specifies that: "The scheme for housing and sheltering categories is as follows:... Support through allocation of land with tenure rights for special cases, in accordance with the applicable Law on Allocation for Use and Exchange of Immovable Property of Municipality."[71] This regulation aims to create the conditions for achieving durable solutions for internally displaced people within Kosovo and in the region from 28 February 1998 until 31 March 2004.

As mentioned above, in this case, the Municipality of Obiliq has failed to consider the legal obligations, including those arising from the Law on Agricultural Land and the Regulation on the Return of Displaced Persons, and has treated the returned Roma families unequally. By denying authorisation to build houses on their purchased land, the municipality has indirectly discriminated against these families.

4.7.2. Discrimination in the Case of Restricting Freedom of Assembly

Discrimination in this case involves the denial of the right to freedom of assembly, linked to the murder of Kujtim Veseli, a child from the Roma community, on 11 July 2019. His murder was accompanied by a great public reaction, due to suspicions that institutions of the Republic of Kosovo had neglected the case.[72]

In response to widespread citizen demands for justice, an activist advocating for the protection of the rights of the Roma, Ashkali and Egyptian community planned a peaceful rally on 31 August 2020 near the State Prosecutor's office. The purpose of the gathering was to express outrage over the case and demand institutional action addressing the perceived lack of institutional response to the murder. The activist notified the Kosovo Police of the planned rally on 27 August 2020, indicating that 10 to 20 people would participate. In the announcement sent to the Kosovo Police, the anti-COVID measures that would be respected were also indicated. [73]

Despite this, the Kosovo Police rejected the request and in response said that "there are no conditions in terms of security to allow the gathering because the causes of the COVID-19 epidemic already exist". This decision of the Kosovo Police did not contain adequate reasoning.[74] Moreover, this denial In this particular case, the Kosovo Police had violated the

71 Regulation (GRK) - No 01/2018 On the Return of Displaced Persons and Durable Solutions (04 January 2018) art 15 <https://www.refworld.org/legal/decreees/natlegbod/2018/en/122389> accessed 25 March 2025.

72 'The Battle for Justice in the Case of the Murder of 11-Year-Old Kujtim Veseli' (*Insajderi*, 11 October 2020) <https://insajderi.org/en/the-battle-for-justice-in-the-case-of-the-murder-of-the-11-year-old%2C-a-happy-memory/> accessed 25 March 2025.

73 Data from the National Platform for the Protection against Discrimination of the Roma, Ashkali and Egyptian communities.

74 Office of the Prime Minister, *Protection against Discrimination* (n 57) 12.

freedom of assembly, guaranteed by Article 43 of the Constitution of Kosovo, accompanied by discrimination, since at the same time other assemblies were held that had more people than this one, which was about a protest organised by the Roma community. Thus, the Kosovo police had treated differently, in the same situations, this action, which according to the law is considered discrimination.[75]

4.7.3. Cases of Discrimination through Hate Speech Resulting in Criminal Offences

Following the circulation of a photo on social media, several online portals falsely claimed that the individual in the image—an ethnic Roma woman—was a man dressed as a woman, and raised unfounded suspicions that the person might be transgender. These misleading reports were accompanied by videos and inflammatory commentary, which fueled hateful discourse online. As a direct consequence of this incitement, the Roma woman was physically attacked by individuals on two separate occasions, on 29 May and 31 May 2019, in the city of Ferizaj. The case was widely reported, including in the article titled "Serious incident in Ferizaj: Roma woman brutally assaulted on the street", published by Mapo Newspaper on 31 May 2019. In response, the Ombudsperson Institution of Kosovo issued a special report, categorising the incident as a case of discrimination and hate speech that led to violence. The report included recommendations to several institutions, including the Chief State Prosecutor, the Kosovo Police, the Independent Media Commission, and the Centres for Social Work, urging them to take appropriate action.[76]

A separate case of hatred, incitement and intolerance on social media occurred when the Prime Minister of Kosovo visited a private company employing members of the Roma, Ashkali, and Egyptian communities. A public official, commenting on the official Facebook page of the Prime Minister, made inappropriate remarks. This behaviour constitutes discrimination with elements of a criminal offence and is currently being addressed by competent institutions, specifically the state prosecutor.[77]

These cases illustrate the severe consequences of hate speech and incitement on social media, particularly when directed at vulnerable groups like the Roma community. The Roma woman was physically assaulted following defamatory online content and public speculation about her gender identity. This example reflects how unchecked hate speech can escalate into real-world violence. The People's Advocate rightly classified the incident as

75 Data from the National Platform for the Protection against Discrimination of the Roma, Ashkali and Egyptian communities.

76 Ombudsperson Institution, *Report with recommendations In accordance with the positive obligations in the case of Ms ZS, guaranteed by the Constitution of the Republic of Kosovo and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Ex-officio No 468/2019, 9 December 2019) <https://oik-rks.org/en/2019/12/09/report-with-recommendations-ex-officio-no-4682019-in-accordance-with-the-positive-obligations-in-the-case-of-ms-z-s-guaranteed-by-the-constitution-of-the-republic-of-kosovo-and-article-3-of-the-e/> accessed 30 March 2025.

77 Office of the Prime Minister, *Protection against Discrimination* (n 57) 12.

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discrimination driven by hate speech and issued recommendations to relevant institutions, highlighting the urgent need for coordinated institutional responses. Similarly, the discriminatory comment made by a public official on the Prime Minister's Facebook page, targeting Roma, Ashkali, and Egyptian workers, further demonstrates how hate and prejudice continue to infiltrate public discourse, even from those in positions of authority.

Both cases underscore the dangerous role that online platforms and irresponsible media can play in fueling discrimination and violence. To effectively address this, Kosovo's institutions must take concrete action by strengthening monitoring and sanctioning mechanisms for hate speech, especially when it originates from public officials or media outlets. Awareness campaigns and training on hate speech, anti-discrimination, and responsible online behaviour should be implemented across public institutions and the media.

4.7.4. The Case of Discrimination against a Member of the Egyptian Community by the Ministry of Health

This case concerns the ongoing request of a healthcare professional from the Egyptian community to obtain a specialisation certificate for employment in Kosovo's healthcare system. The Ministry of Health of Kosovo has continuously refused to issue the specialisation certificate, relying on outdated administrative instructions from 2003, valid only until Kosovo declared its independence in 2008.[78]

After a lengthy legal battle, the competent Court of First Instance ruled that the Ministry of Health had imposed unequal employment requirements on the Egyptian professional, thus discriminating against him indirectly.[79]

This case clearly illustrates indirect institutional discrimination. The Ministry's continued reliance on an outdated administrative instruction from 2003—invalid since Kosovo's independence in 2008—resulted in unequal employment conditions and hindered the professional advancement of a non-majority individual. The Court of First Instance rightly found that this practice created discriminatory barriers, contradicting Kosovo's constitutional principles and legal guarantees for equality and non-discrimination.

The case illustrates how failure to update and align institutional procedures with current laws can disproportionately harm marginalised communities. To prevent similar cases, the Ministry of Health and other public institutions should urgently review and revise all administrative acts and ensure that staff are trained on anti-discrimination standards. Clear accountability mechanisms must be established to safeguard equal treatment for all citizens, particularly those from vulnerable communities.

78 Data from the National Platform for the Protection against Discrimination of the Roma, Ashkali, and Egyptian communities, 2023.

79 Case C No 400/19 (Basic Court in Prishtina, General Department, 18 May 2023).

5 CONCLUSIONS

The circumstances of the Roma, Ashkali, and Egyptian communities presented above demonstrate that, although these communities in Kosovo enjoy the same formal legal protection as other non-majority communities, in practice, they are more frequently and deeply exposed to various forms of discrimination. Such discrimination is not only isolated but systemic, manifesting in almost every sector of life—including education, employment, access to health services, property rights, and justice. Despite Kosovo's progressive constitutional and legal framework that guarantees equality and prohibits discrimination—particularly based on ethnicity—the lived reality of these communities continues to reflect persistent inequality and marginalisation.

One of the most concerning aspects remains the deep level of poverty that affects the Roma, Ashkali, and Egyptian communities, which directly impacts their access to public services, especially to education. Their low levels of educational attainment severely limit their opportunities for meaningful participation in social and economic life. This condition further perpetuates a vicious cycle of exclusion, underdevelopment, and discrimination. While Kosovo has indeed developed a solid legal infrastructure for the protection of communities, including the adoption of the Law on Protection from Discrimination and other sectoral legislation, as well as the establishment of bodies like the Ombudsperson and specialised mechanisms such as the National Platform for Anti-discrimination measures, the practical enforcement and implementation of these laws and structures remain weak and insufficiently impactful.

The cases presented on the National Platform for Anti-Discrimination measures offer a clear illustration of the types and extent of discrimination faced by members of these communities. These range from institutional discrimination by public authorities and the police to violations of the right to education and hate speech in the media and public discourse. Although the creation of this platform marks an important step toward visibility and accountability, it is not enough on its own. The reluctance of many individuals to report discrimination, often due to fear of retaliation or lack of trust in institutions, highlights a significant gap in public awareness and institutional outreach.

This indicates an urgent need for Kosovo's institutions to intensify efforts to raise awareness among Roma, Ashkali, and Egyptian communities regarding their rights and the mechanisms available for protection. Such awareness campaigns must be culturally sensitive, community-specific, and accessible to people with limited education. Moreover, the data suggests that enforcement of anti-discrimination measures is inconsistent and that the punishment of perpetrators, especially public institutions and private businesses, is rare or inadequate. Therefore, it is essential to strengthen the sanctioning mechanisms against entities found responsible for discrimination to build public trust and deter future violations.

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Furthermore, Kosovo's constitutional obligation to take affirmative measures to support the integration and protection of these communities must be translated into concrete, result-oriented policies. This includes improving housing conditions for returnees, ensuring equitable access to education and employment, and facilitating access to justice and documentation. Through such comprehensive and consistent efforts, the state can meet its commitments under domestic and international law and move towards a more inclusive and just society.

In conclusion, the fight against discrimination against the Roma, Ashkali, and Egyptian communities in Kosovo must go beyond formal legal provisions. It requires political will, active institutional engagement, public awareness, and a functioning accountability system. The experiences documented in this study reaffirm the urgent need for Kosovo to adopt a more proactive, inclusive, and enforceable approach to addressing the systemic discrimination faced by these communities, ensuring that equality is not only a constitutional promise but a lived reality for all.

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Egyptian Communities in Kosovo and Its Content. – 4.2. Implementation of International Standards for Protection from Discrimination in Kosovo, Including Those of the European Union. – 4.3. From Discrimination to Antigypsyism - Kosovo One Step Further. – 4.4. Practical Implementation of the Rights of the Roma, Ashkali, and Egyptian Communities. – 4.5. Measures Taken and Additional Mechanisms Developed to Safeguard the Roma, Ashkali, and Egyptian Communities against Discrimination. – 4.6. Data of Cases Reported to the National Platform for Anti-Discrimination Measures of the Roma, Ashkali and Egyptian Communities in Kosovo. – 4.7. Discrimination against the Roma, Ashkali, and Egyptian Communities - What Does the Practice of Reported Cases Show? – 4.7.1. The Case of Discrimination against Returned Roma Families. – 4.7.2. Discrimination in the Case of Restricting Freedom of Assembly. – 4.7.3. Cases of Discrimination through Hate Speech Resulting in Criminal Offenses. – 4.7.4. The Case of Discrimination against a Member of the Egyptian Community by the Ministry of Health. – 5. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДИСКРИМІНАЦІЯ МЕНШИН У КОСОВІ: ПРАКТИЧНІ ВИСНОВКИ З ДОСВІДУ РОМІВ, АШКАЛІВ ТА ЄГИПТЯН

Аделіна Ракай, Мелос Колші*, Александра Кліч та Керіман Садікай

АНОТАЦІЯ

Вступ. *Незважаючи на прогресивну конституційну та правову базу, яка гарантує рівність та забороняє дискримінацію, громади ромів, ашкалів та єгиптян у Косові продовжують стикатися із системною та багатогранною дискримінацією майже в усіх аспектах суспільного та приватного життя. Ці громади, хоча й конституційно визнані та захищені як національними, так і міжнародними стандартами, зокрема Європейською конвенцією з прав людини та Рамковою конвенцією про захист національних меншин, залишаються одними з найбільш маргіналізованих груп у Косові. Юридичні документи, такі як Закон про захист від дискримінації та Закон про захист та просування прав громад та їхніх членів, спрямовані на захист цих громад, проте розрив між правовими гарантіями та практичною реалізацією прав залишається суттєвим. Соціально-економічна ізоляція, обмежений доступ до освіти, охорони здоров'я, житла та правосуддя, а також поширені упередження та інституційна недбалість сприяють дискримінації, особливо в постконфліктному та перехідному контексті управління в Косові.*

Методи. *Це дослідження використовує міждисциплінарний методологічний підхід, поєднуючи нормативно-правовий аналіз з емпіричними даними та оцінками тематичних досліджень. Правовий аналіз зосереджується на конституційних гарантіях, законодавчому захисті та судовій практиці як національних, так і міжнародних судів, включно з Конституційним судом Косова та Європейським судом з прав людини. Емпіричні дані взяті з Національної платформи антидискримінаційних заходів, інституційних звітів, судових вироків та моніторингу громадянського суспільства. Метод тематичного аналізу використовується для виявлення задокументованих випадків дискримінації, починаючи від мови ненависті та відмови в державних послугах до дискримінації при працевлаштуванні та порушень права на освіту. Для того, щоб виявити системні закономірності та недоліки, з'ясувати розбіжність між законом та практикою у статті був здійснений аналіз документів та змісту законодавства, офіційних рішень та звітів про права людини.*

Результати та висновки. *Результати дослідження показують, що хоча правова та інституційна база Косова формально забезпечує надійний захист від дискримінації, її впровадження є слабким та непослідовним. Маргіналізація громад ромів, ашкалів та єгиптян залишається глибоко вкоріненою через недостатнє забезпечення дотримання правових норм, обмежену інституційну реакцію та низьку обізнаність серед самих громад.*

Тематичні дослідження ілюструють форми дискримінації, зокрема відмову в житлі для репатріантів, обмеження права на мирні зібрання, мову ворожнечі, що призводить до насильства, та інституційну упередженість у сфері зайнятості. Звіти показують, що страх помсти та відсутність довіри до інституцій перешкоджають звітності, тоді як відповідальність винних, особливо в державних установах та серед приватних суб'єктів, залишається рідкісним явищем.

Створення таких механізмів, як Національна платформа антидискримінаційних заходів, є позитивним кроком, проте її охоплення та вплив обмежуються недостатнім фінансуванням та просуванням.

У дослідженні було зроблено висновок, що правові гарантії повинні бути доповнені цільовими кампаніями з підвищення обізнаності, орієнтованими на громади, посиленням інституційної підзвітності та позитивними державними заходами для боротьби зі структурною нерівністю. Без політичної волі, постійного нагляду та інклюзивного формування політики дискримінація залишатиметься проблемним питанням для цих громад. Косово має перетворити свої правові зобов'язання на практичні гарантії, що забезпечують гідність, рівність та повну участь громад ромів, ашкалі та єгиптян у всіх сферах суспільного життя.

Ключові слова: *недискримінація, права, меншини, роми, ашкалі, єгиптяни, Косово.*

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Review Article

THE LEGALITY OF DRONE USE UNDER INTERNATIONAL HUMANITARIAN LAW: THEORETICAL PERSPECTIVES AND CASE LAW INSIGHTS

Driss Ed.daran*, Fatima Ezzohra El Hajraoui, Zaid Ali Zaid, Riad Al Ajlani and Zia-ud-Din Malik

ABSTRACT

Background: *Modern warfare is increasingly characterised by the use of drone technology to manage and operate aerial systems for surveillance and target identification. Initially, unmanned aerial vehicles (UAVs) were primarily used for surveillance. However, their active involvement in military operations has raised significant legal questions regarding their status under International Humanitarian Law (IHL). The expanded use of drone strikes beyond conventional war zones has brought to light critical issues related to state sovereignty, the principle of distinction, and the principle of proportionality in armed conflict. With the growing reliance on drones in conflict zones, particularly in the Middle East by the United States and Israel, concerns have emerged regarding civilian safety and military accountability.*

Methods: *This study employs a literature review approach and conducts doctrinal legal research, drawing primarily on primary sources such as the United Nations Charter and secondary sources, including case law like the Corfu Channel Case and Nicaragua v. United States. Journal articles, academic research papers, and reports from human rights organisations were analysed to assess the application of International Humanitarian Law in the context of drone warfare. Case studies from Pakistan, Gaza, and Yemen were examined to evaluate the practical implementation of the principles of distinction, proportionality, and necessity. These examples were used to assess legal standards and state compliance in minimising civilian casualties.*

Results and Conclusions: *The analysis reveals that while drones provide strategic advantages, their use often violates the fundamental principles of IHL. Drone strikes in Yemen and Gaza have demonstrated instances where civilian casualties were inadequately avoided, raising serious concerns about adherence to the principles of proportionality and distinction. The study also highlights that states employing drone strikes, particularly the U.S. and Israel, bear accountability for civilian deaths despite the lack of a robust legal framework to address such issues. To address these challenges, there is a pressing need for international laws that enhance oversight and ensure compliance with IHL, particularly in safeguarding civilians during armed conflict. Consequently, there is a growing call for stronger international regulation to ensure that the use of force aligns with the protection of civilian populations.*

1 INTRODUCTION

The rapid advancements in drone technology have introduced unprecedented capabilities on the battlefield, fundamentally transforming the nature of modern warfare. While drones were initially employed solely for surveillance and reconnaissance, an increasing number of nations are now utilising them for offensive operations, enabling precise and targeted strikes. Their deployment in active conflict zones has sparked significant legal and ethical debates under International Humanitarian Law (IHL). These concerns are further amplified as states increasingly use drones beyond traditional war zones, highlighting the growing importance of IHL in regulating such practices. The use of drones intersects with critical issues such as state responsibility, sovereignty, and the principles of distinction and proportionality in armed conflict.[1] This has become a contentious topic, as drone strikes often occur in territories far from conventional frontlines, challenging established norms on the use of force. While the technology itself is generally considered legal, its application frequently violates international law. Critics have raised objections to the implementation of drone technology, as its use in diverse contexts necessitates addressing varying legal and ethical considerations. Nonetheless, scholars like Henderson, Keane, and Liddy argue that the legal obligations governing drone strikes are no different from those applicable to other weapons, emphasising the need for consistent adherence to IHL standards.[2]

This paper explores the complexities of drone warfare within the framework of International Humanitarian Law, focusing on four key areas of concern: the legality of remote operations, the role of operators, target identification, and the pervasive lack of

1 Amelie Theussen, 'International Law Is Dead, Long Live International Law: The State Practice of Drone Strikes' (2023) 60 International Politics 859, doi:10.1057/s41311-021-00333-0.

2 Ian S Henderson, Patrick Keane and Josh Liddy, 'Remote and Autonomous Warfare Systems: Precautions in Attack and Individual Accountability' in Jens David Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar Publishing 2017) 335; Afonso Seixas-Nunes, *The Legality and Accountability of Autonomous Weapon Systems: A Humanitarian Law Perspective* (CUP 2022) doi:10.1017/9781009090001.

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transparency in drone programs. Through practical examples, case studies, and relevant court rulings, this analysis demonstrates that while drone warfare often operates in a legal grey area, the principles and norms of IHL continue to play a crucial role in shaping its regulation and application in contemporary security environments.

2 METHODOLOGY

The method applied in this report and related research on "The Legal Framework of Drones Under International Humanitarian Law"[3] entailed a literature review approach and doctrinal legal research. This approach provided the foundation for evaluating current laws, treaties, and legal norms governing drone warfare, particularly in the Middle East and Gaza. The study began with critically assessing primary and secondary legal materials, including legal statutes and case law. Key documents, such as the United Nations Charter[4] and various International Court of Justice (ICJ) decisions, served as primary sources. These sources were instrumental in understanding the fundamental legal principles governing armed conflict, particularly distinction, proportionality, and necessity.

Additionally, scholarly publications—including peer-reviewed journals, legal commentaries, and statements from human rights organisations—were analysed to assess the real-world application of these legal principles in drone warfare. A crucial aspect of the research involved examining case law, particularly the Corfu Channel Case and Nicaragua v. United States, to explore evolving legal interpretations regarding state sovereignty, the use of force, and extraterritorial jurisdiction.[5] These cases provided a framework for analysing modern drone strikes, especially in relation to state responsibility and the duty to protect civilians. Another significant component of the study was the examination of key concepts in International Humanitarian Law (IHL), such as distinction, proportionality, and necessity. To evaluate these principles, insights were drawn from drone operations conducted in the Middle East, particularly in Yemen by the United States and in Gaza by Israel. Casualty statistics were used to assess the extent to which these operations complied with IHL, highlighting the ethical and legal challenges posed by modern drone technology.

3 ICRC, 'Views of the International Committee of the Red Cross (ICRC) on autonomous weapon system' (Convention on Certain Conventional Weapons (CCW): Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) , Geneva, 11-15 April 2016) <https://www.icrc.org/en/document/views-icrc-autonomous-weapon-system> accessed 25 December 2024; Neil Davison, 'A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law' (*ICRC*, 30 2018) <https://www.icrc.org/en/document/autonomous-weapon-systems-under-international-humanitarian-law> accessed 25 December 2024.

4 United Nations Charter (26 June 1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 25 December 2024.

5 Theussen (n 1); *Corfu Channel* Case *(United Kingdom of Great Britain and Northern Ireland v People's Republic of Albania)* [1949] ICJ Rep 4, 244 <https://www.icj-cij.org/case/1> accessed 25 December 2024; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits [1986] ICJ Rep 14 <https://www.icj-cij.org/case/70> accessed 25 December 2024.

3 THE LEGAL FRAMEWORK OF DRONES UNDER INTERNATIONAL HUMANITARIAN LAW

3.1. Definition and Nature of Drones

Drones, also known as Unmanned Aerial Vehicles (UAVs), are small to medium-sized aircraft that operate without a human pilot. These versatile devices can be remotely controlled or fly autonomously, demonstrating their ability to sustain flight under various conditions. Modern drones are equipped with state-of-the-art technologies, including GPS, radar control, infrared sensors, and high-resolution cameras, enabling them to perform a wide range of tasks efficiently.[6] In many ways, UAVs function similarly to traditional aircraft, such as helicopters and aeroplanes. For instance, UAVs can be programmed to execute aggressive manoeuvres, land or perch on inclined surfaces, and carry out general aviation and civil functions. They are powered by electric, jet, or combustion engines and rely on multiple propellers for balance and manoeuvrability. While most UAVs feature four propellers, variations exist with three, six, or even eight propellers. Each UAV is equipped with a flight control system that regulates stability through magnetic field sensors and adjusts the speed of the propellers accordingly.[7] The presence of an anterior endoskeleton allows drones to execute precise movements without human intervention, following preset flight paths.

Drones are now widely used across various domains, including military applications. In defence operations, they play a crucial role in surveillance, intelligence gathering, and precision strikes. UAVs enhance situational awareness by providing real-time information about the surrounding environment, while reducing the risk to human pilots. They also assist in distinguishing between objects and individuals, identifying potential targets, and detecting weapons or explosives.[8] This capability has revolutionised modern warfare, allowing for tactical precision while reducing the risk to human lives.

However, the increasing use of drones raises significant legal and ethical concerns under International Humanitarian Law (IHL). UAVs blur traditional notions of warfare by enabling remote operations, potentially undermining accountability for military actions.[9] Their ability to conduct precise strikes necessitates strict adherence to distinction and proportionality principles to prevent collateral damage and human rights violations. Despite advancements in UAV technology, the application and interpretation of IHL

6 'Drones: What They Are, How They Work, Spanish Regulations' (*Ferrovial*, 2024) <https://www.ferrovial.com/en/resources/drones/> accessed 25 December 2024.

7 Bowen Zhang and others, 'Overview of Propulsion Systems for Unmanned Aerial Vehicles' (2022) 15(2) *Energies* 455, doi:10.3390/en15020455.

8 Maurice Marshall and Jimmie C Oxley (eds), *Aspects of Explosives Detection* (Elsevier Science 2011) doi:10.1016/B978-0-12-374533-0.X0001-3.

9 Hugh Gusterson, *Drone: Remote Control Warfare* (MIT Press 2016).

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remain contested and require ongoing regulation to ensure compliance with humanitarian principles. As a fusion of robotics and aerodynamics, drones have numerous innovative applications, particularly in military and security operations.[10] Given their increasing role in modern conflicts, assessing their impact on warfare and civilian populations is crucial. A deeper understanding of their implications is essential for establishing appropriate regulatory frameworks and ethical oversight mechanisms as their use continues to expand.

3.2. Relevant International Humanitarian Law Principles

The fundamental principles of International Humanitarian Law (IHL) include distinction, limitation, and precaution. In contemporary warfare—particularly involving drones—principles such as proportionality, necessity, and precaution play a crucial role in protecting both combatants and civilians.[11] One of the core tenets of IHL is the principle of distinction, which prohibits the direct targeting of individuals who are not combatants. This principle is enshrined in Articles 48 and 52 of Additional Protocol I of the Geneva Conventions, which emphasise the protection of civilians.[12] However, the increasing use of drones as instruments of warfare presents significant challenges in this regard. While drones are capable of precision targeting, concerns persist regarding the potential misidentification of targets. This issue arises primarily due to the uncertainty of battlefield conditions and the subjective nature of military advantage assessments, which can lead to differing interpretations of what constitutes "excessive" injury.

Legal compliance with IHL in this context necessitates adherence to the principles of necessity and precaution. Military necessity allows the use of force to achieve a legitimate military objective but does not exempt operators from adhering to humanitarian constraints. The principle of precaution requires that all feasible measures be taken to minimise civilian casualties. This includes gathering intelligence to accurately identify targets, using precision-guided munitions designed to limit collateral damage, and rigorously assessing the potential impact on civilians. The failure to implement such precautions may constitute a violation of IHL, underscoring the need for meticulous planning and execution of drone strikes.

The legal framework governing drone warfare also raises serious concerns regarding extraterritoriality, state sovereignty, and accountability. Issues related to national sovereignty emerge when drone strikes are conducted within the territory of a sovereign

10 Syed Agha Hassnain Mohsan and others, 'Unmanned Aerial Vehicles (UAVs): Practical Aspects, Applications, Open Challenges, Security Issues, and Future Trends' (2023) 16(1) *Intelligent Service Robotics* 109, doi:10.1007/s11370-022-00452-4.

11 Khoirunnisa Khoirunnisa and others, 'The Ukraine-Russia Conflict: An International Humanitarian Law Review of the Involvement of Foreign Fighters' (2025) 11 Social Sciences & Humanities Open 101340, doi:10.1016/j.ssaho.2025.101340.

12 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (adopted 8 June 1977) [1979] UNTS 1125/3.

state that is not engaged in an active conflict, particularly when the target does not pose an imminent threat to the attacking state.[13] Furthermore, the question of accountability for unlawful drone strikes—including the mechanisms for punishing violations of IHL—remains a complex and contentious issue. While drones can enhance the efficiency of military operations, their deployment must align with international humanitarian law standards. The complexities of modern warfare make it challenging to ensure a distinction between combatants and civilians, accurately measure proportionality and uphold the principles of necessity and precaution.[14] Legal and ethical concerns surrounding drone strikes also stem from gaps in the application of international treaties, which are meant to safeguard civilians and promote humanitarian values in armed conflict.

4 PRACTICAL EXAMPLES OF DRONE USAGE IN MODERN CONFLICTS

4.1. US Drone Operations in the Middle East

Drones have become a focal point in military operations, particularly in the Middle East, with a significant presence in Pakistan, Afghanistan, and Yemen, where the United States has conducted counterterrorism operations. Unmanned Aerial Vehicles (UAVs), such as the MQ-9 Reaper, are effective in reconnaissance and precision strikes.[15] However, their use under IHL raises serious legal and ethical concerns. The practice of targeted assassinations via drone strikes is often justified as a necessary measure in the war on terror. However, the legality of such actions under IHL depends on several factors, primarily the principles of distinction, proportionality, and necessity.[16]

The principle of distinction requires that parties in armed conflict differentiate between combatants and civilians. It is often argued that drones can target military objectives with high precision, thereby reducing civilian casualties. However, they cannot entirely eliminate the risk of collateral damage.[17] Reports of civilian casualties, particularly in Yemen, have raised concerns about whether these operations are conducted in compliance with IHL. Another legal challenge in drone operations is the principle of proportionality,

13 Rosa Brooks, 'Drones and Cognitive Dissonance' in Peter L Bergen and Daniel Rothenberg (eds), *Drone Wars: Transforming Conflict, Law, and Policy* (CUP 2014) 230.

14 Jack Beard, 'The Principle of Proportionality in an Era of High Technology' in Christopher M Ford and Winston S Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Lieber Studies Series 1, OUP 2018) 261.

15 Ankit Kumar, 'Drone Proliferation and Security Threats' (2020) 33(1/2) *Indian Journal of Asian Affairs* 43.

16 Nicolene Renske Steyn, '*The Adequacy of International Humanitarian Law in Regulating the Challenges Posed by Drone Warfare*' (PhD thesis, North-West University 2019) doi:10.13140/RG.2.2.17222.24646.

17 James Igoe Walsh, 'Precision Weapons, Civilian Casualties, and Support for the Use of Force' (2015) 36(5) *Political Psychology* 507, doi:10.1111/pops.12175.

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which mandates that an attack must not cause excessive civilian harm relative to the anticipated military advantage.[18] Proportionality is inherently subjective, particularly in conflict zones where conditions are fluid and unpredictable. The recent escalation of violence in Gaza and the increasing scale of Houthi attacks against U.S. targets highlights the difficulty of ensuring proportionality in military responses.[19]

The principle of necessity allows the use of force only when it is essential to achieving a legitimate military objective. The United States maintains that drone strikes help eliminate imminent threats. However, legal concerns arise when these strikes occur in regions where the U.S. is not formally engaged in military operations or lacks the explicit consent of the host country. The extraterritorial nature of sovereignty issues, particularly in countries like Yemen, do not always approve of the U.S. military actions on their territory.

In a recent incident in which Houthi forces reportedly shot down an MQ-9 Reaper drone serves as a stark reminder of the risks and geopolitical tensions associated with drone operations in the Middle East.[20] As long as the U.S. military and intelligence agencies continue using drones for counterterrorism missions, the legal framework governing these operations must strike a careful balance between national security interests and compliance with IHL.[21] The legality of U.S. drone strikes extends beyond the battlefield, impacting international relations, state sovereignty, and global norms of warfare.

4.2. Israel's Use of Drones in Gaza

The deployment of drones by Israel in Gaza, particularly in the context of urban warfare, has raised significant concerns regarding proportionality and distinction in its military operations. Since the escalation of hostilities on 7 October 2023, the use of quadcopter drones has increased substantially, serving various purposes, including surveillance and lethal strikes against Palestinian civilians.[22] Advanced drones such as the "SMASH Dragon" and "Spike Firefly" are equipped with cutting-edge technology that enables both surveillance and targeted attacks. However, their application in Gaza has had devastating consequences on multiple occasions.

18 Beard (n 14).

19 Xavier Pons Rafols, 'The War in Gaza and the Israeli-Palestinian Conflict: A Turning Point in the Midst of an Endless Cycle of Violence' (2024) 12 Paix et Securite Internationales 1, doi:10.25267/Paix_secur_int.2024.i12.1002.

20 Douglas C Youvan, 'Downing the MQ-9 Reaper: Analyzing Yemen's Air Defense Tactics and Capabilities in Modern Warfare' [2024] doi:10.13140/RG.2.2.11144.64005.

21 David Hastings Dunn and others, *Drones, Force and Law: European Perspectives* (CUP 2023) doi:10.1017/9781009451499.

22 Nehaluddin Ahmad, Faizah Rahim and Nurulqayyimah Aziz, 'Can International Humanitarian Law Regulate Recent Drone Strikes?: A Case Study' (2024) 17(1) *Journal of East Asia and International Law* 159, doi:10.14330/jeail.2024.17.1.09.

For instance, the reported extrajudicial assassination of Silah Muhammad Ahmad Odeh, who was shot while holding a white flag, highlights a clear failure to distinguish between combatants and civilians. Similarly, the killing of 70-year-old Fathi Hassan Yassin while he was seeking refuge underscores the severe repercussions of the indiscriminate use of drones in civilian areas.[23]

Beyond the physical harm, the psychological impact of these operations is profound. Drones instil a pervasive sense of dread and terror among Palestinians, who live under constant surveillance and the ever-present threat of sudden attacks. The intimidating sound of drones, coupled with the disruption of daily life, exacerbates the suffering of Gazans. This approach violates the ethical principles of armed conflict, which prioritise the protection of civilian lives in accordance with international humanitarian law. Moreover, the principle of proportionality—which stipulates that the anticipated military advantage must outweigh potential civilian casualties—is frequently disregarded. According to Euro-Med Monitor, drone attacks often result in a high civilian death toll, particularly in public areas where distinguishing between combatants and civilians is challenging.

While Israel's military operations benefit from the technological advantages of drones, the necessary precautions to minimise civilian harm are often overlooked. The situation in Gaza reflects a troubling trend in the use of modern military technology in ways that violate established humanitarian norms. The frequent deployment of drones for extrajudicial killings and the targeting of civilians raise serious ethical and legal concerns, warranting an urgent international response.[24] Accountability from the global community is essential, along with concerted efforts to ensure the protection of civilians in conflict zones.

4.3. Challenges in Ensuring Compliance with International Humanitarian Law

However, compliance with these principles has so far been elusive in practice, particularly in the context of U.S. drone operations in Pakistan and Yemen, where significant counterterrorism efforts have been concentrated, especially under the Bush, Obama, and Trump administrations. These operations have drawn criticism from human rights groups, and International Humanitarian Law (IHL) advocates due to civilian casualties and potential violations of the principles of distinction and proportionality.[25]

23 'Gaza: Israeli Army Expands Its Use of Quadcopters to Kill More Palestinian Civilians' (*Euro-Med Human Rights Monitor*, 4 June 2024) <https://euromedmonitor.org/en/article/6357/Gaza:-Israeli-army-expands-its-use-of-quadcopters-to-kill-more-Palestinian-civilians> accessed 26 December 2024.

24 David Cortright, Rachel Fairhurst and Kristen Wall (eds), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press 2015).

25 Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (Lieber Studies Series 6, OUP 2021) doi:10.1093/oso/9780197556726.001.0001.

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The United States began its drone campaign in Pakistan as early as 2004, with the killing of Taliban leader Nek Muhammad in South Waziristan. However, the drone war escalated significantly during the Obama administration, reaching its peak in 2010.[26] While the operations were ostensibly aimed at militant leaders affiliated with al-Qaeda and the Taliban, reports of civilian casualties continued to emerge. Strikes were frequently conducted in the Federally Administered Tribal Areas (FATA) along Pakistan's northern border. Despite claims of targeting terrorists, the lack of transparency and accountability fuelled suspicions that the United States was violating the principle of proportionality and failing to take adequate measures to minimise civilian harm.[27]

Similarly, U.S. drone strikes in Yemen, which began in 2002, expanded considerably under the Obama administration starting in 2009. One of the most controversial operations occurred in 2011 when a U.S. strike killed Anwar al-Awlaki, an American citizen and alleged leader of al-Qaeda.[28] While al-Awlaki was considered a legitimate target under U.S. counterterrorism strategy, the same strike killed his son two weeks later, raising significant legal and ethical questions. Under the Trump administration, the counterterrorism campaign in Yemen intensified further, with at least 131 strikes reported in 2017 alone.[29] Trump also eliminated the designation of specific locations as "areas of active hostilities," a move that effectively lowered the threshold for acceptable civilian casualties. The January 2017 Yakla raid, which resulted in the deaths of numerous civilians, including children, sparked global outrage.[30] The lack of clear accountability for civilian deaths has led many to question whether the U.S. is adhering to IHL norms.

U.S. drone operations in Pakistan and Yemen illustrate the complexities of complying with IHL in modern warfare. While these operations have targeted high-level insurgents, their secretive nature and the resulting civilian casualties have led to accusations of IHL violations. This underscores the challenges of conducting warfare in non-traditional battlefields, where the lines between combatants and civilians are often blurred, and accountability mechanisms are insufficient.

26 Francis N Okpaleke, *Drones and US Grand Strategy in the Contemporary World* (New Security Challenges, Springer 2023) 103-44, doi:10.1007/978-3-031-47730-0.

27 Imtiaz Ali, 'Mainstreaming Pakistan's Federally Administered Tribal Areas: Reform Initiatives and Roadblocks' (*United States Institute of Peace,* 20 March 2018) <https://www.usip.org/publications/2018/03/mainstreaming-pakistans-federally-administered-tribal-areas> accessed 26 December 2024.

28 Charles M McNiel, '*The Killing of Anwar al-Awlaki: How the United States Lost a Crucial Battle in the War of Ideas*' (PhD thesis, Air Command and Staff College, Air University 2016).

29 Mahmoud Saleh Al Shawhati, '*Impact of the United States Policy in Supporting the Saudi War in Yemen during the Term of the Trump Administration and the Joe Biden Administration*' (PhD thesis, San Francisco State University 2023).

30 Hussam Radman, 'Al-Qaeda's Strategic Retreat in Yemen' (*Sana'a Center for Strategic Studies, 17 April* 2019) <https://sanaacenter.org/publications/analysis/7306> accessed 26 December 2024.

5 COURT CASES AND JUDICIAL RULINGS

5.1. International Court of Justice (ICJ) Cases

The Corfu Channel Case (1949) established fundamental principles regarding state responsibility in preventing harm within its territory.[31] These principles are also relevant to the legal obligations of states deploying drones in military operations. In its ruling, the International Court of Justice (ICJ) found Albania liable for mine explosions in its territorial waters, even though there was no direct evidence that Albania had laid the mines.[32] The Court ruled that Albania had a duty of awareness and prevention, meaning it should have taken appropriate measures to warn and protect foreign vessels from the minefield. This principle is applicable to modern drone strikes, where states conducting such operations—such as the United States—have a duty of care to ensure they do not cause unnecessary civilian casualties. States deploying drone strikes are obligated to take all feasible precautions to minimise civilian harm. Failure to do so constitutes a breach of due diligence, akin to Albania's failure to safeguard its territorial waters in the Corfu Channel Case.

In the case of Nicaragua v. United States (1986), the ICJ further clarified principles of state sovereignty and the prohibition of force, both of which are directly relevant to transboundary drone strikes.[33] The Court found that the United States had violated Nicaragua's sovereignty by supporting paramilitary operations and laying mines in its waters. Additionally, the Court rejected the U.S. justification of collective self-defence, ruling that no state has the right to interfere in another state's affairs through force unless it fully complies with international law. This principle is particularly significant when analysing cross-border drone strikes, which often infringe upon the sovereignty of the targeted state. For instance, U.S. drone strikes in Pakistan and Yemen have frequently been criticised are violations of state sovereignty.[34] The ruling in Nicaragua v. United States establishes that no state may unilaterally resort to cross-border force unless it has the explicit consent of the affected state or a recognised legal justification under international law, such as self-defence.[35]

31 *Corfu Channel Case* (n 5); MA Fitzmaurice, 'The Corfu Channel Case and the Development of International Law' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda,* vol 1 (Brill 2022) 119, doi:10.1163/9789004531161_015.

32 Katherine Del Mar, 'The International Court of Justice and Standards of Proof' in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012) 98.

33 *Nicaragua v United States of America* (n 5).

34 Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3(1) *Journal on the Use of Force and International Law* 97, doi:10.1080/20531702.2015.1135658.

35 *Nicaragua v United States of America* (n 5) 25.

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Furthermore, such operations must comply with the United Nations Charter, which prohibits the threat or use of force except under specific legal circumstances. A drone strike that fails to meet these conditions constitutes a breach of international law and an infringement on state sovereignty. The ICJ's rulings reinforce the principle that states must take responsibility for preventing harm and respect the sovereignty of other nations.[36] These concerns are at the core of ongoing legal debates surrounding the legitimacy of contemporary drone warfare.

5.2. International Criminal Court (ICC) on Crimes of Aggression and Self-Defense

The International Criminal Court (ICC) plays a crucial role in addressing crimes of aggression and severe violations of international law, particularly regarding the use of military force by one state against another's sovereignty and territorial integrity. The rise of modern warfare, especially the increased use of drones, has raised concerns about whether certain drone strikes could constitute crimes of aggression.[37] However, the pre-emptive use of drones presents additional legal challenges, particularly when such strikes occur without the formal consent of the state in which the target is located and without prior authorisation from the United Nations Security Council (UNSC).

In February 2022, as the conflict between Russia and Ukraine escalated, the question of holding perpetrators of aggression accountable became a focal point in international legal discussions.[38] The United Nations General Assembly condemned Russia's military actions, declaring them an act of aggression in violation of the UN Charter. While neither Russia nor Ukraine are signatories to the Rome Statute, Ukraine has accepted the ICC's jurisdiction.[39] However, the ICC can only prosecute crimes of aggression if referred by the UNSC, a process that Russia has blocked using its veto power. This legal barrier complicates prosecution under existing international frameworks, prompting discussions about the establishment of a special tribunal to address severe crimes of aggression. Additionally, these debates highlight the importance of regional norms, particularly in Eastern Europe, when determining responsibility for acts of violence under customary international law.

For instance, drone warfare, specifically the anticipatory use of drones by states to eliminate targets on foreign territory, could be classified as an act of aggression if it violates another

36 Jennifer Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2(3) *Global Responsibility to Protect* 213, doi:10.1163/187598410X500363.

37 Patrycja Grzebyk, 'Crime of Aggression against Ukraine' (2023) 21(3) *Journal of International Criminal Justice* 435, doi:10.1093/jicj/mqad045.

38 Driss Ed.daran, Rehman Akhtar and Hafiz Syed Shoaib Altaf, 'The International Legal Framework with Regards to Russia's Invasion of Ukraine' (2023) 3(1) Pakistan Journal of Criminal Justice 40, doi:10.62585/pjcj.v3i1.18.

39 Iryna Marchuk, 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' (2021) 49(2) *Vanderbilt Journal of Transnational Law* 323.

state's sovereignty. Drone strikes conducted without the consent of the targeted state or without UN authorisation may reach the threshold of aggression, particularly if they result in significant harm and an escalation of conflict. While ICC cases addressing drone warfare are limited, legal precedents on aggression—such as the first use of force doctrine, which was excluded from the Rome Statute but remains part of customary law in some Eastern European legal frameworks—could provide guidance in future cases. The key legal challenge lies in determining whether a drone strike constitutes an unprovoked and unjustifiable use of armed force, which could lead to international criminal liability.

On the other hand, various states invoke Article 51 of the UN Charter to justify the use of drones in self-defence against perceived threats.[40] Article 51 grants states the inherent right to self-defence when they are under attack, provided that any use of force is reported to the UNSC. A major legal hurdle in drone-related litigation is defining what constitutes an "imminent threat" that justifies the use of force. Leading states, such as the United States, have argued that drone strikes against terrorist targets serve to prevent imminent attacks. However, such claims have been met with scepticism by the ICC and other international legal bodies. In practice, many states justify extraterritorial drone operations, such as those conducted in Pakistan and Yemen, as pre-emptive measures against terrorist groups, whose threats must be neutralised before they materialise.[41] These actions, however, raise significant legal and ethical concerns, particularly regarding the principles of proportionality and necessity. Under international law, these justifications become problematic when the imminence of the threat is uncertain or when the response is deemed disproportionate.[42]

5.3. The Role of International Justice and Accountability

International justice and accountability have increasingly played a crucial role in regulating drone strikes, particularly in addressing civilian casualties and violations of International Humanitarian Law (IHL). However, a significant accountability gap persists, as there are no clearly defined mechanisms for assessing and responding to drone strikes.[43] One of the most serious concerns surrounding drone operations is the lack of transparency and accountability, especially regarding civilian deaths. Many drone strikes—primarily those carried out by the United States in Pakistan and Yemen—are conducted as covert

40 Jordan J Paust, 'Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense' (2015) 8(1) *Albany Government Law Review* 166.

41 Alabo Ozubide, '*Extraterritorial Use of Force Against Non-State Actors and the Transformation of the Law of Self-Defence*' (PhD thesis, University of Pretoria 2016).

42 Stephen Townley, 'The Rise and Risk in International Law' (2017) 18(2) *Chicago Journal of International Law* 594.

43 James Michael Page and John Williams, 'Drones, Afghanistan, and Beyond: Towards Analysis and Assessment in Context' (2022) 7(3) *European Journal of International Security* 283, doi:10.1017/eis.2021.19.

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operations, making them difficult to investigate. This secrecy hinders efforts to document civilian harm and obstructs accountability for potential violations of IHL.

International humanitarian law mandates that states distinguish between combatants and civilians, ensuring that any use of force is proportionate to the military advantage gained. However, when drone strikes result in high civilian casualties, often dismissed as "collateral damage," questions arise about whether these legal requirements are genuinely upheld. Many incidents remain unreported, as there is minimal international oversight and no rigorous mechanism for assessing or investigating drone attacks.

International tribunals and local courts have made some progress in addressing this accountability gap but with mixed results. While the International Criminal Court (ICC) has jurisdiction over war crimes and crimes against humanity, prosecuting unlawful drone strikes remains challenging due to jurisdictional limitations.[44] Not all nations fall under the ICC's authority, as several states—including the United States—have refused to sign the Rome Statute, thereby limiting the Court's ability to challenge drone warfare policies.

Despite these constraints, domestic courts have occasionally intervened in drone-related legal cases. For instance, Pakistani nationals have sought legal redress against the U.S. drone program, arguing that it violates their constitutional rights. While Pakistani courts have raised concerns about civilian losses, the prospects for meaningful accountability remain limited due to the political dimensions of such cases and the reluctance of powerful states to support legal actions against drone strikes.

One of the most notable cases involves the United States' use of drone strikes in Pakistan to eliminate suspected terrorists. Since 2004, U.S. drone operations have primarily targeted high-ranking leaders of groups such as the Taliban and al-Qaeda. However, these strikes have been shrouded in secrecy and controversy, particularly regarding civilian casualties. The Obama administration faced criticism for failing to provide sufficient transparency about civilian exposure in counterterrorism operations, especially following the surge in drone attacks. Under the Trump administration, operational constraints were loosened, leading to a significant increase in drone strikes and raising further concerns about accountability and oversight.

The 2017 Yemen raid, which resulted in civilian deaths, further highlighted the challenges of ensuring proportionality and legality in drone operations.[45] A major obstacle to prosecuting unlawful drone strikes is the difficulty of obtaining concrete evidence. In

44 Victor Tsilonis, 'Lethal Autonomous Weapons, Drones and Robots: To What Extent Their Usage Infringes Upon Established Principles of International Criminal Law?' in Victor Tsilonis, *The Jurisdiction of the International Criminal Court* (2nd edn, Springer 2024) 299, doi:10.1007/978-3-031-46138-5_11.

45 Mohammad Bitar and Benarji Chakka, 'Drone Attacks During Armed Conflict: Quest for Legality and Regulation' (2023) 13(3-4) *International Journal of Intellectual Property Management* 397, doi:10.1504/IJIPM.2023.134058.

stealth operations conducted in remote areas, it is often challenging to prove that an attack took place, let alone establish responsibility for violations of international law. Additionally, high-level authorities, including the United Nations, frequently invoke Article 51 of the UN Charter to justify drone strikes as acts of self-defence, further complicating legal challenges.

5.4. Balancing Theory and Practical Implementation

The theoretical discourse surrounding key legal concepts and the practical realities of drone warfare remains difficult to reconcile, particularly in the context of IHL. Although state sovereignty, state responsibility, and the protection of civilians are well-established principles under international law, their practical application in modern warfare remains problematic.[46] As drone strikes become increasingly prevalent in contemporary conflicts, there is a growing need to harmonise these legal principles with the tactical realities of drone warfare.

A fundamental concept in international law and relations is sovereignty, which refers to a state's right to govern itself without external interference. However, drone warfare often challenges this principle, as states frequently conduct strikes within the borders of another state without its explicit consent. For example, the United States has carried out drone strikes in Pakistan and Yemen, raising concerns about violations of sovereignty. These strikes are often justified on the grounds of self-defence, particularly against non-state actors, such as terrorist groups, that pose cross-border threats. Another crucial theoretical issue is state accountability under international law, particularly IHL. This principle demands that states ensure distinction and proportionality in the use of force. However, applying these standards in practice has proven challenging, especially in clandestine operations where transparency is limited and civilian casualties often go unreported or unrecognised.[47]

While IHL principles are theoretically well-defined, their practical enforcement in drone warfare has been extremely limited. For instance, gathering reliable intelligence for drone strikes is particularly difficult in areas that are inaccessible or unsafe for human agents. Advanced surveillance technologies, which are designed to help distinguish combatants from civilians, often fail in complex environments where moving targets or terrorist groups blend into civilian populations.[48] This failure undermines the principle of distinction, which forms the foundation of IHL. Moreover, since most drone operations are covert, accountability mechanisms are significantly weakened. Many states conduct drone strikes

46 Francis Deng, 'From "Sovereignty as Responsibility" to the "Responsibility to Protect"' (2010) 2(4) *Global Responsibility to Protect* 353, doi:10.1163/187598410X519534.

47 Sam Dubberley, Alexa Koenig and Daragh Murray (eds), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (OUP 2020).

48 Audrey Kurth Cronin, *Power to the People: How Open Technological Innovation Is Arming Tomorrow's Terrorists* (OUP 2020).

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in secrecy, classifying them as matters of national security, which leads to a lack of transparency regarding civilian casualties. As a result, many civilian deaths go unreported or are dismissed as collateral damage. For example, the United States' drone operations in Pakistan and Yemen have faced criticism for their lack of transparency regarding civilian casualties and IHL compliance. Due to insufficient legal oversight, states cannot easily be held accountable for violations of international law.

To address these challenges, it is crucial to enhance IHL frameworks and enforcement mechanisms to regulate the use of drones in modern warfare. One key measure is the need for increased transparency and accountability in drone operations. States employing drones should be required to provide regular updates on their military actions, including their justification for target selection and anticipated non-combatant casualties. This would allow independent verification of IHL compliance and strengthen state accountability in cases of unlawful strikes. Another possible solution is to reinforce international oversight mechanisms by expanding the authority of international bodies, such as the ICC, or by introducing comprehensive legal frameworks specifically addressing drone warfare.[49] However, similar to the jurisdictional constraints that have previously limited the ICC, efforts to expand legal jurisdiction must be carefully designed to avoid inadvertently reducing accountability in regions most affected by drone operations.

6 CONCLUSIONS

Thus, the legal ambiguities surrounding drone warfare under International Humanitarian Law (IHL) raise significant concerns regarding legal responsibility, proportionality, and civilian protection. While drones have become integral to modern military operations, enabling remote strikes and surveillance, their use challenges traditional definitions of warfare, particularly the distinction between combatants and civilians. The principles of distinction and necessity, which are central to IHL, are often difficult to uphold, especially in situations where target misidentification leads to high civilian casualties.

As drone warfare continues to evolve, IHL must also adapt to address emerging legal and ethical challenges. The rapid advancement of drone technology necessitates the development of clear regulatory frameworks that define accountability for IHL violations and ensure mechanisms for civilian protection. Strengthening global oversight and accountability measures will be crucial in mitigating the risks associated with drone operations and reinforcing compliance with international legal standards.

49 Kaja Kowalczewska, 'Legal Aspects of Unmanned Warfare and Military Drone Operations' in Katarzyna Zombory and János Ede Szilágyi (eds), *Shielding Europe with the Common Security and Defence Policy: The EU Legal Framework for the Development of an Innovative European Defence Industry in Times of a Changing Global Security Environment* (Central European Academic Publishing 2024) 581, doi:10.54237/profnet.2024.zkjeszcodef_13.

Ultimately, a balance must be struck between military necessity and humanitarian obligations. Achieving this balance will require enhanced international cooperation, legal reforms, and greater transparency in drone operations. By implementing robust accountability measures and reinforcing adherence to IHL, the international community can ensure that drone warfare remains within the bounds of legality and upholds the fundamental rights of those affected by armed conflict.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ЗАКОННІСТЬ ВИКОРИСТАННЯ БЕЗПІЛОТНИКІВ ЗГІДНО З МІЖНАРОДНИМ ГУМАНІТАРНИМ ПРАВОМ: ТЕОРЕТИЧНІ ПЕРСПЕКТИВИ ТА СУДОВА ПРАКТИКА

Дріс Ед.даран*, Фатіма Еззохра Ель-Хаджрауї, Заїд Алі Заїд, Ріад Аль Айлані та Зіа-уд-Дін Малік

АНОТАЦІЯ

Вступ. *Сучасна війна все частіше характеризується використанням технологій безпілотників для управління та експлуатації повітряних систем із метою спостереження та ідентифікації цілей. Спочатку безпілотні літальні апарати (БПЛА) в основному використовувалися для спостереження. Однак їхня активна участь у військових операціях викликала серйозні правові питання щодо статусу БПЛА згідно з міжнародним гуманітарним правом (МГП). Розширене використання безпілотників за межами звичайних зон бойових дій виявило критичні питання, пов'язані з державним суверенітетом, принципом розрізнення та принципом пропорційності у збройному конфлікті. Використання безпілотників у зонах конфлікту стало розповсюдженим, зокрема на Близькому Сході, у Сполучених Штатах та Ізраїлі, тож виникло занепокоєння щодо безпеки цивільного населення та військової відповідальності.*

Методи. *У цьому дослідженні використовується підхід, заснований на огляді літератури, та проведено доктринальне юридичне дослідження, спираючись головним чином на першоджерела, такі як Статут Організації Об'єднаних Націй, і вторинні джерела, включно з прецедентним правом, такими як Справа про канал Корфу та Нікарагуа проти Сполучених Штатів. Академічні статті, наукові дослідження та звіти правозахисних організацій були проаналізовані для оцінки застосування міжнародного гуманітарного права в контексті використання безпілотників під час бойових дій. Для оцінки практичного впровадження принципів розрізнення, пропорційності та необхідності були розглянуті тематичні дослідження з Пакистану, Гази та Ємену. Ці приклади були використані, щоб оцінити правові стандарти і дотримання державою вимог щодо мінімізації жертв серед цивільного населення.*

Результати та висновки. *Аналіз показує, що хоча безпілотники забезпечують стратегічні переваги, їх використання часто порушує фундаментальні принципи МГП. Удари безпілотників у Ємені та Газі продемонстрували випадки, коли втрат серед цивільного населення не вдалося уникнути, що викликає серйозні занепокоєння щодо дотримання принципів пропорційності та розрізнення. У дослідженні також підкреслено,*

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що держави, які застосовують удари безпілотників, зокрема США та Ізраїль, несуть відповідальність за загибель цивільних, незважаючи на відсутність надійної правової бази для вирішення таких проблем. Щоб подолати ці виклики, існує нагальна потреба в міжнародних законах, які посилюють нагляд і забезпечують дотримання МГП, зокрема щодо захисту цивільних осіб під час збройного конфлікту. Отже, зростає вимога до посилення міжнародного регулювання, щоб гарантувати, що застосування сили узгоджується із захистом цивільного населення.

Ключові слова: *безпілотники, суверенітет, розрізнення, пропорційність, військові, самооборона, цивільне населення.*

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Review Article

CHALLENGES OF EU INTEGRATION AND COLLECTIVE SECURITY IN KOSOVO: LOOKING BEYOND THE FREE TRADE AGREEMENTS

Ilir Zylfiu and Dukagjin Leka*

ABSTRACT

Background: *Collective security is among the main principles guiding today's international law. This is particularly relevant for a country like Kosovo, whose statehood is contested by several countries, including Serbia, which has violated collective security through various actions. The primary purpose of this paper is to analyse the impact of collective security on Kosovo's integration into the EU, particularly in relation to the implementation and progress of free trade agreements with the EU, such as the Stabilisation and Association Agreement (SAA) and the Central European Free Trade Agreement (CEFTA).*

Methods: *This paper employs a systematic review of theoretical studies and research. Several sources of theoretical literature regarding Kosovo's EU integration, free trade agreements, regional cooperation in the Western Balkans, and the Stability Pact have been reviewed, and based on this evidence, conclusions have been formulated.*

Results and Conclusions: *The paper's relevance lies in the fact that it addresses issues of security, economic, political and legal nature. There is a noticeable lack of theoretical evidence on this topic within the Kosovar academic world. Therefore, this paper is particularly relevant, as it integrates these fields. The study of European integration and the effects of free trade agreements in post-conflict countries is of particular importance for countries like Kosovo and other Western Balkan states.*

1 INTRODUCTION

Historically, the Western Balkans, particularly Kosovo, have had a fragile history, forcing international forces to intervene to ensure collective security and protect the well-being of the region's population.[1] Even in recent decades,[2] the issue of humanitarian intervention has been contested.[3] It is thought to have reached a peak in the case of Kosovo, where it drew global attention. In contrast, the failure of intervention in Syria—where conflict continues even today—has been deemed ineffective, contributing to ongoing humanitarian catastrophes on a scale unseen since World War II.[4] The intervention in Kosovo, therefore, has caused a great stir and debate around the globe.

Typically, discussions have centred on banning the use of force, which is key to the debate regarding humanitarian intervention as a means to protect human rights, as opposed to humanitarian intervention being viewed as a violation of state sovereignty or an instrument of political or military influence. Indeed, the Kosovo case continues to be a subject of debate, even 23 years after it took place.[5] Despite these discussions, the EU began to commit to ensuring collective security by stabilising the region through trade agreements. An important date is 1999 when the European Union proposed the launch of the Stabilisation and Association Process for the Western Balkan countries.[6] At this moment, it was declared by the European Council that all countries included in the Stabilisation and Association Process would be considered as potential candidates for membership in the European Union.[7]

With the signing of the Free Trade Agreements (FTAs) and the intensification of efforts to embrace the integration process with the EU, the document preceding the SAA marked the beginning of the liberalisation phase with the countries of the region. In 1999, the Stability Pact for South-Eastern Europe and the EU began the process of achieving two interdependent goals: regional stabilisation and integration and European integration of the Western Balkan countries.

1 Inis L Claude, 'Collective Security as an Approach to Peace' in Phil Williams, Donald M Goldstein and Jay M Shafritz, *Classic Readings and Contemporary Debates in International Relations* (3rd eds, Thomson Wadsworth 2006).

2 Richard Grieveson, Mario Holzner and Goran Vukšić, 'Regional Economic Cooperation in the Western Balkans: The Role of Stabilization and Association Agreements, Bilateral Investment Treaties and Free Trade Agreements in Regional Investment and Trade Flows' (2021) 59(1) Eastern European Economics 3, doi:10.1080/00128775.2020.1846130.

3 René Värk, 'Terroris as Threat to Peace' (2009) 16 Juridica International Law Review 216.

4 Alba Ripoll Gallardo and others, 'Yemen's Unprecedented Humanitarian Crisis: Implications for International Humanitarian Law, the Geneva Convention, and the Future of Global Health Security' (2016) 10(5) Disaster Medicine and Public Health Preparedness 701, doi:10.1017/dmp.2016.50.

5 Adom Getachew, 'The Limits of Sovereignty as Responsibility' (2019) 26(2) Constellations 225, doi:10.1111/1467-8675.12387.

6 Joseph S Nye, *Understanding International Conflicts: An Introduction to Theory and History* (7th edn, Pearson 2008).

7 Hans Köchler, *Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of "Just War" Compatible with the International Rule of Law?* (IPO 2001).

The promotion of foreign trade was developed through two main initiatives: Stabilisation and association agreements, and free trade agreements (FTAs) between the beneficiary countries of the Stability Pact.[8] Facilitated by the EU, the countries in this region have strengthened regional cooperation, paricularly in trade exchange within free trade areas such as CEFTA. The CEFTA agreement includes Southeast European countries such as Kosovo, Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina and Moldova. Its creation aimed to facilitate the procedures of the states aspiring to membership in the EU, as well as to create a market economy, eliminating obstacles to the development of mutual trade between its member states. Kosovo signed the agreement in 2006 under the United Nations Mission in Kosovo (UNMIK).[9]

When discussing FTAs, it should be noted that in addition to the economic aspect, partner countries must also engage in political, strategic and institutional reforms. In addition to the costs, the reforms to be undertaken constitute the greatest costs, both in monetary and material terms, as well as in human terms. Nevertheless, they are essential to implement and consolidate to generate a direct, significant and possibly immediate impact on the country's economic development. Despite these efforts, trade between the countries of the region remains below its potential, and in some cases, the implementation of bilateral agreements has been unsatisfactory.[10]

Among the factors that have influenced this situation are structural economic factors that have driven profound geographical and sectoral changes in trade; historical factors, including wars and occasional ethnic conflicts; infrastructure problems, especially those related to transport; the small size of the regional economies;[11] low per capita incomes across the region; complex concession structures; asymmetries in trade preferences; differences in legal systems; and persistent issues in border management and bureaucratic customs procedures.[12]

The effect of humanitarian intervention on collective security remains a controversial topic[13] and a highly significant issue in international law. The 78-day military intervention

8 Gazmend Qorraj and Gezim Jusufi, 'The EU Stabilization and Association Agreement for the Western Balkans: Between Challenges and Opportunities' (2018) 24(81) Croatian International Relations Review 51, doi:10.2478/cirr-2018-0003.

9 Gazmend Qorraj, 'Towards European Union or Regional Economic Area: Western Balkans at Crossroads' (2018) 64(1) Naše Gospodarstvo/Our Economy 11, doi:10.2478/ngoe-2018-0002.

10 Gazmend Qorraj and Gezim Jusufi, 'Does EU trade ıntegration support export promotion in the Western Balkans' (2021) 8(1) InterEULawEast 75, doi:10.22598/iele.2021.8.1.5.

11 Ardian Kastrati, 'The Role of Civil Society in the European Integration Process in Kosovo: EU Mechanisms and Instruments for NGO Sector Development' (Proceedings of the 37th International Academic Conference, Budapest, 5-8 June 2018) 49, doi:10.20472/IAC.2018.037.009.

12 Burim Mexhuani, 'The Prospects and Challenges of Kosovo's Accession to the EU in Light of the EU's Policies and Priorities' (2023) 5 Frontier in Political Science, art 1197359, doi:10.3389/fpos.2023.1197359.

13 ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (IDRC 2001).

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undertaken by NATO against Yugoslavia was justified as an effort to protect the Albanian population, who at the time were disappearing or being deported by Serbian authorities. This marked the first time in NATO's history that it directly engaged in war with a sovereign state.[14]

NATO's main strategy was to stop violence in Kosovo and, as a consequence, prevent the possibility of another humanitarian catastrophe, similar to the earlier conflict in Bosnia and Herzegovina. According to Rrustemi, Hasani, Jusufi and Mladenović,[15] these strategies are reproducible in identifying, collecting, critically evaluating, and synthesising relevant issues on a specific topic. The main methods used for synthesising and comparing studies or research are the synthesis of textual narration and comparative analysis. Textual narrative synthesis uses many approaches and methodologies, producing extensive knowledge.

Notably, there are significant literature gaps, particularly a marked lack of studies on this issue. The theoretical and conceptual framework applied in this study draws on various papers, such as those authored by Gazmend Qorraj.[16] The rest of this paper is structured as follows: Section 2 reviews the relevant literature; Section 3 analyses the methodology employed; Section 4 presents the results and discussion; and Section 5 concludes the paper.

2 METHODOLOGY

This paper is grounded in a systematic review of theoretical studies and research, with a particular focus on collective security, EU integration, trade liberalisation, and trade agreements in the Western Balkans. Additionally, a narrative synthesis was employed to summarise and analyse the evidence of other papers. The primary aim is to provide readers with a clear understanding of these key concepts and illustrate how they should be used within academic research discourses.

It should be emphasised that the primary objectives of this review are to examine the development of economic cooperation following the 1999 humanitarian intervention in Kosovo and to assess its impact on interethnic reconciliation. The methodology employed is a theoretical review of relevant literature on the subject. Analysis and synthesis methods are applied, and through their use, the study aims to achieve its objectives.

The research methodology consists of a systematic review of studies and research related to the topic. This paper concludes that the lack of collective security—particularly orchestrated

14 Iain King and Whit Mason, *Peace at Any Price: How the World Failed Kosovo* (Cornell UP 2006).

15 Visar Rrustemi and others, 'Social Media in Use: A Uses and Gratifications Approach' (2021) 26(1) Management 201, doi:10.30924/mjcmi.26.1.12.

16 Gazmend Qorraj, 'Economic Cooperation as a Way Toward Reconciliation and EU Integration for Kosovo and Serbia' in Leandrit I Mehmeti and Branislav Radeljić (eds), *Kosovo and Serbia: Contested Options and Shared Consequences* (University of Pittsburgh Press 2016) 196, doi:10.2307/j.ctt1qv5n21.16.

terrorist acts such as the Banjska terrorist attack in 2023—greatly harms EU integration processes, free trade, economic cooperation, and corporate image. The relevance and significance of this study lie in these findings.

3 LITERATURE REVIEW

3.1. Free Trade Agreements in the Western Balkans

According to Holta Kora-Bako,[17] despite being called "Free Trade Agreements," they are in fact trade agreements that either eliminate customs duties or reduce them. These agreements have clear objectives in terms of contributing to the removal of trade barriers, stimulating the harmonious development and expansion of world trade, the gradual elimination of restrictions on trade in goods and the establishment of equal competitive conditions for trade in goods. Additional objectives include the promotion of trade and cooperation between the parties and third countries, the expansion and deepening of economic cooperation among the parties, and the increase in the standard of living of their populations. These goals aim to create favourable conditions for the further promotion of investments—particularly the development of joint investments in these countries/regions.

Dennis Appleyard and Alfred Field[18] claim that the degree of economic integration varies according to the type of trade agreement in force. At the initial level, Preferential Trade Agreements reduce trade barriers between members. Such preferential trade is usually limited to the entry of trade flows from less developed countries, and is often non-reciprocal. An FTA is a reciprocal agreement where trade barriers, usually tariffs, between participating nations are abolished, meaning all members must remove tariffs on products they trade with each other. However, each member may apply independent tariffs on trade with other non-member countries. More broadly, trade barriers are reduced over time, but in most cases, not all trade is completely free of national barriers. A prominent example of such an FTA is the North American Free Trade Agreement (NAFTA).

In a customs union, trade barriers among members are eliminated, meaning that all tariffs between them are removed. Participating nations also adopt a common foreign trade policy, such as a Common External Tariff (CET),[19] which is applied uniformly to imports from non-member countries. A customs union is equivalent to an FTA plus a common foreign trade policy.[20]

17 Holta Kora (Bako), 'Trade Liberalization, Impact on Economic Growth: The Case of Albania' (PhD thesis, University of Tirana 2015).

18 Dennis R Appleyard and Alfred J Field, *International Economics* (McGraw-Hill Higher Education 2016).

19 Vladimir Ristanović, 'International Trade Flows of the Balkan States' (2022) 73(1184) The Review of International Affairs 5, doi:10.18485/iipe_ria.2022.73.1184.1.

20 Ilir Zylfiu and Dukagjin Leka, 'Political Representation of the Albanian Minority in Serbia' (2023) 24(196) Qualıty Access to Success 63, doi:10.47750/QAS/24.196.08.

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All Western Balkan countries are in the accession process, a process referred to as the "Stabilisation and Association Process." The agreements concluded under this framework are known as "Stabilisation and Association Agreements". A key prerequisite for entering this process was the creation of political and economic stability in the region. This area has historically been a hotspot for various conflicts and violent wars, particularly among former federal units of the former Yugoslavia, as well as countries outside it, including Albania, which experienced significant transformation following the fall of its totalitarian regime. Within this context, Kosovo appears in this group as a specific and complex case in the broader history of the European integration process, often described as *sui generis* due to its unique circumstances.[21]

3.2. Security, Regional Cooperation and Integration in the Western Balkans

The issue of regional cooperation and participation in regional initiatives appears particularly problematic in the case of Kosovo, with the main obstacle being Serbia. The initiation of dialogue between the parties became a necessary step. Beyond the normalisation of relations, the need to fulfil specific criteria for membership—commonly referred to as preconditions for the continuation or initiation of the accession process—also emerged. One of the key EU foreign policy engagements of the EU in the Western Balkans has been to mediate the dialogue between Kosovo and Serbia, aiming to normalise relations. These talks have been led directly by the EU High Representative for Foreign Affairs and Security Policy.[22]

The EU has previously faced challenges regarding issues of regional cooperation and good neighbourly relations. A notable example is Cyprus's membership in the EU. Cyprus had long-standing relations between its Turkish and Greek communities, which were complicated by the involvement of Turkey and Greece—both NATO members. The unification and normalisation of relations between them became a criterion for Cyprus's EU membership process.

As Katarzyna Gajewska[23] notes, the avoidance of trade barriers and the promotion of free movement in Europe remain central objectives of EU integration. The future of trade

21 Dukagjin Leka, Selim Daku and Gezim Jusufi, 'Regional cooperation and Free Trade Agreements in Western Balkans: Opportunities and Obstacles' (2022) 17(7) International Journal of Sustainable Development and Planning 2239, doi:10.18280/ijsdp.170724; Dukagjin Leka and Gezim Jusufi, 'The Stabilization and Association Agreements in the Western Balkans as a Tool for Trade Promotion and Regional Reconciliation' (2024) 6(1) Corporate Law & Governance Review 38, doi:10.22495/clgrv6i1p4.

22 Senada Nezirović and others, 'Stabilisation and Association Agreement between the Western Balkan Countries and the European Union' (2022) 12(2) Journal of Geography, Politics and Society 36, doi:10.26881/jpgs.2022.2.05.

23 Katarzyna Gajewska, *Transnational Labour Solidarity: Mechanisms of Commitment to Cooperation with the European Trade Union Movement* (Routledge 2009) doi:10.4324/9780203878354.

cooperation among Western Balkan countries will depend on the creation of organisational structures and their action. These structures and actions show the longevity of the cooperation. Gajewska analyses the dynamics of interaction and action, describing them as mechanisms that foster transformation, even in the presence of underlying differences. Within this framework, two primary factors are identified: the creation of a ritual towards an identity in formation, and the process of learning through interaction.

Essential to this trade cooperation between these countries is the creation of sustained interaction and joint action. These are necessary both for the construction of a shared cooperative trade identity and for mutual learning derived from the cooperation itself. However, trade integration in the Western Balkans remains limited due to several general problems, including the lack of a corporate governance framework, the development of small trade in the country and its fragmentation, and partial privatisation processes.[24]

Among these countries, Kosovo is the country that suffers the most from insecurity and unresolved conflicts, thus hindering EU integration. Kosovo is characterised by three levels of opposition. The first stems from Serbia, which maintains a territorial claim over Kosovo. The second layer consists of EU member states, five of which refused to recognise Kosovo. The third reflects a broader ideological opposition from some countries around the world that view Kosovo's declaration of independence as a unilateral decision and a possible precedent for other countries.

It is important to clarify that the conclusion of the SAA is not related to, or equates to, obtaining the status of a candidate country for EU membership. Signing the SAA does not imply acceptance of the status of a candidate country. In fact, some countries—such as Croatia and Serbia—acquired candidate status before their SAAs entered into force. Kosovo is the most recent country to have signed the SAA and remains the only one that has not yet applied for candidate country status.[25]

The primary objective for both parties to the agreement should be its implementation. While the full implementation of the SAA does not guarantee Kosovo's immediate membership in the EU, it constitutes a critical transition in the country's reform process within the SAP. For Kosovo and other countries, the SAA has served as a central "roadmap" of their journey towards EU membership. There have been instances where signatory countries, after initiating implementation, have requested changes or extensions to the implementation timeline.

The success of negotiations and negotiators ultimately depends on whether the agreements reached are fully implemented. Today, many agreements remain unfulfilled despite being

24 Jelena Trivić and Łukasz Klimczak, 'The Determinants of Intra-Regional Trade in the Western Balkans' (2015) 33(1) Proceedings of Rijeka Faculty of Economics 37.

25 Jędrzej Paszkiewicz, 'Regional Cooperation in Western Balkans: A View from Inside the European Union: The Premises and Obstacles' [2012] (Spec) SDU Faculty of Arts and Sciences Journal of Social Sciences 149.

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formally concluded. Meanwhile, the SAA signatory countries, like Kosovo, have adopted an action plan—officially known as the National Program for the Implementation of the SAA—to ensure practical follow-through. This has been facilitated by establishing responsible institutions tasked with overseeing the agreement's implementation.

A unique feature of Kosovo's SAA is the explicit requirement for the improvement of stable relations with Serbia and the enhancement of collective security. Notably, this request was not made in Serbia's SAA. The EU has emphasised that the normalisation of relations must be achieved through an agreement binding the parties. The core challenge lies in the fact that the 1999 war between Serbia and Kosovo did not conclude with an agreement but was halted by NATO intervention and the introduction of the UN international mission (UNMIK), following an agreement between NATO and the Yugoslav Army.[26]

It is for this reason that the EU has included in Kosovo's SAA a provision calling for a "permanent agreement" to complete the process of normalisation. Like other SAAs signed with Western Balkan countries, Kosovo's SAA primarily addresses trade-related matters. Its objectives include the free movement of goods, services, and capital, and the promotion of fair competition.

Its purpose is to build capacities for the creation of an open and competitive market with the common internal market of the EU. While political attitudes on Kosovo's final status may change within the framework of this Union, the SAA offers a strategic opportunity for Kosovo to advance its economic and trade development with the EU. In doing so, Kosovo can strengthen its position in the wider EU market.[27]

The issue of budgetary and financial coverage represents an important factor during the accession phase, particularly in relation to the implementation of the SAA. This includes the execution of foreseen measures and reforms across various areas. As primarily a trade and economic agreement, the SAA requires proper and realistic planning, especially as it facilitates a country's transition towards full market liberalisation with the EU. This presents a particular challenge for states like Kosovo, which have limited national income and are heavily dependent on imports and trade revenues.

Džogović, Cucović, Ajdarpašić and Hamzagić[28] note that in July 2006, the Council of the European Union adopted Council Regulation (EC) No. 1085/2006, establishing an Instrument for Pre-Accession Assistance (IPA). This instrument replaced previous programmes and financial instruments such as PHARE, CBC, ISPA, SAPARD, and CARDS. The bulk of these funds go primarily to economic development and legal reform in Kosovo.

26 Aferdita Tepshi and Arjan Qafa, 'The European Union and Albania, the Relations between them' (2015) 6(3) Mediterranean Journal of Social Sciences 358, doi:10.5901/mjss.2015.v6n3p358.

27 Maurice Schiff and L Alan Winters, *Regional Integration and Development* (World Bank Trade & Development Series, OUP 2003) doi:10.1596/0-8213-5078-1.

28 Suada A Dzogovic and others, 'The Effects of IPA II pre-Accession Assistance Instruments in Bosnia and Herzegovina, Kosovo, and Turkey' (2021) 26(2) Management 245, doi:10.30924/mjcmi.26.2.14.

According to Suada Ajdarpasic and Gazmend Qorraj,[29] although the European Commission allocates these funds to Kosovo, their implementation is primarily overseen by the EU itself, acting as the principal monitor. In most cases, these dedicated funds are spent on capacity building within local institutions through the support of international ones.

To qualify for this financial assistance, countries—including Kosovo—must achieve certain specific objectives outlined by the EU, such as:

- ✓ Political reforms: Strengthening institutions and democracy, ensuring an independent and efficient judiciary, upholding the rule of law, protecting fundamental human rights and freedoms, fostering regional cooperation and good neighbourly relations, promoting reconciliation and peace building, combating corruption and organised crime, reforming public administration, supporting civil society, improving border management and migration policies, and enhancing social dialogue and partnerships.
- ✓ Sustainable economic development: Establishment of EU economic standards, functional market economy, fiscal and economic governance, competition, promotion of employment and job creation, promotion of social and economic inclusion (especially for vulnerable groups), integrated education system, preservation of cultural heritage, infrastructure, technological and innovative developments.[30]
- ✓ Legal harmonisation: Aligning national legislation with the EU acquis and fostering regional integration and cooperation among IPA II beneficiary countries.

To achieve these objectives, the EU allocated a financial package of 698,668,000 euros for the period 2014-2024.[31]

As a result, all countries aspiring to EU membership must continuously work toward achieving market economy standards and strengthening their competitiveness, with pre-accession assistance serving as a critical support mechanism. Kosovo's economy remains highly dependent on imports, and a large percentage of its budget revenues are provided by the collection of customs duties. Therefore, any transfer of a centralist economy to an open market economy, or to a capitalist economy, presents several challenges, especially as such systems require compliance with complex standards governing the EU's internal market.

An additional illustration of Kosovo's international challenges is its failed bid for UNESCO membership in 2015. Despite agreements reached during the EU-mediated Brussels talks,

29 Suada Ajdarpašić and Gazmend Qorraj, 'The impact of the EU programs in the Western Balkans' (2020) 7(1) InterEULawEast 65, doi:10.22598/iele.2020.7.1.4.

30 Safet Beqiri, 'Challenges of the Western Balkan Countries in the European Union Membership Process: The Case of Kosovo' (PhD thesis, University of Tirana, Institute of European Studies 2018).

31 Gezim Jusufi and Suada Ajdarpašić, 'The impact of EU programmes on financing higher education institutions in Western Balkans – Evidence from Kosovo' (2020) 12(1) LeXonomica 107, doi:10.18690/lexonomica.12.1.107-128.2020.

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which stipulated that Serbia would not obstruct Kosovo's participation in regional and international organisations, Kosovo's application was blocked, largely by Serbia and its allies. The failure to secure membership by two votes underlines the ongoing difficulties Kosovo faces in securing full international recognition and participation.[32]

For this reason, an agreement was reached regarding regional representation and cooperation, allowing Kosovo to participate in regional forums and international initiatives with a footnote status regarding its political status. However, Serbia has continued not to implement this agreement and to hinder Kosovo's membership in various international organisations.[33] Despite these challenges, in 2016, Kosovo successfully became a member of several international sporting organisations, including UEFA and FIFA. Serbia's lobbying efforts to prevent Kosovo's admission into these bodies—despite their apolitical and sporting character—highlight its ongoing resistance. These actions have further undermined collective security in Kosovo.[34]

3.3. Trade Liberalisation

Two of the most comprehensive factors that have influenced the trade balance and economic growth are certainly the free trade agreements (FTAs) concluded by these countries and the characteristics of the economy, which include internal and external factors. The implementation of various trade policies must also comply with multilateral, regional and bilateral FTAs, as well as obligations under the World Trade Organisation (WTO) agreements.[35] The importance and benefits of trade liberalisation can be understood through contemporary trade theories and derivatives of these theories, particularly those based on comparative advantage, competition, trade openness, and globalisation. Indeed, nearly all developed countries are members of at least one regional trading bloc.[36]

It can therefore be concluded that economic integration and FTAs directly affect trade liberalisation. Developing countries have an obligation to liberalise their trade policies and practices of openness under bilateral, regional and multilateral agreements. Trade is also

32 Behxhet Mustafa and others, 'Natural Heritage in the Republic of Kosovo: Looking for Potential UNESCO Sites' (2018) 63 Landscape Online 1, doi:10.3097/LO.201863.

33 Christopher M Jackson, 'The EU and Rule of Law Development in Kosovo: EULEX, Domestic Spoilers, and a Two-Level Commitment Problem' (2020) 42(7) Journal of European Integration 955, doi:10.1080/07036337.2019.1703967.

34 Fadil Osmani, Dukagjin Leka and Gezim Jusufi, 'Regional Economic Cooperation in the Western Balkans: Promoter or Inhibitor of EU Integration of this Region' (2022) 13(1) Advances in Business-Related Scientific Research Journal 68.

35 Gezim Jusufi and Bashkim Bellaqa, 'Trade Barriers and Exports between Western Balkan Countries' (2019) 65(4) Naše Gospodarstvo/Our Economy 72, doi:10.2478/ngoe-2019-0021.

36 Peter Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement between the EU and Kosovo' (2017) 22(3) European Foreign Affairs Review 393, doi:10.54648/EERR2017032.

one of the determinants of growth, especially in developing countries.[37] One of the principal advantages of trade liberalisation is the elimination of tariff barriers between countries, which fosters increased trade flows and market access.

Undoubtedly, the free trade movement has become a buzzword for almost all economic, political, journalistic and administrative opinion across countries. Contracts in economic and financial agreements with foreign firms, as well as Foreign Direct Investment (FDI), provide access not only to new knowledge embodied in traded products and physical capital but also to efficient business management rules and practices.[38] All of this shows that economies are creating a functional connection between them and are getting to know and understand each other better, enabling social cohesion.

Many scholars, such as Katerina Tosevska-Trpcevska,[39] assert that open economies tend to outperform closed ones, with open policies contributing significantly to economic development and growth. Nonetheless, many commentators fear that, in both the short and long term, trade liberalisation may be detrimental to the poorest agents in the economy. All countries that pursue economic integration as part of trade liberalisation have a wide variety of goods and services from which they can choose. Entering this process will benefit the country by allowing it to obtain goods and services at a very low cost. This process also supports tariff reductions and competitive pricing, ultimately benefiting distributors and consumers. The ultimate goal of economic integration is the expansion of global trade.

This vital strategy is primarily employed to mitigate the adverse effects of political instability and human conflicts, both of which can hinder regional development. For developing countries in particular, it also serves as a mechanism to attract greater volumes of foreign direct investment (FDI). When firms engage in FDI—whether through new operations or by merging with enterprises in the country where they invest—they can evolve into international enterprises. This creates a favourable situation for firms, businesspeople, and economies involved in the process, as the primary impact is reflected in economic growth indicators that reflect the increase in well-being and living standards. This is especially relevant for transition economies considered as developing countries. However, studies clearly show that developed countries often reap even greater benefits from opening up markets with developing countries.

Models for trade liberalisation predict that such policies will have a positive impact on collective security, global economic development, the welfare of participating countries, and

37 Vladimir Međak (ed), *Effects of Stabilization and Association Agreements and CEFTA 2006 on WB 6 European Integration and Regional Cooperation: Achievements and Ways Forward* (European Movement in Serbia 2018).

38 Gezim Jusufi and Fatos Ukaj, 'Turkey's Trade with Western Balkans: Looking Beyond the Turkish Foreign Policy' (2021) 8(2) InterEULawEast 133, doi:10.22598/iele.2021.8.2.7.

39 Katerina Tosevska-Trpcevska, 'Analysis of the Effects of the Stabilization and Association Agreement over the External Trade of the Republic of Macedonia' (The 17th International Conference of the International Trade and Finance Association, Miami, Florida, 16-20 May 2007).

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consequently, poverty alleviation—key priorities of the international community. This explains why numerous studies have focused on assessing the expected benefits of trade liberalisation on national economic development. The primary empirical tools used in these assessments include partial equilibrium models (Partial Equilibrium Model, PEM), gravity equations (Endogenous Gravity Theory, EGT), and computable general equilibrium models (CGEMs), applied both to individual countries and multi-country contexts.

Dani Rodrik, Arvind Subramanian, and Francesco Trebbi[40] argue for the priority of institutions in explaining economic growth under conditions of complete collective security. They estimate that the effect of trade on income is almost always insignificant, although positively related to effective institutions. Trade reforms in general, and FTAs in particular, are often seen as vehicles for implementing other reforms that improve the investment environment and attract FDI from developed countries, potentially enabling technology transfer and productivity gains. This is particularly relevant for countries that are secure and free of frozen conflicts.

Andreas Waldkirch[41] highlights that foreign investment and FTAs are also subject to sovereign risk. FTAs can serve as a mechanism to achieve higher sustainable levels of FDI. Horst Raff[42] argues that FTAs influence the geographic allocation of FDI, as governments may adjust external taxes and tariffs to attract investment. Whether this raises or lowers welfare has been shown to depend on the relative size of the efficiency gains from integration and the revenue losses associated with tax competition. These findings reinforce the idea that welfare gains from trade and FDI are context-specific and generally higher in economies with already integrated domestic economies.

FDI has the potential to generate employment, increase productivity, transfer skills and new technology, increase exports, and contribute to the long-term economic development of developing countries. Traditional trade theory has focused on the efficiency gains from trade by focusing on the concept of comparative advantage.

Global free trade is expected to increase the prosperity of all nations, representing a recent success for competitive liberalisation. The risk of regional agreements evolving into two hostile blocs outside a global framework is excluded. In this sense, through globalisation, any risk of conflict is put to an end by engaging both countries in a multilateral cooperative enterprise. Companies within free trade zones compete with one another, and this competition encourages productive restructuring.

40 Dani Rodrik, Arvind Subramanian and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development' (2004) 9 Journal of Economic Growth 131, doi:10.1023/B:JOEG.0000031425.72248.85.

41 Andreas Waldkirch, 'The "New Regionalism": Integration as a Commitment Device for Developing Countries' (2006) 21(2) Journal of Economic Integration 397, doi:10.11130/jei.2006.21.2.397.

42 Horst Raff, 'Preferential Trade Agreements and Tax Competition for Foreign Direct Investment' (2004) 88(12) Journal of Public Economics 2745, doi:10.1016/j.jpubeco.2004.03.002.

Multinational corporations tend to invest in countries with a sound business climate—where costs, delays, and risks are minimised. Investors seek a predictable and acceptable return (profit) on their investment: as the saying goes, "Money is cowardly".

3.4. Central European Free Trade Agreement (CEFTA 2006)

Following criticism from various authors that Regional Trade Agreements had not yet yielded significant benefits for the economies of the Balkan countries,[43] the Central European Free Trade Agreement (CEFTA 2006) was created. It was on 19 December 2006 in Bucharest by Albania, Bosnia and Herzegovina, Kosovo, Moldova, Serbia, Montenegro, Macedonia, and Croatia, and entered into force in November 2007. At that point, all bilateral agreement previously concluded by Albania with countries in the region were consolidated into the multilateral CEFTA agreement.

The main objectives of CEFTA include eliminating trade barriers among member states, expanding trade in goods and services and promoting investment, ensuring adequate protection of intellectual property rights by international standards, and harmonising provisions on trade-related issues such as competition rules and state aid. It also establishes clear and effective dispute settlement procedures.

CEFTA goes beyond being a simple tariff agreement; it is, in fact, a multidimensional instrument. From a political perspective, CEFTA is part of the broader efforts by the countries of the region and the European Union (EU) to create a regional market that fosters economic development and contributes to increased security and political stability in the Balkans. In fact, CEFTA is a pre-accession instrument to the EU: every former communist country that has become a member of the EU today is now part of CEFTA.

Economically, CEFTA supports development in the region by liberalising and developing trade. Global experience has proven that countries that close their doors to trade close their doors to development. In the Western Balkan countries, challenges such as collective security, organised crime, and corruption continue to delay full implementation of the SAA.

Kosovo's accession to CEFTA has, in particular, encouraged Albania to turn from a once unknown European country into a factor of stability and an example of dynamic economic development in the Western Balkans. Politically, Kosovo's participation in CEFTA places it within a regional cooperation mechanism that promotes economic development, political stability in the region, increased collective security, while also enhancing Kosovo's negotiating power vis-à-vis the larger countries in the region.

43 Bartlomiej Kaminski and Manuel de la Rocha, *Stabilization and Association Process in the Balkans: Integration Options and Their Assessment* (Policy Research Working Paper no 3108, The World Bank 2003) doi:10.1596/1813-9450-3108.

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4 RESULTS AND DISCUSSION

One of the main reasons for the creation of the European Community—and its later transformation into the European Union—was to build good neighbourly relations and overcome disputes between them. In addition to preventing conflicts and divisions, the EU also aims to promote economic and political development within a common legal and political framework. Initially, the European Community had a primarily economic character. In addition to the Copenhagen criteria and other criteria set for each country based on their characteristics, this process is shaped by both internal and external influences, which can either accelerate or hinder a country's path to membership.

Currently, the official EU candidate countries are Albania, North Macedonia, Serbia, Montenegro and Turkey. The potential candidates are Bosnia and Herzegovina and Kosovo. However, the EU is currently not prepared to admit countries with inter-neighbourhood disputes or territorial claims, and even less so to transfer those problems within the framework of the European Union. This problem has specifically emerged with Serbia's claims to the state of Kosovo; therefore, before their membership, the issue of their mutual, or reciprocal, acceptance must be resolved.

Despite internal challenges, the Western Balkans cannot be separated from the EU integration process. This is not only for long-term development and stability of the region but is also essential for the EU's own security.

In areas such as freedom, security, and justice, Kosovo has been called upon to strengthen its rule of law institutions further and ensure their effective implementation. In other words, strengthening the state and building sustainable institutions have been set as conditions for meeting all European standards, enabling Kosovo to become a member of the EU in the future.

5 CONCLUSION

The process of European integration has recently become more complex and challenging. The rapid increase in the number of EU member states has contributed to internal insecurity and growing scepticism about further enlargement. This scepticism was further intensified by the outcome of the United Kingdom's referendum to leave the EU (Brexit). The Western Balkans region remains fragile due to its turbulent past.

Economic and trade developments are key factors influencing the EU enlargement process. As a recommendation, it can be said that the removal of trade barriers and the creation of a common or single market contribute to the increase in demand for deepening integration. Positive outcomes in internal trade and economic exchange are often reflected in growth in GDP, trade volumes, and direct investment.

Despite the political will for integration by all parties, collective insecurity and frozen conflicts hinder economic integration. Kosovo is not the only point of contention for Serbia; ongoing disputes with other countries, such as Bosnia and Herzegovina—particularly concerning Republika Srpska—and Croatia, also remain problematic. This problem caused by Serbia has become an international problem.

Although the region, despite the large financial assistance it has received from the West, has struggled to foster a unified political vision among political elites and civil society that would drive the reforms necessary for rapid transformation. Nevertheless, with EU support, the countries of the region have made progress in certain areas—most notably in establishing integrated border management systems. This cross-border cooperation, particularly among institutions such as border police, customs, and food and veterinary agencies, marks a step toward deeper institutional coordination and stability.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ВИКЛИКИ ІНТЕГРАЦІЇ ДО ЄС ТА КОЛЕКТИВНОЇ БЕЗПЕКИ В КОСОВІ: ПОГЛЯД ЗА МЕЖІ УГОД ПРО ВІЛЬНУ ТОРГІВЛЮ

Ілір Зилфіу та Дукаджин Лека*

АНОТАЦІЯ

Вступ. *Колективна безпека є одним з основних принципів, якими керується сучасне міжнародне право. Це особливо актуально для такої країни, як Косово, державність якої оспорюється кількома країнами, зокрема Сербією, яка порушила колективну безпеку різними діями. Основною метою цієї статті є аналіз впливу колективної безпеки на інтеграцію Косова до ЄС, особливо, що стосується впровадження та прогресу угод про вільну торгівлю з ЄС, таких як Угода про стабілізацію та асоціацію (УСА) та Центральноєвропейська асоціація вільної торгівлі (ЦЄАВТ).*

Методи. *У цій статті використовується систематичний огляд теоретичних досліджень та наукових праць. Було проаналізовано кілька джерел теоретичної літератури стосовно інтеграції Косова до ЄС, угоди про вільну торгівлю, регіональне співробітництво на Західних Балканах та Пакт стабільності, і на основі цих даних було сформульовано висновки.*

Результати та висновки. *Актуальність статті полягає в тому, що в ній розглядаються питання безпеки, економіки, політики та правового характеру. У академічному світі Косова помітний брак теоретичних даних із цієї теми. Тому ця робота є особливо актуальною, оскільки вона об'єднує ці галузі. Дослідження європейської інтеграції та наслідків угод про вільну торгівлю в постконфліктних країнах має особливе значення для таких країн, як Косово, та для інших держав Західних Балкан.*

Ключові слова: *лібералізація торгівлі, регіональне співробітництво, Західні Балкани, фінансова допомога.*

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Review Article

DIGITAL EVIDENCE AS A MEANS OF PROOF IN CRIMINAL PROCEEDINGS IN THE UAE

Ayman Nawwaf Alhawawsheh*, Qusay Salman Alfalahi, Khaled Ramadan Soltan, Abdulghani Qasem Taher and Luma Ali Al Dhaheri

ABSTRACT

Background: *This paper addresses key issues related to the admissibility of digital evidence—a pivotal concern in modern legal proceedings. The use of such evidence is fraught with challenges, particularly due to the rapid technological changes and heightened concerns surrounding electronic data privacy. In the criminal justice system, these challenges can impact the admissibility of evidence, its presentation in trial, and the charging and resolution of cases.*

This study examines the difficulties of admitting digital proof before the UAE judiciary. Considering the trend towards the digital world as an alternative to the tangible world, interest is increasing in the extent of the authenticity and strength of the means of technical storage of information in proof, the importance of the authenticity of computer extracts, and the extent to which the legal system of proof can accommodate these new types of means of proving. The study concludes that, despite the difficulty in obtaining digital evidence and the necessity of providing certain conditions required for its acceptance, it often enjoys a higher degree of credibility than traditional forms of evidence due to its accuracy and scientific and technical nature. This article seeks to address these challenges and explore potential solutions.

Methods*: This paper adopts a legal-analytical methodology focused on the UAE's legal framework. It employs a descriptive-analytical approach, utilising content analysis to analyse legal texts. Specifically, it reviews the position of the UAE legislator on the use of electronic evidence and analyses the perspectives of legal scholars and judicial rulings related to the validity of electronic evidence in criminal proceedings.*

Results and Conclusions: *The analysis and comparison of relevant legal frameworks yielded several findings. Foremost, among these is the need for the judiciary to adapt to digital and electronic evidence, recognising its standalone evidentiary value—provided that the conditions of certainty, legitimacy, and integrity are met. Such evidence must also be subject to oral examination and accessible to all parties.*

Particular attention is paid to the Federal Decree Law No. (34) of 2021 on Combating Rumours and Cybercrimes, which affirms the validity of digital evidence in criminal proof by explicitly defining and recognising its probative value under Article 65. The study concludes that digital evidence has characteristics that distinguish it from physical evidence, and current procedural rules do not adequately regulate its proper treatment; it is currently considered a form of documentary evidence.

1 INTRODUCTION

Criminal evidence remains one of the greatest challenges facing authorities responsible for combating crime at all levels. This difficulty arises from the deliberate efforts of criminals to conceal their crimes and their identities to evade justice. However, technological progress has greatly contributed to uncovering many previously unsolved crimes, which in the past were shrouded in mystery and routinely recorded as committed by an unknown person.[1]

The objective of this study is to examine the concept of digital evidence and assess whether a legislative framework exists regarding its definition and the strength of proof. It also aims to evaluate the extent of the validity and strength of digital evidence before criminal courts in jurisprudence, legislation, and judicial practice, and to identify legislative trends across different legal systems. This is particularly important given the significance of digital evidence, which distinguishes it from traditional evidence. Its digital nature makes it especially significant in proving crimes involving computers or communication networks, as such evidence often requires decoding and translating magnetic or electrical signals into data and information related to the crime.[2]

As it is widely understood, evidence is an item or information that tends to establish the existence of a fact or make it probable. By one estimate, digital evidence is a factor in approximately 90% of criminal cases.[3] Evidence can take various forms, including witness testimony, documents, photographs, videos, voice recordings, DNA testing, or other

1 Farouk Al-Kilani, *Lectures on the Principles of Criminal Trials* (Dar Al Farabi 1985).

2 Jessica Smith, 'Criminal Evidence: Relevancy' in James M Markham, Jessica Smith and Shea Riggsbee Denning, *North Carolina Superior Court Judges' Benchbook* (UNC School of Government 2015).

3 Christa M Miller, 'A Survey of Prosecutors and Investigators Using Digital Evidence: A Starting Point' (2022) 6 Forensic Science International: Synergy 100296, doi:10.1016/j.fsisyn.2022.100296.

tangible objects. Nevertheless, not all evidence is automatically admissible in court. It must comply with the specific jurisdiction's rules of evidence.[4]

2 RESEARCH METHODOLOGY

The descriptive and analytical approach will be employed to examine the subject of the validity of proof in digital evidence. This will involve tracing relevant references from a variety of sources, including legislative texts, judicial rulings, academic books, and scientific dissertations. The study primarily focuses on the legal framework in the UAE and a Directive of the European Union Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. A mixed-methods design is employed, combining both analytical and comparative approaches to assess amendments to the UAE Penal Code regarding indicators from a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence.

This process involves assigning thematic units to the respective articles on the UAE and the European Union, as well as comparative legal research. These methods are effective in revealing and interpreting legislative and jurisprudential changes. Data for the study are drawn from legal documents, including the UAE Penal Code and the ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings.

2.1. Objectives and Research Problem

Criminal proof through digital evidence is considered one of the most prominent aspects of modern legal systems, particularly in light of the increasing threat posed by cybercrime. Such crimes can result in extensive economic, financial, and security-related harm. The legislative position varies: while some recognise it as a legitimate and reliable proof of evidence, like other traditional evidence, others question its legal value. This study explores the growing importance of digital evidence in the context of proof in criminal proceedings. It aims to address the following key questions: What is the legal legitimacy of digital evidence? How is digital evidence treated under UAE legislation and judicial practice in criminal cases?

4 Vanshika Shukla, 'The Admissibility of Digital Evidence: Challenges and Future Implications' (2023) 9 Commonwealth Law Review Journal 464.

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3 THE CONCEPT OF DIGITAL EVIDENCE

3.1. The Concept of Digital Evidence in the European Union

Electronic evidence, as defined in paragraph 1(b) of the ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings,[5], refers to any evidence that exists in electronic form or is transmitted in electronic form at the time it is obtained. It is irrelevant whether the evidence was already stored electronically before the time of acquisition or became electronically stored as a result of the act of acquisition. For instance, image recordings taken by a criminal investigation department in criminal proceedings are thus considered electronic evidence, as they are stored in electronic form upon acquisition.

3.2. The Concept of Digital Evidence in the UAE

The UAE legislator explicitly addressed digital evidence in Federal Decree Law No. (34) of 2021 On Countering Rumours and Cybercrimes,[6] specifically in Article 1, where digital evidence is defined as any electronic information that possesses probative force or value and is stored, transmitted, extracted, or derived from computer sets, information networks, and similar sources.[7] Such evidence may be gathered and analysed using special technological devices or applications.[8]

By comparing the previous texts, it is evident that the UAE legislator[9] has settled the controversy over the validity of electronic evidence in criminal proceedings,[10] explicitly recognising it as a form of material evidence. The definition provided in the UAE legislation closely aligns with the European Union's conceptualisation. According to the Proposal for a Directive, evidence means any object, data, or information to be used to prove a fact in criminal proceedings (para. 1(a)).[11] The term "evidence" is thus very broadly defined.

5 ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings' (*European Law Institute (ELI)*, September 2020–May 2023) <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-proposal-for-a-directive-of-the-european-parliament-and-the-council-on-mutual-admissibility-of-evidence-and-electronic-evidence-in-criminal-proceedings/> accessed 10 February 2025.

6 Federal Decree Law No (34) of 2021 'On Countering Rumors and Cybercrimes' [2021] Official Gazette of UAE 712.

7 Musa Masoud Arhouma, 'Procedural Problems Raised by Transnational Crime' (The First Maghreb Conference on Informatics and Law: Academy of Graduate Studies, Tripoli, 28-29 October 2009) 3.

8 John Ashcroft (ed), *Electronic Crime Scene Investigation: A Guide for First Responders* (US Department of Justice, Office of Justice Programs, National Institute of Justice 2001).

9 Federal Decree Law No (34) of 2021 (n 6) art 1.

10 Mhd Samer Al Kattan, 'Digital Justice "Model of the United Arab Emirates"' (2023) 18(1) Revista de Gestão Social e Ambiental 4-5, doi:10.24857/rgsa.v18n1-091.

11 ELI Proposal (n 5).

4 LEGAL FRAMEWORK FOR THE DIGITAL EVIDENCE IN THE EUROPEAN UNION AND UAE

4.1. The Legality Characteristic of Digital Evidence

Digital and informational evidence—considered a fundamental means of proving cybercrimes— raises many problems regarding its legitimacy and reliability, whether at the level of initial reports conducted by criminal investigation personnel or at the level of discussions that take place publicly and in the presence of the court. These challenges persist throughout all stages of the criminal process.[12]

4.2. The Judge's Freedom to Evaluate the Evidence

First, it is necessary to define the field or scope of this crime, as this is central to understanding the evidentiary framework. The scope of information crime is considered somewhat narrower than what has been approved by some jurisprudence. It primarily encompasses crimes where the subject matter involves information, data, or documents stored in computers, information systems, application programs, or related software. Whether the data is publicly available or confidential, certain conditions must be met. These include whether the perpetrator is qualified for this legitimate access—such as through authorised passwords—or gained entry through illegal methods such as hacking.

Cybercrimes often involve the alteration of data, disrupting its flow, rendering it temporarily or permanently unstable, or destroying it permanently, all with the aim of achieving certain goals.[13]

Notably, some criminal legislation has not assigned particular procedural distinctions to cybercrimes in terms of proof. Consequently, these crimes remain subject to the general principle of proof established in the penal article. Under this principle, the Public Prosecution may rely on any recognised legal means of proof to pursue the accused and defend them before the investigating judge and the court. Likewise, the accused may refute these charges by all means of proof.

The principle of freedom of proof also governs the discretion of the criminal judge, who is entrusted with the evaluation and assessment in each case.[14] The presumption of innocence guarantees that the burden of proof is borne by those who claim contrary to this principle. It would be contrary to this principle to require the defendant to prove their innocence, as they are presumed innocent until proven guilty.

12 Aman Vedwal, 'Admissibility of Digital Evidence for Cyber Crime Investigation' (School of Law, University of Petroleum & Energy Studies (UPES) 2023) 16, doi:10.2139/ssrn.4443356.

13 System Security Study Committee and others, *Computers at Risk: Safe Computing in the Information Age* (National Academy Press 1991).

14 Smith (n 2).

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It follows from this that in the event of an inability to prove what was alleged with conclusive evidence, the criminal judge must acquit the accused, whose innocence is presumed. Moreover, even if evidence is presented in a case that the judge could not establish. His complete conviction in the crime attributed to the accused was due to the doubt that remained in his belief regarding it, because doubt is always interpreted in the interest of the accused.[15]

From the above, it can be said that if proving a crime means not only verifying its occurrence, but also attributing it to a specific person, then attribution requires that there be evidence proving that attribution or connection, and the evidence is within the scope of proving the crime and attributing it to a specific person in general, either it may be physical evidence, or it may be moral or verbal evidence, such as testimony and confession.[16]

To establish the principle of freedom of proof, crimes can be proven by any means of proof, except in cases where the law requires otherwise. The judge rules according to his deep conviction, and the decision must include what justifies the judge's conviction by stating all the factual and legal reasons on which it is based, even in the case of innocence. Therefore, nothing is preventing the criminal judge from relying, in convicting or acquitting the accused, on the various means of proof approved in the penal code, including digital evidence, about proving the commission of information crimes and attributing them to the persons being investigated for that purpose, if there is nothing explicitly preventing or indirectly resort to it.[17]

However, the multiplicity of forms, manifestations, and descriptions of information crime, which can take the form of an infringement on databases and data, the form of forgery and destruction of electronic documents, or the form of information fraud and deception makes it difficult to prove in most cases because there is no reliable material evidence or witnesses who can rely on it. Benefiting from their testimonies in this context, and from the high efficiency and skill that the perpetrators often possess in this field to hide their identities, mislead the monitoring authorities, and delete everything that might identify them or the method they used to penetrate an information system.

This requires members of the criminal investigation team charged with researching and investigating this type of crime to have enough skills and competencies in the areas of information systems and the Internet to obtain means of proof that guarantee the attribution of these crimes to their perpetrators. It also imposes on all judicial bodies involved in the dispute, from the Public Prosecution to the Judiciary. Investigation and

15 Osama Ahmed Al-Manaasah and Jalal Mohammed Al-Zoubi, *Information Technology Crimes: A Comparative Study* (Dar Althkafa 2022).

16 Ayman Nawwaf Alhawawsheh, 'Cybercrimes in the Kingdom of Saudi Arabia' (11th Cybercrime Conference, Jordan, Faculty of Law, Jerash University, 5-6 May 2015) 15.

17 ibid.

governance bodies must possess sufficient knowledge in this field so that they can follow up on perpetrators, hold them accountable, and impose the penalties stipulated by law.[18]

4.3. The Legal Framework for Digital Evidence in the European Union

To date, no uniform standard has been introduced by the EU legislator for harmonising domestic judicial procedures or establishing coherence within the EU's internal judicial order. Notably, the admissibility of e-evidence data in court is completely alien to the GDPR. Although the issue directly influences trial procedure, judicial impartiality, and potentially undermines the right to a fair trial, the GDPR provides no guidance.

Despite the absence of a harmonised admissibility framework at the EU level, national courts, in abiding by their domestic legal system, retain the discretion to determine whether the evidence obtained through illegal processes should be excluded.[19] In instances where a public body or law enforcement agency legally gathers sensitive data as evidence of an imminent threat to public interest or security, a clear-cut rule of law governs the matter.

However, legal complexity emerges in cases when such evidence is obtained illegally and both parties appear before a national court, each attempting to substantiate their claims through competing evidentiary submissions. In such scenarios, the judge should first decide the validity and authenticity of the data and then examine the substantive issues of the case. The position advanced in this research is that judicial determinations regarding the admissibility of e-evidence directly influence the EU's fundamental right to a fair trial.[20]

While EU legislation tends not to oversee the admissibility of e-evidence, the current stance of the European Court of Human Rights system reveals a much more practical approach. However, it is important to distinguish between the admissibility of evidence in domestic legal proceedings. The former is enshrined in Article 35 of the ECHR, which sets out the procedural criteria for a claim to be considered admissible by the Court.

To evaluate procedural irregularities, the ECtHR has established a test known as the "overall fairness" test. According to this test, the court must consider ten factors to determine the admissibility of evidence. The ten-factor test ensures that obtaining and presenting evidence at trial and procedural actions of domestic law enforcement do not jeopardise the accused's fundamental rights, notably the right to a fair trial (Article 6 ECHR).[21] Of these ten principles, the reasoning of judicial decisions, the principle of immediacy, legal certainty,

18 Al-Manaasah and Al-Zoubi (n 15).

19 Giulia Lasagni, 'Admissibility of Digital Evidence' in Vanessa Franssen and Stanisław Tosza (eds), *The Cambridge Handbook of Digital Evidence in Criminal Investigations* (CUP 2025) 126.

20 Oleksii V Kostenko and Vahid Akefi Ghaziani, 'Admissibility of Illegally Obtained e-Evidence: A Critical Study of EU law and the precedents of the European Court of Human Rights' (2024) 2 European Journal of Privacy Law and Technologies 205, doi:10.57230/EJPLT242OVKVAG.

21 Ibid 213.

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prejudicial publicity, and (requirements related to) plea bargaining face only minor challenges rooted in the digital nature of e-evidence and may, therefore, be set aside.[22]

The ECtHR does not evaluate the validity of each piece of evidence; such evaluations fall within the competence of national courts. Rather, the ECtHR exercises its judicial capacity only after the exhaustion of all domestic remedies.

By contrast, the position in the UAE presents a distinct legal approach. Article 210 of the UAE Code of Criminal Procedure, titled "Satisfaction of the Judge," provides that a judge shall adjudicate on the case based on their own satisfaction.[23] The basis of proof in criminal cases is the court's conviction and confidence in the evidence presented to it. The law does not restrict the criminal judge to specific evidence, but rather gives him absolute authority to form his belief from any evidence or indication presented to him.[24]

The ECtHR's jurisprudence in *Bykov v. Russia*[25] illustrates the complexities surrounding covert evidence-gathering operations. In that case, the Federal Security Service of the Russian Federation (FSB) orchestrated a covert operation involving a third party (V.) who was instructed to carry on a hidden radio-transmitting device to engage in a conversation with the applicant in a guesthouse where he was residing. During the encounter, V. initiated a discussion about an assassination plot with the applicant and falsely claimed to have already carried it out. In an effort to convince the applicant, V. showed him evidence linked to the victim, including a watch. Ending their chat, V. received a cash reward from the applicant, consistent with their prior arrangement. Upon exhausting domestic remedies, the applicant submitted a complaint to the ECtHR, which recognised that conducting covert listening constitutes a breach under Article 8 of the Convention.[26] However, the Court held that such a violation did not render the obtained evidence illegal. Provided the use of the evidence complied with the requirements of Article 6 (1), it could be deemed admissible. Finally, the court, concerning non-pecuniary damages, awards the applicant €1000—€118,089.25 lower than his request.[27]

In *Schenk v. Switzerland*,[28] the Court made a judgment concerning illegally intercepted calls in France, which had been forwarded to Swiss law enforcement authorities. Although the

22 Radina Stoykova, 'The Right to a Fair Trial as a Conceptual Framework for Digital Evidence Rules in Criminal Investigations' (2023) 49 Computer Law and Security Review 105801, doi:10.1016/j.clsr.2023.105801.

23 Federal Decree Law No (38) of 2022 'Promulgating the Criminal Procedures Law' [2022] Official Gazette of UAE 737.

24 Apps Nos 1006 and 1114 of 2023 (Abu Dhabi Court of Cassation (Crim), 26 December 2023).

25 *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009) <https://hudoc.echr.coe.int/fre?i=001-91704> accessed 10 February 2025.

26 Kostenko and Ghaziani (n 20) 216.

27 Applicant claimed 4,059,061.80 Russian Roubles (119,089.25 euros) for both pecuniary and nonpecuniary damages. See, *Bykov v Russia* (n 25) para 108.

28 *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988) <https://hudoc.echr.coe.int/eng?i=001-57572> accessed 10 February 2025.

ECtHR acknowledged that the interception lacked a legal basis, it concluded there was no evidence of a violation of Article 6 ECHR. Given the existence of other evidence, the use of illegal interception did not compromise the presumption of innocence or render the proceedings unfair.[29]

4.4. The Legal Framework for Digital Evidence in the UAE

Based on the principles of a fair trial, a court may not base its decision to convict an individual on any arguments or evidence that has not been presented and discussed orally during a public hearing. As such, the court must present and discuss all the evidence presented to it,[30] whether by the judicial police, the public prosecution service, or the civil claimant. In application of this, the Court of Cassation of the Emirates ruled:

"Given the text of Article (50) of the Law of Evidence in Commercial and Transactions and the text of Article 269 of the Code of Criminal Procedure - and on what the judiciary of this court has established - that the final criminal ruling issued acquitting the accused is based on the non-occurrence of the act. That which is attributed to the accused, or if the court doubts that it happened on his part, or that there is insufficient evidence against him - is the only one that has authority that the civil courts are bound by in cases that have not been decided by a final ruling and that are related to the subject of that criminal case, and the acquittal ruling based on the fact that the act attributed to the accused is not punished, or the absence of the elements of the crime does not have this authority before the civil courts, and this does not prevent them from examining the availability of evidence of the mistake and its attribution to the person who committed it, since the contested ruling concluded, about the subsidiary case, that it is not permissible to examine liability. The fifth respondent has erred in applying the law, and the appeal 1 on the ruling is unfounded."[31]

Notably, since the entry into force of Federal Decree Law No. (34) of 2021 on Combating Rumours and Cybercrimes, Emirati courts have demonstrated a cautious approach in relying solely on digital evidence derived. Although courts have discretionary authority to convict based on digital evidence—such as data extracted from the victim's computer, the accused's computer, information systems, or other digital evidence recorded in a judicial police report—they typically reinforce such evidence with one or several other "traditional" forms of evidence. These may include the accused's confessions, witness testimonies (for either the prosecution or the defence), or expert findings. Courts may also request that expert reports be supplemented—particularly when access to information from digital devices is obstructed. In the absence of adequate evidence or means of proof, the court must acquit the accused.

29 Stoykova (n 22) 8.

30 Smith (n 2).

31 App No 711 of 2011 (Abu Dhabi Court of Cassation (Crim), 18 October 2011).

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Effectively combating this type of crime, therefore, requires preserving the rights and interests of those who pursue it. In all cases, legislative and judicial solutions must be sought to achieve a balance between the interests of the state in combating these extremely serious crimes and the interests of those accused of committing them, whose innocence must be presumed unless and until a judicial decision is issued against them with the force of res judicata.

The UAE legislator, under Article 65 of the Federal Decree Law and under the title of Validity of Evidence, stipulates that evidence derived or extracted from devices, equipment, media, electronic supports, information systems, computer programs, or any means of information technology constitutes authentic material forensic evidence in criminal proceedings.

It is observed that the legislator has, as an initial step, limited the provision to affirming the evidentiary authority of digital evidence. The law equates digital evidence with physical forensic evidence in terms of its evidentiary value for criminal proof. However, it is hoped that the Emirati legislator will further specify the conditions and controls related to the mechanism for obtaining such evidence, the techniques used, and the relevance of the evidence to the electronic crime in question. This includes the requirement that digital evidence be collected and stored by a competent judicial officer or by experts or specialists assigned by the investigative or trial authorities, the procedures for examining copies of the digital evidence and, where necessary, reviewing the original, and the documentation of digital evidence in official records prior to the examination by specialists. The record should include the location of seizure, the place of its storage, handling procedures, and the technical specifications of the evidence. This approach mirrors the one adopted by the Egyptian legislator.[32]

A question arises regarding the authenticity of evidence obtained by the prosecution to prove the accused's guilt, versus evidence obtained by the accused to prove their innocence.

Digital evidence extracted by the Public Prosecution has authority against the accused, provided it is obtained lawfully. However, the accused may, in some circumstances, rely on evidence even if it is not legitimate. The judge retains the discretionary rule to issue an acquittal if he is convinced of the accused's innocence despite the illegitimacy of the evidence. For example, if a judicial police officer (outside the cases of flagrant) inspects the accused's phone without obtaining permission from the Public Prosecution and compels the accused to reveal the password, any incriminating evidence found therein would be inadmissible due to the unlawful method of acquisition.

Conversely, if the accused relies on unlawfully obtained evidence—such as photographing someone without obtaining permission—to prove their innocence, the

32 Law No 175 of 2018 'Anti-Cyber and Information Technology Crimes Law' [2018] Official Journal of Egypt 32(C), art 11.

judge may consider the evidence, and if convinced, may rule in favour of acquittal despite the evidence's illegitimacy.[33]

In application of the aforementioned priciples, the UAE Court of Cassation ruled that when the court reviewed the case documents and the accused's plea to invalidate the evidence derived from recordings and photos taken from the accused's phone—allegedly obtained by the complainant—the accused's goal was to cast doubt on the legitimacy of the digital evidence derived from the recordings and photos.[34] The court held that this was an attempt to undermine consistent case evidence. The court unanimously found the appellant had committed the crime of promoting immoral consent as alleged in the case files. It concluded that the defence's objection amounted to nothing more than an objective controversy in the assessment of the evidence, which falls within the exclusive discretion of the court. The court was satisfied with the facts of the incident, the credibility of the incident, and the evidence presented therein, rendering the defence's objections meritless.[35]

In another case, the court reaffirmed that establishing criminal liability depends on the trial judge's conviction, which must be based on the evidence presented. The judge has the right to weigh the evidence and consider only those testimonies, confessions, and evidence that he is comfortable with, provided that the law does not restrict him to a specific piece of evidence.[36]

Moreover, it is established that if an arrest and search are conducted unlawfully, any conviction based on the resulting evidence is invalid. The ruling emphasised that no conviction can be based on evidence derived from such an unlawful search, including the testimony of the person who conducted it.

Finally, in another case, the court found that the conviction of the second accused—the appellant in the appeal at hand—was based on the testimony of law enforcement officers and the confession of the first accused. However, the court determined that the confession had been extracted through an illegal process. The first accused had admitted that the second accused had delivered drugs to him for sale and promotion. This confession prompted the police officers to request permission from the Public Prosecution to arrest and search the second accused. Since the arrest and search were based on unlawfully obtained evidence, they were deemed invalid—a matter concerning public order due to its connection with the legitimacy of the conviction. Consequently, all evidence derived from this unlawful procedure, including the testimony of the one who conducted it.

Given that the first accused's admission was the basis for the search and arrest, and that the ruling against the first accused had already been overturned due to the illegality of the evidence, the same reasoning applied to the second accused. The Court of Cassation held

33 App No 903 of 2022 (Abu Dhabi Court of Cassation (Crim), 7 November 2022).

34 App No 1030 of 2021 (Abu Dhabi Court of Cassation (Crim), 27 January 2022).

35 ibid.

36 App No 270 of 2008 (Abu Dhabi Court of Cassation (Crim), 27 January 2009).

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that the judgment should be overturned for both parties, due to the shared basis of appeal, the unity of the incident, and the interest of justice. Accordingly, the appealed ruling was overturned and referred back, without the need to examine the grounds of appeal.[37]

4.5. Legitimacy Of Obtaining Electronic Evidence

The UAE legislator has stipulated the legitimacy of obtaining evidence in Article 73, titled Searching the Communications and Technical Means and Recording of Conversations. The provision stipulates:

> "1. The Prosecutor may seize, at the post offices, all correspondence, letters, papers, printed materials, and parcels, and, at the telegram offices, all cables. Furthermore, he may search the devices, networks, equipment, media, electronic supports, information systems, computer programs, or any technical means whenever the investigation so requires, or he may assign experts or specialists he deems appropriate to perform the same.
>
> 2. Subject to prior approval of the Attorney General, the Prosecutor may monitor and record the conversations, including wired and wireless communications. "[38]

A textual analysis of this article reveals that the method of obtaining the evidence must be legitimate. If it is not, any resulting ruling may be rendered invalid.

The UAE Court of Cassation has reinforced this principle, confirming that the trial court has the authority to understand the facts of the case, assess the evidence and accept expert reports as long as it is convinced of their credibility.[39]

In another case, it was ruled: "In this appeal, it becomes invalid, and it is a matter related to public order due to its connection to the legitimacy of the evidence of conviction, and all evidence derived from this invalid procedure is invalid, including the testimony of the person who conducted it and the confession of the first accused against him."[40]

If the only evidence supporting the claimant's conviction is found to be illegitimate during the Court's assessment, the doctrines of allowance and suppression represent differing viewpoints on the fairness of a trial. Suppose the sole evidence is the product of illegal government surveillance. In such cases, suppression could, in certain scenarios, undermine the public interest, especially when the alleged conduct poses a serious threat to public safety. In some cases, some might argue that excluding the evidence solely due to a procedural misstep, such as a warrant defect, allows a potentially dangerous individual to avoid accountability.

37 App No 142 of 2013 (Abu Dhabi Court of Cassation (Crim), 19 June 2013).
38 Federal Decree Law No (38) of 2022 (n 23).
39 App No142 of 2023 (n 37).
40 Apps Nos 1006 and 1114 (n 24).

It is also conceivable that the infringement of privacy may not be of particular interest to the accused, who nonetheless asserts his legal right to a fair trial in order to dismiss the case. However, if there is several evidence in a case and the first piece of evidence was obtained illegitimately, the second piece (correlated or irrelevant to the subject of the first) must be suppressed to protect the fundamental rights of the accused, provided there is no opposing public interest justifying its admission.

Moreover, courts should be careful to distinguish between the following orders in gathering supportive evidence. First, if legitimate-looking evidence stems from an illegitimate measurement or evidence which was itself a product of illegal action, all further evidence (no matter whether correlated to the first or not) must be disregarded by applying the exclusionary rule.

Nonetheless, some governments permit the admission of illegal evidence, even if it is obtained through an illegitimate route.[41]

5 DIGITAL EVIDENCE IN FOREIGN JURISDICTION (JOINT INVESTIGATION TEAMS)

Joint investigation team (JIT) represent one of the most advanced tools used in international cooperation in criminal matters. A JIT comprises a legal agreement between competent authorities of two or more States, enabling them to conduct criminal investigations. These teams typically include prosecutors, law enforcement authorities and judges, and are established for a fixed period—typically between 12 and 24 months—sufficient to carry out a specific investigation effectively.[42]

Under the auspices of Europol and Eurojust, several JITs have been set up to support cross-border investigations. These joint investigations allow for an efficient way of collecting and sharing electronic evidence pertinent to an investigation. However, experience has shown that further development of a common European framework is necessary to increase the legal certainty needed for such joint investigations to be carried out more smoothly and efficiently.[43]

In the UAE, the legislature stipulated provisions for International Judicial Cooperation in Criminal Matters.[44] However, this law has a legislative vacuum regarding the exchange of

41 Kostenko and Ghaziani (n 20) 210.

42 'A Joint Investigation Team (JIT)' (*European Union Agency for Criminal Justice Cooperation*, 2025) <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams> accessed 10 February 2025.

43 Jeanne Pia Mifsud Bonnici, Melania Tudorica and Joseph A Cannataci, 'The European Legal Framework on Electronic Evidence: Complex and in Need of Reform' in Maria Angela Biasiotti and others (eds), *Handling and Exchanging Electronic Evidence Across Europe* (Law, Governance and Technology Series 39, Springer 2018) 222, doi:10.1007/978-3-319-74872-6_11.

44 Federal Law No (39) of 2006 'Concerning International Judicial Cooperation in Criminal Matters' [2006] Official Gazette of UAE 457.

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digital evidence, even among the Gulf Cooperation Council (GCC) countries. While instances of cooperation and joint investigations with other countries do occur, these are not codified.[45] Here, it is recommended that the UAE legislator consider adopting aspects of the Europol and Eurojust model, particularly regarding the exchange of digital evidence at the international level.[46]

6 CONCLUSION

The article concludes that the adoption of the EU e-evidence rules is an important step toward enhancing joint efforts in the fight against crime. Fundamentally relying on the principle of mutual trust among EU Member States and the presumption of their compliance with Union law, the rule of law, and fundamental rights and values, the application of the e-evidence package will nonetheless require constant scrutiny, monitoring, and cooperation among all involved actors.[47]

It is imperative that the UAE and the Gulf Cooperation Council (GCC) countries draw upon the European Parliament's experience, particularly the ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings.

This study offers several suggestions and recommendations, emphasising that comparative legislation should explicitly recognise digital evidence as valid in criminal proceedings and grant it conclusive probative value—as a justified exception to the criminal judge's discretion in evaluating evidence. Legislators are encouraged to follow the example of the Emirati legislator by including provisions that ensure the integrity of digital evidence as a prerequisite for its admissibility. It is also recommended to explicitly permit the search and seizure of content from virtual environments by amending the criminal procedure laws to reflect the appropriate tools of proof for such crimes. Furthermore, it is essential to define the conditions that digital evidence must meet—particularly the requirement of legality—for it to be accepted in proving or disproving cybercrime.

45 For instance , Abu Dhabi Police sent two teams to the United Kingdom, as per the higher leadership's directives, following the shocking assault on the Emirati nationals (Ohoud, Khuloud and Fatima). A first team from the Criminal Investigation Department (CID) was dispatched to follow up on the case and the criminal investigations, in cooperation with the British authorities. The second team, from the Social Support Centers Department, was in charge of providing psychological support to the victims of this tragic accident.

46 Bayazid Hossain, 'Digital Evidence in Foreign Jurisdiction and Quality of Justice' (2023) 1 ELCOP Journal on Human Rights 143, doi:10.59871//SFGB7594.

47 Adam Juszczak and Elisa Sason, 'The Use of Electronic Evidence in the European Area of Freedom, Security, and Justice: An Introduction to the New EU Package on E-evidence' [2023] 2 EUCRIM: Electronic Evidence 182, doi:10.30709/eucrim-2023-014.

For evidence to be admissible in criminal proceedings, it must be relevant, material, and competent. This standard applies to court proceedings in civil cases as well. To be relevant, evidence must reasonably help prove or disprove some fact. The degree to which this evidence increases or decreases the likelihood of the fact influences the weight the judge gives it.

It is recommended that the UAE legislator adopt the experience of Europol and Eurojust regarding the exchange of digital evidence at the international level, and codify the treatment of digital evidence obtained in foreign jurisdictions to enhance the quality of justice.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ЦИФРОВІ ДОКАЗИ ЯК ЗАСІБ ДОКАЗУВАННЯ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ В ОАЕ

Айман Навваф Альгававше*, Кусай Салман Альфалагі, Халед Рамадан Солтан, Абдулгані Касем Тагер та Лума Алі Аль Дагері

АНОТАЦІЯ

Вступ. *У цій статті розглядаються ключові питання, пов'язані з допустимістю цифрових доказів, що становить основну проблему сучасного судочинства. Використання таких доказів супроводжується низкою труднощів, зокрема через стрімкий розвиток технологій та зростаючу стурбованість питаннями конфіденційності електронних даних. У системі кримінального правосуддя ці виклики можуть впливати на допустимість доказів, порядок їх подання в суді, висунення обвинувачень та вирішення справ.*

У цьому дослідженні розглядаються труднощі, пов'язані з прийняттям цифрових доказів у судовій системі ОАЕ. З огляду на тенденцію до переходу до цифрового світу як альтернативи матеріальному, зростає інтерес до ступеня автентичності та надійності засобів технічного зберігання інформації в процесі доказування, важливості автентичності комп'ютерних витягів і того, наскільки правова система доказування здатна пристосуватися до цих нових видів засобів доказування. У дослідженні зроблено висновок, що, незважаючи на труднощі в отриманні цифрових доказів та потребу в забезпеченні певних умов, необхідних для їх прийняття, цифрові докази часто користуються вищим ступенем довіри, ніж традиційні форми доказів, завдяки своїй точності та науково-технічному характеру. Метою цієї статтяя є вирішення цих проблем та дослідження потенційних рішень.

Методи. *У цій роботі застосовується юридично-аналітична методологія, що зосереджена на правовій базі ОАЕ. Також у статті використовується описово-аналітичний підхід, здійснюється аналіз юридичних текстів за допомогою контент-аналізу. Зокрема, було розглянуто позицію законодавця ОАЕ щодо використання електронних доказів, проаналізовано погляди вчених-юристів та судові рішення, пов'язані з допустимістю електронних доказів у кримінальному процесі.*

Результати та висновки. *Аналіз і порівняння відповідних нормативних актів дали підстави для низки висновків. Серед них, перш за все, є необхідність адаптації судової системи до цифрових та електронних доказів, визнання їх самостійної доказової сили – за умови дотримання правової визначеності, законності та цілісності. Такі докази також повинні підлягати усному дослідженню та бути доступними для всіх сторін.*

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Особлива увага приділяється Федеральному декрету-закону № (34) від 2021 року «Про боротьбу з чутками та кіберзлочинністю», який підтверджує достовірність цифрових доказів у кримінальному доказуванні, чітко визначаючи їхню доказову силу відповідно до статті 65. У дослідженні також було зроблено висновок, що цифрові докази мають характеристики, які відрізняють їх від матеріальних доказів, а чинні процесуальні норми не регулюють належного поводження з ними; наразі вони розглядаються як різновид документальних доказів.

Ключові слова: *цифрові докази, допустимість, доказування, легітимність, кіберзлочинність.*

CASE STUDY

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Case Study

AGREEMENT ON THE RIGHT TO CHOOSE THE COURT: PECULIARITIES OF LEGAL REGULATION AND CASE-LAW

Iryna Malinovska*, Liudmyla Leiba, Viktoriia Panchenko and Iryna Cherevatenko

ABSTRACT

Background: *The present article provides a detailed analysis of legislative regulation—both national and international—and case-law concerning the choice of court in cross-border disputes. In international business relations, the issue of which jurisdictional body that have jurisdiction over potential future disputes often arises. In addressing this subject, the authors meticulously unravel the intricate issues surrounding the application of the forum selection agreement, including issues related to derogation from such an agreement and the imposition of liability for actions taken in breach of it. A significant portion of the analysis is dedicated to examining the doctrinal approaches and court practices of Ukraine, which is in the nascent stages of introducing 'contractual mechanisms' for choosing a court. Furthermore, an analysis of case law from the Court of Justice of the European Union, and national courts of European countries reveals the absence of uniform approaches to this issue.*

Methods*: The study employed analytical, normative and comparative methods. The method of statutory research is used to characterise the statutory instruments relating to the procedure for selecting a competent court and the specifics of an exclusive agreement. In addition, the comparative method is reflected in the study of international and national legal regulation of the choice of court that will be authorised to hear cross-border disputes. By choosing the method of legal analysis and synthesis, the author provides a reasonable assessment of the case law of both national courts of the European Union, Ukraine, and the Court of Justice of the European Union.*

Results and Conclusions: *According to the research, the authors determine that utilising the Hague Convention on Choice of Court Agreements by parties in foreign economic relations will, firstly, enhance the objectivity of resolving disputes between the parties, and secondly, bolster and advance the global business community.*

1 INTRODUCTION

The development of international trade and foreign economic relations between business entities necessitates clear regulation of their interaction. Despite the existence of heterogeneous legal systems, each party to such relations seeks to have an opportunity to effectively protect their rights in case of their violation. In response, international institutions and legal schools have endeavoured to establish a unified definition of "cross-border law" and to develop common legal approaches to the procedure for resolving cross-border disputes. For an extended period, scholarly debate has been shaped by two contradicting theories regarding the interpretation of "transboundary law": the theory of fragmentation and the theory of constitutionalism.

With regard to the theory of fragmentation, its proponents argue that transboundary law should be viewed as a non-hierarchical order, explained exclusively through the relationship between general and specialised branches of international law. In contrast, advocates of the constitutionalism theory, in describing the legal nature of transboundary law, identify a constant transformation of the global legal order from a horizontal structure to a hierarchical one.[1]

Despite the existence of such approaches to the definition of transboundary law, one of the key issues that remains to be fully researched is the establishment of courts and jurisdictional international bodies that are recognised as authorised institutions for dispute resolution in the international arena. Ultimately, it is the will of the subjects of international law that will determine the further effectiveness of such institutions. A fairly valid scientific point of view holds that the establishment of international courts and the existence of competition between them contribute to a shift away from a legal order characterised by intergovernmental agreements, while the rise of judicial constitutionalism reinforces the principles of the rule of law and legal certainty.

The current state of development of private international law demonstrates a commitment to harmonising laws and creating legal platforms for cross-border disputes. It is thanks to the choice of the vector of legal syncretism that the international community has developed several international legal acts over the past 20 years, which have become the driving force for the development of the types and methods of resolving such disputes.

A notable manifestation of such harmonisation was the adoption of the Convention on Choice of Court Agreements on 30 June 2005 at the Hague Conference on Private International Law.[2] This instrument enables parties to a contract, through a mutually agreed

1 Sai Ramani Garimella and Poomintr Sooksripaisarnkit, 'Jurisdiction under the Hague Convention on Choice of Court Agreements: A Critique' (2017) 57(3-4) The Indian journal of international law 309, doi:10.1007/s40901-018-0081-z.

2 The Hague Convention of 30 June 2005 on Choice of Court Agreements' (*Hague Conference on Private International Law*, 13 March 2024) <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> accessed 20 February 2025.

clause, to designate a specific court in a contracting state that "shall have jurisdiction to determine the dispute."[3] A court chosen by the parties cannot refuse to consider such a dispute on the grounds of conflict of laws in cross-border disputes, except in cases where the subject matter falls within the exclusive jurisdiction of another state's court.

The emergence of such an international mechanism—allowing contractual parties to select a court that will satisfy their needs and requirements—has led to new scientific approaches, according to which the 2005 Coventry reduces the effect of the doctrines of *lis alibi pendens* and *forum non conveniens*.[4]

This Convention is a prime example of the universal unification of private international law. Although adopted in 2005, it was largely ratified and transposed into national legal systems after 2015. Its scope of application currently includes all EU member states, as well as Mexico, Montenegro, Singapore, and Ukraine. Israel, North Macedonia, China and the USA have signed the Convention but not yet ratified it.[5]

2 CHOICE OF COURT BY THE PARTIES TO THE DISPUTE: GENERAL APPROACHES TO CHOICE OF COURT AGREEMENT

In the course of foreign economic activity, it is common for counterparties to such foreign economic agreements to determine, in advance, the jurisdictional authority competent to resolve any potential disputes. These bodies may include either national courts or extrajudicial bodies, such as arbitration, mediation or other alternative dispute resolution instruments. The parties' selection of a particular dispute resolution mechanism carries distinct procedural and legal consequences. Accordingly, such an agreement between the parties is set out either in an arbitration or mediation clause, or in an agreement that designates the court authorised to hear the dispute.

Such a plurality of dispute resolution methods affords parties the autonomy to select the forum they consider most trustworthy. Notably, international commercial arbitration—although not subject to national jurisdiction—provides disputing parties greater autonomy, including the choice of substantive and procedural law, the arbitrators, the language, and

3 Convention on Choice of Court Agreements (30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 20 February 2025.

4 Trevor Hartley and Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (*Hague Conference on Private International Law*, 8 November 2013) <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959> accessed 20 February 2025.

5 Ronald A Brand, 'United States Signs the Hague Judgments Convention' (*Transnational Litigation Blog*, 31 March 2022) <https://tlblog.org/united-states-signs-the-hague-judgments-convention/> accessed 20 February 2025.

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the place of arbitration. These attributes often render arbitration particularly attractive as a dispute resolution method.[6]

Concerning the choice of a national court of a particular country to resolve a dispute between the parties, the existence of clear international legal regulation of this issue is an indisputable prerequisite for giving preference to the autonomy of the parties' will, regardless of the legal regulation in national legislation. Art. 1 of the Convention on Choice of Court Agreements stipulates that a case is international if the parties are not residents of the same Contracting State and the relations between the parties, as well as all other circumstances relating to the dispute, regardless of the location of the chosen court, are not connected only with that State. A case is also considered international where recognition or enforcement of a foreign judgment is sought.

In accordance with Art. 5(1) of the Convention, any subsequent actions taken by the parties in violation of the Convention shall be interpreted in favour of the court (or courts) of the Contracting State specified in the exclusive agreement on the choice of court.

However, despite such declaratory approaches provided for in Art. 1, in certain cases, national courts in Contracting States may, in specific circumstances, deviate from the general approaches governing the jurisdictional body to resolve the dispute due to the lack of connection between the State and the parties or the subject matter of the dispute itself—even in the presence of an exclusive agreement.

In relation to the choice of contractual jurisdiction, it should be noted that this right clearly corresponds to the impossibility of applying general approaches to the choice of court in cases with a foreign element (i.e., conflict of laws). Contractual jurisdiction should be applied not only when the parties have clearly agreed on the name of the court that will be authorised to hear the dispute, but also when such a court can be reasonably inferred from the contract's context. In this case, compliance with the formal requirements for choice of court agreements is presumed.

3 FORM OF EXPRESSION OF THE CHOICE OF COURT AGREEMENT

Art. 3(c) of the Convention provides a rather unclear definition of the form of such a choice of court agreement, namely, in writing or concluded by any other means of communication that ensures the availability of information so that it is suitable for further reference. Before a detailed analysis of the form of expression of such an agreement, it is important to examine its regulation and interpretation within the European Union.

6 Serhii Kravtsov, 'The Definitive Device of the Term "International Commercial Arbitration"' (2022) 12(3) Juridical Tribune 346, doi:10.24818/TBJ/2022/12/3.03.

Peculiarities of the forum selection agreement in the European Union.

Regarding the conclusion of a choice of court agreement in the European Union, the formal requirements are not only governed by Art. 3 of the Convention, but also by Art. 25 of the Brussels I Regulation. It is therefore anticipated that a forum selection agreement may be concluded in all forms of written reproduction of agreements. This includes contemporary means of communication that are prevalent in international trade and business, such as electronic correspondence.[7]

Interaction of international and European regulations.

The coexistence of universal and purely European legal regulation of this issue gives rise to its dualistic nature, which in turn has raised a number of problematic issues before the national courts of the European Union and the Court of Justice of the European Union. One such unresolved issue is: what are the peculiarities of application of the choice of court agreement in the case when the parties to the dispute are residents of the same EU country, but have agreed to consider potential disputes in the national court of another EU country?

This issue has been the subject of discussion among many schools of thought, but remains unsettled. To address this ambiguity, the European Court of Justice delivered a ruling on 8 February 2024 in Case C-566/22, aiming to provide clarification on the possible application of Art. 25 of the Brussels I Regulation in such circumstances.[8]

In the case, a Slovak citizen (the lender) and a legal entity domiciled in Slovakia (the debtor) entered into a loan agreement, which provided that in the event of a dispute that could not be resolved through negotiations, the dispute "shall be resolved by a court of the Czech Republic having substantive and territorial jurisdiction". The lender assigned its receivables to the Slovak company *Inkreal*. Due to the debtor's failure to repay the debt, the new creditor was forced to apply to the Nejvyšší soud (Supreme Court of the Czech Republic) as the court of first instance with a claim for debt recovery and determination of the competent Czech court to hear the claim.

The plaintiff argued that the jurisdiction transfer agreement was valid and complied with the requirements of Art. 25(1) of Regulation No. 1215/2012 and that no other special or exclusive jurisdiction of the court existed under the Regulation. However, the Czech Supreme Court raised doubts about the application of Regulation No. 1215/2012, particularly concerning whether the case contained a sufficient foreign element to trigger the Resolution. For this reason, the Supreme Court of the Czech Republic suspended the proceedings and referred the following issue to the CJEU for a preliminary ruling:

7 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)' [2012] OJ L 351/1.

8 Case C-566/22 *Inkreal v Dúha reality* (CJEU, 8 February 2024) <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-566/22&jur=C> accessed 20 February 2025.

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"From the point of view of the international element required for the application of Regulation No. 1215/2012, can the application of this regulation be based solely on the fact that two parties domiciled in one EU Member State have agreed to the jurisdiction of the courts of another EU Member State?"

Systematising the legal position of the CJEU in this case, the following conclusions can be drawn:

Regarding the nature of cross-border proceedings.

Although Regulation No. 1215/2012 refers to "civil matters with cross-border effects" and "cross-border legal proceedings" in Arts. 3 and 26, it does not provide a clear definition of "the international element", which is a prerequisite for the regulation's applicability. However, guidance can be found in Art. 3(1) of Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006, which establishes a European payment order procedure. This article defines the equivalent concept of "cross-border legal proceedings" as "those in which at least one of the parties has his or her domicile or habitual residence in a Member State other than the Member State in which the proceedings take place".

The primary concern the court must address in such cases is whether the dispute falls within the scope of "cross-border proceedings" as established in Regulation (EC) No. 1896/2006.

Regarding the determination of the appropriate court.

Art. 25 of Regulation (EU) No. 1215/2012 must be understood in the context of its overarching aims: preserving party autonomy and enhancing the effectiveness of exclusive choice of court agreements. As noted in paras. 15, 19, and 22, the Regulation seeks to standardise jurisdictional rules in civil and commercial matters through a framework that ensures predictability. This predictability promotes legal certainty by enabling claimants to easily identify the applicable court and allowing defendants to reasonably foresee the court where they might face liability. Legal certainty also necessitates that national courts can readily determine their jurisdiction without needing to evaluate the case's substantive issues.

In this regard, Art. 25(1) affirms that jurisdictional agreements like the one in question fall within its scope, supporting the Regulation's aim of ensuring legal certainty and consistency. Enforcing such agreements reduces the risk of simultaneous legal proceedings and conflicting rulings across Member States, in line with the objective of consistent application of justice as stated in para. 21 of the Regulation.

Moreover, the implementation of Art. 25(1) reflects the principle of mutual trust among Member States' legal systems. As para. 26 notes, this confidence and access to justice underpin the aim of reinforcing the European region of freedom, security, and justice.

While Art. 1(2) of the Convention on Choice of Court Agreements specifies that "a case is considered international if the parties are residents of different Contracting States and all elements concerning the dispute, regardless of where the chosen court is located, are linked solely to that State," the EU legislature opted not to incorporate a comparable provision in Regulation No. 1215/2012. Instead, it focuses on preserving and enhancing the area of freedom, security, and justice through measures related to judicial cooperation in civil matters that have cross-border implications, as stated in para. 3.

In the case discussed, the court concluded that Art. 25(1) of Regulation (EU) No. 1215/2012 applies to a jurisdiction agreement in which both parties—though domiciled in the same Member State—choose to submit their disputes to the courts of another Member State, even if the contract has any connection to that state.

Thus, it can be concluded that the issue of legal regulation of choice of court agreements in the EU has its specifics and patterns of development. Within the EU, priority is given to EU instruments such as Regulation No. 1215/2012. However, when a dispute involves a foreign element that is not domiciled in the EU, the Convention on Choice of Court Agreements should take precedence.

4 PECULIARITIES OF CHOICE OF COURT AGREEMENT FORM: UKRAINIAN EXPERIENCE

Until 2023, the choice of court in Ukraine was governed solely by bilateral state agreements or by the relevant conflict of laws clauses of the Ukrainian Law on Private International Law[9] in the case-law of the national courts. The ratification of the Hague Convention on Choice of Court Agreements—a unique instrument allowing parties to choose the competent jurisdiction they believe is best to handle disputes—was an irreversible step towards the recognition of the primacy of international law over national law.

The consequences of ratifying the Convention are extremely significant for Ukraine. First, as stated in the Preamble, the expansion of legal cooperation is one of the factors in the development of international trade and investment, and accordingly, foreign investors and the business community may feel more protected in the legal field. Second, given the high level of distrust of the judiciary (according to a survey by the Kyiv International Institute of Sociology, only 12% of Ukrainians trust the courts and only 9% trust prosecutors, compared to 63% and 67% who do not[10]), the Convention offers a potential opportunity to overcome this barrier by reducing parallel proceedings and potentially increasing predictability and

9 Law of Ukraine no 2709-IV of 23 June 2005 "On Private International Law" <https://zakon.rada.gov.ua/laws/show/2709-15#Text> accessed 20 February 2025.

10 'Dynamics of Trust in Social Institutions in 2021-2024' (*Kyiv International Institute of Sociology*, 9 January 2025) <https://www.kiis.com.ua/?lang=ukr&cat=reports&id=1467&page=1> accessed 20 February 2025.

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certainty in international litigation. Third, the Convention provides more clearly defined mechanisms for the recognition and enforcement of foreign judgments issued by Ukrainian courts and vice versa, avoiding reliance on the principle of reciprocity.

In the doctrine of international civil procedure and law enforcement practice, the prevailing view is that the choice of court is a prerogative of the contracting parties.[11] However, the case law of Ukrainian courts shows that there is no uniform approach to resolving this issue. For example, in one case, the plaintiff (a Russian company) filed a claim with the Kyiv Commercial Court to declare a surety agreement concluded between the defendants invalid. The claim alleged that the agreement contained signs of fictitiousness as it was concluded without the intention of creating legal consequences stipulated by this agreement, but rather to fabricate debt and manipulate bankruptcy proceedings to the detriment of independent creditors. The initial issue faced by the court was determining the appropriate court. The plaintiff invoked a clause in the agreement stating that any disputes arising from the performance of this contract—including its interpretation, amendment, supplementation or cancellation—would first be resolved through negotiation, and only in the absence of agreement would the case be referred to the competent court. The parties recognised the Economic Court of Kyiv Region as the competent court for the consideration of disputes arising from the performance of the contract and Ukrainian substantive law as applicable.

The court of first instance, citing the agreement on the choice of court and the relevant rules of procedural law—specifically Art. 31 of the Code of Commercial Procedure of Ukraine—determined that the case materials should be transferred to the Commercial Court of Kyiv Region. However, upon appellate review, this conclusion was rejected. The appellate court reasoned that the plaintiff was not a party to the legal relations of the parties within the obligations under the Surety Agreement, and neither the principal nor the surety agreement contained an arbitration clause covering third-party disputes. Consequently, the court of first instance erred in transferring the claim based on territorial jurisdiction. Furthermore, the appellate court further noted that the phrase "by a court established by law" refers not only to the court's legal basis for existence but also to its compliance with certain rules governing its activities, i.e., it covers the entire organisational structure of courts, including issues within the jurisdiction of certain categories of courts.[12]

In this case, it can be argued that the Russian company, which filed a claim with the jurisdictional body provided for by the contract (to which it was not a party), deliberately

11 Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (Hart Publishing 2020) 3-5; Afifah Kusumadara, 'Jurisdiction of Courts Chosen in the Parties' Choice of Court Agreements: An Unsettled Issue in Indonesian Private International Law and the Way-Out' (2022) 18(3) Journal of private international law 424, doi:10.1080/17441048.2022.2148905.

12 Case no 910/20620/21 (Northern Commercial Court of Appeal, 14 December 2023) <https://reyestr.court.gov.ua/Review/115703939> accessed 20 February 2025.

abused its procedural rights by convincing the lower courts that it was appropriate to consider the case in the courts of Ukraine.

In another case, it was determined that, in accordance with the terms of the International Supply Agreement, any disputes, controversies or claims arising out of or in connection with the Agreement would be considered by the commercial court at the buyer's location, namely the Commercial Court of Dnipropetrovska oblast, Ukraine. However, according to the register of legal entities, the buyer's location was dualistic, as, despite being located in another region of Ukraine (Vinnytsia), its postal address was in another region, Dnipro. The Court of Appeal's position in this case proved to be very controversial, as it overturned the decision of the first instance court which had transferred the case to the Commercial Court of Vinnytsia. The appellate court argued that the parties to the international supply agreement had determined the jurisdiction at the place of the buyer's business, the Commercial Court of Dnipro. The court's own interpretation of the factual circumstances of the case led to a weakening of the right to a fair trial.[13]

According to Art. 1 of the Law of Ukraine on the State registration of legal entities and individual entrepreneurs,[14] the place of residence of a legal entity is the address of the entity or of the person acting on its behalf in accordance with the legal instrument or legal basis. Moreover, under Art. 93(1) of the Ukrainian Civil Code, the place of residence of a legal person is the actual place of business or the place from which the day-to-day management of the activities of the legal person (in particular, the management) is carried out. Under Art. 9(2)(10) of the Law of Ukraine on the State registration of legal entities, individual entrepreneurs and public organisations, information on the place of residence of legal persons is one of the elements to be included in the Unified State Register. Under Art. 97 of the Ukrainian Civil Code, a company is administered by its subsidiaries. The governing bodies of a company are its general assembly of its members and its governing body, unless otherwise specified by law. Art. 98 of the Ukrainian Civil Code provides that the general meeting of the shareholders of a company is entitled to take decisions on all matters related to the company's activities, including matters that are the responsibility of other company bodies. Therefore, when distinguishing between the terms "location" and "postal address" of a legal entity, priority should be given to the term postal address.

Another example illustrating the role of a jurisdictional body in dispute resolution is found in a case involving a seafarer, a citizen of Ukraine, who was insured while working under an employment contract and subsequently filed a claim for damages. The claim identified two defendants: the seafarer's direct employer (a foreign company) and an employment

13 Case no 904/5555/23 (Central Commercial Court of Appeal, 8 January 2024) <https://reyestr.court.gov.ua/Review/116147220> accessed 20 February 2025.

14 Law of Ukraine no 755-IV of 15 May 2003 'On the State Registration of Legal Entities and Individual Entrepreneurs' <https://zakon.rada.gov.ua/laws/show/755-15#Text> accessed 20 February 2025.

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intermediary. The peculiarity of this case was the presence of a clause in the Agreement stipulating that its terms and conditions were subject to the applicable provisions of the vessel's flag state, and that any disputes arising from the agreement were to be resolved in accordance with that law. It was established in the course of the case that the vessel *Aetolia* was flying the flag of Barbados. The Supreme Court, in reviewing the decisions of the courts of first instance and appeal, noted that the absence of a reference to a specific Barbados court in the seafarer's employment agreement did not negate the existence of a valid agreement on contractual jurisdiction.[15]

These examples demonstrate the parties' intent to designate a specific court as competent to hear the dispute. However, there are cases when the parties to a contract, when choosing the contractual type of jurisdiction, do not explicitly name such a court, but refer to the choice of law that they consider appropriate to apply in the dispute. On the one hand, such actions by the parties to the dispute are aimed at selecting a jurisdictional body, as the autonomy of will takes precedence over other rules. On the other hand, the existence of such a situation, by analogy, can be compared to a non-rehabilitating pathological arbitration agreement, the existence of which indicates the invalidity of the choice of arbitration as an alternative dispute resolution method.

In this context, the practice of Ukrainian national courts has shown a degree of inconsistency. For example, when considering a claim for debt collection, the court of first instance refused to open proceedings in the case, citing the contractual clause whereby disputes, claims arising in connection with the agreement, if not resolved by the parties through negotiations, were to be resolved in accordance with the procedure established by the legislation of Ukraine.[16] In other words, in the agreement, the parties only made a choice of law (the law of which state is applicable to legal relations with a foreign element), and did not determine the jurisdiction of the relevant case to the courts of Ukraine. The materials of the claim did not contain any other evidence that the parties had consented to consider disputes arising from this agreement in the courts of Ukraine. By cancelling this decision of the court of first instance, the Court of Appeal believes that the parties' choice of Ukrainian law as the law governing their relations under the agreement means that they have chosen the national legislation of Ukraine, and not individual legislative acts governing the relevant relations of the parties, including until the resolution of the dispute arising between the parties in this case.[17]

15 Case no 947/18611/21 (Civil Court of Cassation of the Supreme Court, 3 May 2023) <https://reyestr.court.gov.ua/Review/110749272> accessed 20 February 2025.

16 Iryna Izarova and others, 'Case Management in Ukrainian Civil Justice: First Steps Ahead' (2022) 40 Cuestiones Políticas 927, doi:10.46398/cuestpol.4072.56.

17 Case no 911/2332/22 (Judge Northern Commercial Court of Appeal, 14 February 2023) <https://reyestr.court.gov.ua/Review/109270533> accessed 20 February 2025.

Such an interpretation raises concerns as it directly contradicts the basic principles of private international law. In the above case, the courts, trying to understand the real will of the parties to the dispute, substituted the concepts of "forum selection agreement" and "choice of law agreement". The latter definition is reflected in the 2015 Principles on Choice of Law in International Commercial Contracts,[18] which reveals its essence.

Both the Convention and the national statutes of member states empower parties engaged in foreign economic contracts to choose their desired court, reflecting a strong adherence to the principles underlying private international law. Although the parties are endowed with a broad spectrum of powers, the principles of international civil procedure and the rulings of domestic courts present several challenging issues: the repercussions of violating the parties' court selection agreement, the determination of liability for such violations, and the presence of extraordinary situations that permit national courts to disregard the court selection agreement.

5 DEROGATION FROM THE AGREEMENT

As previously articulated, a choice of court agreement represents a definitive expression of the concerted actions by two or more parties regarding the selection of a specific jurisdictional authority deemed a "court established by law." The inherent contradiction within this agreement lies in its inability to be governed by the principles of private international law that are applicable to contractual agreements.

It is reasonable to concur with the doctrinal perspective that, in the context of enforcing clauses pertaining to forum selection in contracts, courts within Anglo-American legal systems rely upon a distinct set of rules that have evolved over an extended period. For scholars specialising in conflict of laws or practitioners in commercial law, the specialised regulations governing the enforcement of jurisdiction clauses appear almost self-evident. However, considering the contractual foundation of jurisdiction clauses, these distinctive mechanisms for the enforcement of a contractual agreement are both unexpected and present a significant analytical conundrum.[19]

It is accurately observed within scholarly discourse that to enhance predictability for the involved parties and mitigate uncertainty, it is advisable for the parties to incorporate a forum selection clause within their contractual agreements. Nevertheless, in the event that a dispute emerges, there is no assurance that either party will initiate a claim in the

18 Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (HCCH 2015) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 20 February 2025.

19 Shahar Avraham-Giller, 'The Court's Discretionary Power to Enforce Valid Jurisdiction Clauses: Time for a Change?' (2022) 18(2) Journal of Private International Law 209, doi:10.1080/17441048.2022.2101189.

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designated court. The omission to commence litigation in the specified court may result in various repercussions, predominantly pertaining to procedural jurisprudence.[20]

It is not uncommon for parties to disregard the execution of such an agreement and choose a court they perceive as more "favourable" to their interests. The consequences of such actions, however, are far from uniform. There is no definitive or universally applicable answer, as each legal system may set its own substantive and procedural law filters to determine the legal nature of the forum selection agreement. In this case, the authors refer to such an agreement as a specific type of procedural agreement or as a part of the contract law of a particular country. The classification chosen will directly influence the legal outcomes in cases where a party breaches the forum selection agreement.

In other words, a judicial body that engages with a case stemming from a contract that includes a forum selection clause is obligated to ascertain whether to persist with the legal proceedings or to enact the repercussions of the prorogation clause. Naturally, a litigant who is disinclined to transfer the proceedings to the designated court as per the stipulations of the agreement and who initiates a claim in an inappropriate jurisdiction, in contravention of the forum selection clause, may proffer certain arguments that will constitute irrefutable justifications for non-compliance. These typically include failure to adhere to the formal requirements of the agreement, the establishment of such an agreement under coercion, fraudulent inducement, error, and similar factors.[21] Other effective tools that a party may use include the application of the doctrine of bad faith and violation of public policy.[22]

In US case law, it is acknowledged that there are no clear approaches to determining the criteria for the validity of a forum selection agreement. As can be seen, analysing the case law, scholars have identified seven approaches (methods) to the possibility of derogation from the forum selection agreement.[23] This paper argues that this categorisation may lead to a misunderstanding of the legal character of forum selection agreements. Although it is still appropriate to distinguish those approaches to the disclosure of this issue that were highlighted in *Bremen v. Zapata Off-Shore Co.*[24]

20 Peter Hay, 'Forum Selection Clauses–Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law' (2021) 35(1) Emory International Law Review 1 <https://scholarlycommons.law.emory.edu/eilr/vol35/iss1/1> accessed 20 February 2025.

21 Hannah L Buxbaum, 'The Interpretation and Effect of Permissive Forum Selection Clauses Under US Law' (2018) 66(1) The American Journal of Comparative Law 127, doI:10.1093/ajcl/avy013.

22 Tanya J Monestier, 'When Forum Selection Clauses Meet Choice of Law Clauses' (2019) 69(2) American University Law Review 325.

23 John F Coyle and Katherine C Richardson, 'Enforcing Inbound Forum Selection Clauses in State Court' (2021) 53 Arizona State Law Journal 65, doi:10.2139/ssrn.3691233.

24 Alona E Evans, 'M/S Bremen and Unterweser Reederei, GMBH v Zapata Off-Shore Co 40 USLW 4672' (1972) 66(4) American Journal of International Law 864, doi:10.2307/2198518.

The US Supreme Court, upon deliberation of this particular case, arrived at the determination that given that the jurisdiction clause constitutes a contractual obligation, it follows that if such a clause is incorporated within the contract, it is *prima facie* valid and must be adhered to, barring three mutually exclusive conditions:

- the initial condition pertains to instances where the jurisdiction or subject matter clause contravenes public policy;
- the subsequent condition involves scenarios where the establishment of the jurisdiction clause was adversely affected by fraudulent activities or undue external pressures;
- the tertiary category arises when the clause is deemed "unreasonable" or "unjust".

In accordance with this judicial precedent, the United States Supreme Court, along with numerous other national courts, has adopted this interpretive framework, as it effectively encapsulates the foundational principles that were subsequently articulated in the text of the 2005 Hague Convention.

6 CONCLUSION

The 2005 Hague Convention constitutes the most consequential international accord pertaining to the regulatory framework governing choice of court agreements. It represents a significant milestone achieved by the Hague Conference on Private International Law ("HCCH") in the domain of choice of court agreements within the context of international commercial litigation, and has exerted a constructive influence on the evolution of global transactions. The Convention establishes an international infrastructure designed to foster international trade and investment by promoting judicial collaboration in matters of jurisdiction as well as the recognition and enforcement of judgments concerning choice of court agreements.

The Convention is distinguished by its aspiration to attain "full harmonisation of the Contracting States' regulation", with the principal aim of enhancing legal certainty for parties engaged in international commercial endeavours. Specifically, the Convention endeavours to augment the effectiveness of choice of court agreements across various legal systems by instituting a "coordinated regulatory framework" that encompasses these systems.

Ukraine's ratification of the 2005 Hague Convention serves a dual function. On the one hand, it facilitates the broadening of international trade relationships, while on the other hand, it serves as one of the most efficacious alternatives to the conventional determination of jurisdiction, which is deemed "appropriate" in the context of cross-border dispute resolution.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

УГОДА ПРО ПРАВО ВИБОРУ СУДУ: ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ ТА СУДОВОЇ ПРАКТИКИ

Ірина Маліновська, Людмила Лейба, Вікторія Панченко та Ірина Черватенко

АНОТАЦІЯ

Вступ. *У цій статті подано детальний аналіз законодавчого регулювання – як національного, так і міжнародного – та судової практики щодо вибору суду в транскордонних спорах. У міжнародних ділових відносинах часто виникає питання про те, який орган має юрисдикцію щодо потенційних майбутніх спорів. Розглядаючи цю тему, автори ретельно розкривають складні питання, пов'язані із застосуванням угоди про вибір суду, зокрема питання, пов'язані з відхиленням від такої угоди та покладенням відповідальності за її порушення. Значна частина аналізу присвячена вивченню доктринальних підходів та судової практики України, яка перебуває на початковій стадії впровадження «договірних механізмів» вибору суду. Крім того, аналіз судової практики Суду Європейського Союзу та національних судів європейських країн показує відсутність єдиних підходів до цього питання.*

Методи. *У дослідженні використовувалися аналітичний, нормативний та порівняльний методи. Метод законодавчого дослідження використовується для характеристики нормативних актів, що стосуються процедури вибору компетентного суду та особливостей виключної угоди. Крім того, порівняльний метод було застосовано у дослідженні міжнародного та національного правового регулювання вибору суду, який буде уповноважений розглядати транскордонні спори. Обираючи метод правового аналізу та синтезу, автор надає обґрунтовану оцінку судової практики як національних судів Європейського Союзу, України, так і Суду Європейського Союзу.*

Результати та висновки. *Згідно з дослідженням, автори визначають, що використання Гаазької конвенції про угоди про вибір суду сторонами у зовнішньоекономічних відносинах, по-перше, підвищить об'єктивність вирішення спорів між сторонами, а по-друге, зміцнить та розвине світову бізнес-спільноту.*

Ключові слова: *вибір суду, угода, Гаазька конвенція про угоди про вибір суду, виключна угода.*

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Case Study

TRAFFICKING OF HUMAN BEINGS AND THE CAUSES OF THIS TRAFFICKING IN KOSOVO

Agron Beka* and Agon Beka

ABSTRACT

Background: *Human trafficking is a highly harmful and disturbing crime affecting Kosovo and the broader region, posing a serious threat to human rights. The criminal occurrence of human trafficking is often associated with organised criminal groups that operate transnationally, making the combat of this criminal phenomenon a complex and urgent matter.*

Methods: *This research employs a literature review approach of existing literature, qualitative content analysis of institutional reports, and statistical data. Empirical sources include data from Kosovo national institutions and international organisations such as the U.S. Department of State and the International Organisation for Migration (IOM), among others.*

Results and Conclusions: *Legal reforms have been introduced, including the enactment of the Law on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking, as well as amendments to the Kosovo Criminal Code and the 2022–2026 National Strategy Against Human Trafficking. However, weak institutional capacity and corruption hinder enforcement. The findings demonstrate that human trafficking in Kosovo has an upward trend despite the efforts taken by national institutions. Addressing this requires improved inter-agency coordination, enhanced prosecution, and better victim services.*

1 INTRODUCTION

Human trafficking is one of the most serious violations of human rights and poses a significant challenge to social security and well-being globally. This criminal occurrence involves the exploitation of individuals—especially women and children—for various purposes, including prostitution, forced labour, participation in organised crime, involvement in wars, and forced marriage.[1]

Kosovo, as a newly established state with a strategic geographical position and a developing economy, faces many challenges related to human trafficking. These challenges include a two-decade-long transition, internal political problems, fragile justice institutions, corruption, poverty, high unemployment, and limited personnel and legal capacities to effectively prevent and combat human trafficking.

Human trafficking is a criminal offence punishable by up to 20 years of imprisonment under the Criminal Code of Kosovo.[2] It affects individuals, families, and communities. Victims can be people of any age, gender, ethnicity, or nationality. Human trafficking involves the recruitment, transportation, transfer, harbouring, or acceptance of persons using the threat or use of force or other forms of coercion, kidnapping, fraud, abuse of power, or exploitation of a sensitive position. It can also occur through the giving or receiving of payments or benefits to obtain the consent of a person who has control over another person for the purpose of exploitation.[3]

Exploitation includes, but is not limited to, prostitution of others, pornography or other forms of sexual exploitation, begging, forced labour, slavery or acts similar to slavery and captivity.[4] Human trafficking is often confused with human smuggling, which involves illegal border crossings. Unlike smuggling, trafficking does not require movement; survivors can be recruited and trafficked in their towns or even in their own homes.[5]

Traffickers primarily target individuals in vulnerable situations, such as those in financial need, runaways, individuals without parental care, or those from neglectful or dysfunctional families. Victims may also come from backgrounds marked by domestic violence, mental

1 Francesco Calderoni, *Organized Crime Legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime* (Springer 2010) doi:10.1007/978-3-642-04331-4.

2 Code No 06/L-074 'Criminal Code of the Republic of Kosovo' [2019] Official Gazette of the Republic of Kosovo 2, arts 165, 166.

3 Alexander Kupatadze, *Organized Crime, Political Transitions and State Formation in Post-Soviet Eurasia* (Transnational Crime, Crime Control and Security, Palgrave Macmillan 2012).

4 Jay S Albanese, 'The Causes of Organized Crime: Do Criminals Organize Around Opportunities for Crime, or Do Criminal Opportunities Create New Offenders?' (2000) *16*(4) *Journal of Contemporary Criminal Justice* 409, doi:10.1177/1043986200016004004.

5 Axel Marx and Jan Wouters, 'Combating Slavery, Forced Labor and Human Trafficking: Are Current International, European and National Instruments Working?' (2017) 8(4) Global Policy 495, doi:10.1111/1758-5899.12506.

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health problems, substance abuse, or adolescent issues. Numerous factors can influence a trafficker's decision to target a victim. Many are trafficked by romantic partners, including spouses, as well as by family members such as parents, siblings, or guardians.

Consent is not relevant when force, fraud, or coercion is involved—or if the victim is a minor in a sex trafficking situation case—even if payment was involved. Traffickers typically exploit conditions such as poverty, unemployment, family breakdown, lack of access to resources, and political, social, and economic instability. Migration, refugee status, and language barriers can make individuals more susceptible to traffickers for forced labour or sexual purposes.

This research paper aims to provide a comprehensive analysis of human trafficking in Kosovo. It evaluates the influencing factors and effectiveness of legal frameworks while offering actionable recommendations for improved collaboration among key stakeholders.

2 LITERATURE REVIEW

A general definition of the meaning of human trafficking at the international level has been missing for a long time. However, this changed with the issuance of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, commonly known as the Palermo Protocol.[6] This protocol defined an international formulation for human trafficking, according to which trafficking in persons means the recruitment, transportation, transfer, harbouring, or receiving of persons using the threat or use of force or other forms of coercion, kidnapping, fraud, abuse of power, or a position of vulnerability. It can also involve giving or receiving payments or benefits to obtain the consent of a person having control over another person for exploitation.

Exploitation includes, at a minimum, the exploitation of others for prostitution or other forms of sexual exploitation, forced labour or service, slavery, or practices similar to slavery. This definition recognises all forms of trafficking and does not limit trafficking to sexual services only. It also focuses on the conditions of forced labour, choice, enslaving practices, and slavery, which are defined in international legislation. According to such a definition, trafficking not only focuses on girls and women but also men and boys as victims of trafficking.[7]

Additionally, it is not required that the trafficked victim necessarily cross international borders, since persons can be trafficked by crossing from one area to another within the

6 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000 UNGA Res 55/25) [2005] UNTS 2237/319.

7 Ervin Muco, 'Trafficking in Human Beings: Paradigms of a Successful Reintegration into Society (Albanian case)' (2013) 9(4) European Scientific Journal 92.

same country. Many countries, including Kosovo, have adopted this definition. However, there are other important definitions. According to the EUROPOL Convention, trafficking in human beings means the subjection of a person to the real and illegal power of others, using violence, threats, abuse of authority, or conspiracy for exploitation, including prostitution, other forms of sexual exploitation, and attacks on minors or trafficking in abandoned children.[8]

Additionally, it is crucial to highlight a particularly heinous form of trafficking involving babies, who are "stolen," falsely declared dead, and then sold to interested "owners".[9] Therefore, human trafficking means placing a person under the illegal and de facto control of others using violence, threats, abuse of authority, or deceit to facilitate prostitution, forms of sexual exploitation, and the rape of minors, or the trafficking of abandoned children.[10]

3 DIMENSIONS AND TRENDS OF TRAFFICKING IN HUMAN BEINGS IN KOSOVO

Trafficking in human beings causes direct and multifaceted damages to the quality of life in any society where it occurs, regardless of whether the country in question is one of origin, transit, or destination.[11] This form of trafficking, especially of women and children, is a serious and systematic violation of many human rights, as guaranteed by international conventions and national laws. It primarily violates the freedom and security of the person and their right to live freely.[12]

Trafficking in human beings, particularly that of women, ranks among the three most profitable businesses, after drug and arms trafficking.[13] Since the end of the war in Kosovo in 1999, the country has faced an increase in the number of cases of human trafficking, both domestically and internationally. According to the UN Resolution, this growth was particularly influenced by the international presence stationed in Kosovo, which affected both the volume and dynamics of trafficking in disturbing proportions within Kosovar society. Such a situation prompted the international administration in Kosovo to issue a list

8 Naim Tota, *Trafikimi i Qenieve Njerëzore: Aspekte Penale Juridike, Krahasuese dhe Kriminologjike* (Studime 28, UET Press 2018) 22-3.

9 Goran Boskovic, 'Types of Money Laundering and Suppression Methods' (Master's thesis, Police Academy 2003).

10 Vesel Latifi and Haki Demolli, *Kriminalistika: Zbulimi dhe të Provuarit e Krimit* (Universiteti i Prishtinës 2019).

11 Armend Podvorica, 'International Administration of Kosovo as a Driving Factor in the Appearance of Trafficking in Human Beings' (2015) 6(2S5) Mediterranean Journal of Social Sciences 315, doi:10.5901/mjss.2015.v6n2s5p315.

12 Howard Abadinsk, *Organized Crime* (10th edn, Wadsworth 2013).

13 USAID, *Kuadri Ligjor mbi Trafikimin e Qënieve Njerëzore në Shqipëri dhe Sfidat e Hasura në Praktikën Gjyqësore* (Shkolla e Magjistraturës 2013).

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of premises prohibiting United Nations Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR) personnel from attending certain establishments. One such list (as of the end of 2004) included 200 bars, nightclubs, restaurants, and other establishments suspected of employing victims of human trafficking.[14]

According to official statistics, the number of identified victims was 39 in 2011,[15] 54 in 2012,[16] 52 in 2013,[17] and 42 in 2014.[18] The majority of these victims were from Kosovo. Between 2011 and 2014, a total of 42 foreign victims of human trafficking were counted (23 from the Republic of Moldova, 13 from Albania, five from Serbia, and one from Romania). Most of the victims identified in this period were women and girls trafficked for sexual exploitation. The number of men trafficked for labour exploitation was one in 2011, four in 2012, two in 2013, and three in 2014. Alarmingly, children accounted for 44% of identified trafficking victims in 2013-2014.

According to the Report of the U.S. Department of State on Human Trafficking for 2022, Kosovo remains a source, transit, and destination country for human trafficking,[19] especially from Albania, Serbia, Montenegro, and North Macedonia, en route to other European countries. The open or poorly controlled borders between these states, coupled with unsatisfactory regional cooperation, have enabled trafficking activities across the Western Balkans.[20] Therefore, human trafficking remains a significant challenge not only for Kosovo but for the entire region.

The 2022 Annual Report of the American Embassy in Kosovo regarding "Trafficking in Human Beings in Kosovo" documented 63 cases of trafficking, reflecting an increase from 54 cases in 2021. Meanwhile, about 70% of the victims were women and girls, mostly aged 18-30.[21]

14 UN Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* S/2003/421 (14 April 2003) <https://docs.un.org/S/2003/421> accessed 10 April 2025; Rexhep Gashi, *Krimi i organizuar* (Universiteti i Prishtinës 2023) 190-1.

15 US Department of State, *Trafficking in Persons Report 2011: Kosovo* (Office to Monitor and Combat Trafficking in Persons 2011).

16 US Department of State, *Trafficking in Persons Report 2012: Kosovo* (Office to Monitor and Combat Trafficking in Persons 2012).

17 US Department of State, *Trafficking in Persons Report 2013: Kosovo* (Office to Monitor and Combat Trafficking in Persons 2013).

18 US Department of State, *Trafficking in Persons Report 2014: Kosovo* (Office to Monitor and Combat Trafficking in Persons 2014).

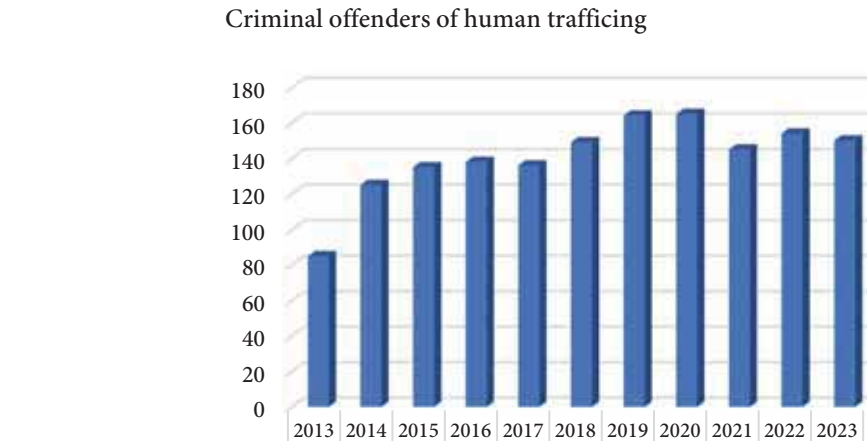
19 US Department of State, *Trafficking in Persons Reports* 2022 (Office to Monitor and Combat Trafficking in Persons 2022) 331

20 Europol, *European Union Serious and Organised Crime Threat Assessment, A Corrupting Influence: The Infiltration and Undermining of Europe's Economy and Society by Organised Crime* (Office of the EU 2021).

21 US Department of State (n 19) 331.

Furthermore, the report "Trafficking in Human Beings in Europe" from the International Organisation for Migration (IOM) highlights that Balkan countries have often served as transit points for victims travelling to other countries in Europe, especially through routes from Turkey and Syria.[22]

Data from the Kosovo State Prosecutor's Office reveals that, between 2013 and 2023, the office handled cases involving 1,546 criminal offenders of human trafficking. These figures are presented in the graph below.[23]



	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Criminal offenders of human trafficing	85	125	135	138	136	149	164	165	145	154	150

Graph 1. Number of criminal offenders of human trafficking treated by Kosovo State Prosecutor

The graph clearly illustrates the consistent rise in the number of individuals processed by the Kosovo State Prosecutor for human trafficking between 2013 and 2023. Starting with 85 offenders in 2013, the data indicates a steady increase, culminating in a high of 160 offenders in 2021. This was succeeded by a modest decline to 154 in 2022 and 150 in 2023.

22 Eliza Galos and others, *Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes* (IOM 2017).

23 Kosovo Prosecutorial Council, *Work Report for* 2023 (KPK 2024); Kosovo Prosecutorial Council, *Annual Work Report of the State Prosecutor 2022* (Office of the Chief State Prosecutor 2023); Kosovo Prosecutorial Council, *Annual Work Report for 2021* (Office of the Chief State Prosecutor 2022); Kosovo Prosecutorial Council, *Annual Report of the Interinstitutional Feedback Mechanism on Characteristic Criminal Offences* (Office of the Chief State Prosecutor 2020). See, 'Reports' (*The Prosecutorial System of the Republic of Kosovo*, 2025) <https://prokuroria-rks.org/en/reports/> accessed 10 April 2025.

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The increase observed over the past decade highlights the ongoing issue of human trafficking in Kosovo, while also indicating that there have been improved institutional initiatives aimed at identifying, investigating, and prosecuting these crimes. The rise in cases may be attributed to the implementation of enhanced legal frameworks, improved coordination among institutions, and more effective reporting mechanisms. Nonetheless, the recent decline suggests a potential need for refreshed approaches to maintain advancements, enhance preventive measures, and ensure that legal actions effectively lead to enduring deterrence and the safeguarding of victims.

Across all dimensions and trends related to human trafficking, it is evident that every form of trafficking has serious consequences—not only for the victims but for society as a whole. Therefore, combating human trafficking in Kosovo and beyond necessitates a multi-dimensional approach, including public awareness, education, and international cooperation with local and international institutions.

In response to these challenges, Kosovo's competent institutions have issued the National Strategy Against Human Trafficking (2022-2026). This strategic document defines the policies and measures that must be implemented to combat human trafficking in Kosovo. It recommends concrete actions and measures aimed at addressing identified challenges and improving the situation in the prevention and effective fight against trafficking.[24]

In this context, actions are planned to improve the national mechanism for addressing human trafficking. These include implementing coordinated efforts to prevent trafficking and raise awareness of its consequences, strengthening systems for victim identification, protection and long-term reintegration, enhancing the efficiency of criminal prosecution of perpetrators, and bolstering regional and international cooperation.

These actions are based on a comprehensive assessment of the current domestic context, as well as the regional and global context regarding trafficking. The strategy draws upon findings from strategic documents and other empirical studies conducted over the past years.

Consequently, addressing the recommended actions is expected to positively impact the identified gaps in the system, while simultaneously enabling the advancement and strengthening of prevention and combating human trafficking.[25]

24 Government of Kosovo, *National Strategy against Trafficking in Human Beings in Kosovo* 2022-2026 (Ministry of Internal Affairs 2022) <https://antitrafikimi.rks-gov.net/f/34/Strategy> accessed 10 April 2025.

25 ibid.

4 CAUSES OF HUMAN TRAFFICKING IN KOSOVO

The main criminogenic factors influencing human trafficking include poverty, unemployment, economic crises, armed conflicts or war, fragile security and justice systems, and the presence of corruption and organised crime, among others.

Poverty and unemployment are factors that contribute to human trafficking in Kosovo and beyond. Individuals from economically disadvantaged families are often vulnerable to the deceptions of traffickers, who offer them opportunities for work and a better life outside of Kosovo. Thus, in search of a better life, these victims become targets of this crime.

Kosovo is characterised by a fragile economy and a high level of unemployment, with labour market indicators among the weakest in the region and Europe. According to data from the Statistics Agency of Kosovo (SAK), the unemployment rate in Kosovo is 11.8%, while participation in the active labour force is only 38.5%. In contrast, 61.5% of the working-age population is economically inactive.

Accordingly, of the total working-age population of 1,195,426, only 461,894 are active in the labour force, comprising 403,813 employed and 58,081 unemployed individuals. The remaining 733,532 people are economically inactive. According to World Bank reports, employment growth in Kosovo is limited by an insufficient human capital base, coupled with a poorly educated and inadequately skilled workforce.[26]

Lack of quality education and unemployment are also significant causes of human trafficking. In the rural regions of Kosovo and other Balkan countries, a considerable degree of illiteracy persists, alongside limited employment opportunities. These factors encourage migration and recruitment by criminal networks.[27]

Public dissatisfaction with Kosovo's education and healthcare systems has further exacerbated this issue. According to the European Commission's 2023 Progress Report for Kosovo, the education system remains one of the most underdeveloped in the region. The quality of education is reflected in the latest PISA tests by the Organisation for Economic Co-operation and Development (OECD), where Kosovo ranked 78th out of 80 participating countries.[28]

Additionally, Kosovo's labour market indicators are among the weakest in the region and Europe. According to data from the Statistics Agency of Kosovo, the unemployment rate stands at 11.8%, and only 38.5% of the working-age population participates in the labour force, compared to 61.5% who are economically inactive.

26 European Commission, 'Instrument for Pre-accession Assistance (IPA II) 2014-2020: Kosovo, EU4 Employment and Education' <https://enlargement.ec.europa.eu/enlargement-policy/overview-instrument-pre-accession-assistance_en> accessed 10 April 2025.

27 ibid.

28 Amira Ramhorst (ed), *Study on Youth Employment in the Western Balkans* (2nd edn, Regional Cooperation Council 2021).

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Out of a total working-age population of 1,195,426, only 461,894 individuals are active in the labour force—403,813 employed and 58,081 unemployed—while 733,532 are classified as economically inactive. According to the World Bank, employment growth in Kosovo is hindered by an insufficient human capital base and an undereducated, inadequately skilled workforce.[29]

Chronic unemployment in many countries, including Kosovo, and especially among women, has influenced the spread of recruitment for exploitation and prostitution.[30]

War and migration: The armed conflict in Kosovo in 1999 and the ongoing crises in the region have created suitable conditions for human trafficking. The Kosovar refugee crisis of 1999, during which the Serbian government forcibly expelled nearly one million Albanian residents to neighbouring countries such as Albania, North Macedonia, and Montenegro,[31] significantly increased the vulnerability of displaced populations to exploitation.

Patterns of legal and irregular migration have heightened individuals' exposure to criminal networks that exploit Kosovo's unstable political and economic situation. The history of Kosovar emigration is long, complex, and continues to pose challenges for the country. The main destinations for Kosovo's citizens have been Germany, Switzerland, and Austria. Currently, around 542,000 people with migration backgrounds from Kosovo reside in Germany.

Corruption and fragile institutions of justice: Kosovo is not immune to corruption in some institutions of the justice system and public state institutions. Such corruption favours human trafficking. Weak justice institutions and a lack of cooperation between different authorities allow traffickers to operate unhindered.[32] This is evidenced by findings that have influenced and continue to influence the inefficiency of the judicial and prosecutorial system, including:

- Protracted judicial procedures that result from corruption, leading to the prescription of specific criminal cases;
- Lenient punitive policies;
- Illegal influence on the judiciary.[33]

29 European Commission (n 26).

30 Zejnulla Gruda, *E Drejta Ndërkombëtare Publike* (Universiteti i Prishtinës 2013).

31 Astri Suhrke and others, *The Kosovo Refugee Crisis* (UNHCR Evaluation and Policy Analysis Unit 2020).

32 'Corruption Perceptions Index 2022' (*Transparency International*, January 2023) <https://www.transparency.org/en/cpi/2023> accessed 10 April 2025; 'CPI 2022 for Eastern Europe and Central Asia: Growing Security Risks and Authoritarianism Threaten Progress Against Corruption' (*Transparency International*, 31 January 2023) <https://www.transparency.org/en/news/cpi-2022-eastern-europe-central-asia-growing-security-risks-authoritarianism-threaten-progress-corruption> accessed 10 April 2025.

33 Kosovo Democratic Institute, *Transparency International Kosova* (KDI 2020) <https://kdi-kosova.org/en/> accessed 10 April 2025.

Illustrative of these issues, data from the first half of 2015 revealed a lack of satisfactory treatment of corruption cases in general. Of the 717 cases pending resolution and carried over from previous years, only 128 cases related to corruption were resolved, representing just 18%. Furthermore, the Specialist Prosecutor's Office managed to resolve only five out of 53 pending cases, further reflecting the systemic challenges in prosecuting high-level corruption.

Organised crime networks: International organised crime networks are widespread in the region, including Kosovo. These networks often exploit weak legal infrastructure and corruption to facilitate human trafficking. They are responsible for creating international trafficking routes and recruiting and transporting victims in and out of the region.[34]

All of these factors collectively contribute to an environment in which human traffickers can operate with relative impunity. Upon arrival at their destination, victims are deprived of their identification documents and mistreated both physically and sexually.

5 KOSOVO LEGAL AND INSTITUTIONAL FRAMEWORK AGAINST HUMAN TRAFFICKING

The legal foundation for combating and preventing trafficking in Kosovo is established by Law No. 04/L-218 on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking,[35] enacted in 2013. This legislation embraces a victim-centred approach, establishing the legal framework for various protective and supportive measures. It requires victims' access to legal assistance, healthcare, safe housing, and compensation, while emphasising the importance of procedural protections and upholding the principle that trafficked individuals should not face punishment for any illegal actions that may arise directly from their exploitation.

Furthermore, the legal structure is reinforced by the Criminal Code of the Republic of Kosovo (No. 06/L-074), which clearly defines human trafficking as a criminal offence in Article 165. This provision includes all the typical aspects of trafficking, such as the recruitment, transportation, harbouring, and receipt of individuals through means like coercion, fraud, abuse of power, or other manipulative tactics aimed at exploitation. The trafficking of minors is unequivocally deemed a criminal act, irrespective of the methods employed. Article 166 of the Code specifies certain aggravating circumstances, including offences perpetrated by organised criminal groups, those targeting minors, or involving

34 'EU Policy Cycle - *European Multidisciplinary Platform Against Criminal Threats* (EMPACT)' *(Europol*, 2023*)* <https://www.europol.europa.eu/crime-areas-and-statistics/empact> *accessed 10 April 2025.*

35 Law No 04/L-218 'On Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking' [2013] Official Gazette of the Republic of Kosovo 34.

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public officials. These circumstances lead to increased penalties, which can extend to a maximum of twenty years of imprisonment.[36] Earlier normative instruments, such as UNMIK Regulation No. 2001/4, served as transitional measures criminalising trafficking and remain historically significant in shaping Kosovo's early institutional responses.[37]

Kosovo's ongoing dedication to addressing the issue of trafficking is evident in the National Strategy Against Trafficking in Human Beings from 2022 to 2026. This strategic document outlines key priorities related to prevention, the protection of victims, prosecution efforts, and collaboration among various institutions. This approach highlights the importance of public education, professional training, international collaboration, and the creation of sustainable rehabilitation programs for victims.[38]

6 RESULTS AND DISCUSSION

The results of this research paper confirm that human trafficking remains a persistent and complex challenge in Kosovo, posing serious concerns for both state and judicial institutions. The case analyses demonstrate that the victims of trafficking are mainly women and children, who are exposed to various forms of sexual exploitation, forced labour, trafficking for forced marriage, trafficking for participation in organised crime, trafficking for participation in war, and trafficking for begging, among others.

While Kosovo's legal framework has notably improved in recent years—with the adoption of new laws and the strengthening of policies for the protection of victims and the prosecution of human traffickers—implementing these laws remains limited due to a lack of resources, limited institutional capacity, and the presence of corruption in some institutions within the justice system.

Furthermore, poverty, lack of opportunities for quality education and employment, as well as institutional weaknesses in the field of justice related to law enforcement, contribute to increasing individuals' vulnerability to trafficking. Victim protection continues to be a major challenge, as many of them face difficulties in accessing psycho-social support and reintegration into society.

This discussion highlights the importance of a more coordinated approach between state institutions, non-governmental organisations, and international partners to prevent and combat human trafficking more effectively. Public awareness is also essential, as many victims are unaware of their rights or lack confidence in justice institutions.

36 Code No 06/L-074 (n 2) arts 165, 166.

37 UNMIK Regulation No 2001/4 'On the Prohibition of Trafficking in Persons in Kosovo' (adopted 12 January 2001) <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_04.htm> accessed 10 April 2025.

38 Government of Kosovo (n 24).

Overall, the research paper finds that significant progress has been made in the fight against human trafficking in Kosovo. However, there are still gaps that require further reforms, particularly in strengthening prevention mechanisms, improving law enforcement, and providing comprehensive support to victims. Addressing this issue requires an integrated strategy that targets the root causes and enhances local and international institutional coordination.

7 CONCLUSION

One of the most dangerous criminal occurrences in contemporary society is the trafficking of human beings. This crime has reached alarming proportions globally, seriously attacking fundamental human rights and freedoms, as well as essential social values. Kosovo—as a relatively new state (independent since 2008)—continues to grapple with the challenges of effectively addressing them.

Kosovo has taken notable steps to strengthen its anti-trafficking framework, including improving the protection of victims and the prosecution of traffickers. Nevertheless, human trafficking remains a persistent and deeply rooted issue, exposing the structural vulnerabilities of state institutions. A more coordinated, efficient, and advanced response—both nationally and internationally—is essential to prevent and combat this crime.

Key interventions include taking preventive measures to address the main factors that cause human trafficking. Through such efforts, combined with tougher repressive measures, it is possible to reduce the impact of this occurrence and better protect the rights and freedoms of the victims in Kosovo. An effective approach to combating human trafficking in Kosovo has to be multifarious and coordinated. First, standardising data collection methods and building a consolidated database that isolates trafficking statistics—including those linked to offender prosecution and punishment—will foster inter-institutional cooperation. Simultaneously, operators of hotlines should receive specific training to improve their handling of trafficking incidents and identification. Moreover, social services play a crucial role in properly fighting trafficking. Social welfare organisations must be adequately funded to meet legal requirements and provide timely assistance to victims. Public awareness should rise from comprehensive education initiatives, including television, radio, social media, and community-based seminars. Close collaboration with government authorities is crucial for these campaigns to reach a broad audience and have a lasting impact.

Furthermore, the correct application of already passed laws is vital. Authorities must intensify their probes of traffickers and other pertinent officials, ensuring that penalties are consistent with the provisions of the Criminal Code of Kosovo's conditions and the National Strategy and Action Plan against Human Trafficking in Persons (2022–2026). Moreover, specific social and financial interventions are needed to identify and support young people forced into begging, as well as other victims of trafficking. This entails enhancing victim

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protection strategies by means of anonymity preservation, reintegration program enhancement, and professional training possibilities for survivors. Ongoing professional development for prosecutors, judges, and specialised police agencies is also essential to uphold the rule of law, ensure the effectiveness of investigations, and reduce the backlog of unresolved trafficking cases. Finally, stronger international cooperation with regional and global organisations—especially EUROPOL and INTERPOL—will enhance Kosovo's capacity to combat trafficking networks that operate across national boundaries.

From all this, it follows that closer cooperation between state institutions, international organisations, and civil society is required, as only through this collaboration can human trafficking be more effectively prevented and the protection of victims in Kosovo be ensured.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ТОРГІВЛЯ ЛЮДЬМИ ТА ПРИЧИНИ ЦЬОГО ЗЛОЧИНУ В КОСОВІ

Аґрон Бека* та Аґон Бека

АНОТАЦІЯ

Вступ. *Торгівля людьми є надзвичайно небезпечним злочином, що становить виклик для Косова, впливає на регіон в цілому, а також створює серйозну загрозу правам людини. Кримінальні випадки торгівлі людьми часто пов'язані з організованими злочинними групами, які діють на транснаціональному рівні, що робить боротьбу з цим кримінальним явищем складною та нагальною справою.*

Методи. *У цьому дослідженні використовується підхід огляду літератури, якісний контент-аналіз інституційних звітів та статистичних даних. Емпіричні джерела містять дані національних установ Косова та міжнародних організацій, зокрема таких як Державний департамент США та Міжнародна організація з міграції (МОМ).*

Результати та висновки. *Було запроваджено правові реформи, включно з прийняттям Закону про запобігання та боротьбу з торгівлею людьми та захист жертв торгівлі людьми, а також було внесено зміни до Кримінального кодексу Косова та Національної стратегії боротьби з торгівлею людьми на 2022–2026 роки. Однак слабка інституційна спроможність та корупція перешкоджають правозастосуванню. Результати дослідження показують, що торгівля людьми в Косові має тенденцію до зростання, незважаючи на зусилля національних інституцій. Вирішення цієї проблеми вимагає покращення міжвідомчої координації, посилення кримінального переслідування та поліпшення допомоги потерпілим.*

Ключові слова: *торгівля людьми, Косово, жертви, експлуатація, проституція, боротьба, запобігання.*

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Case Study

CRYPTOCURRENCIES IN THE WESTERN BALKANS: ANALYSIS OF LEGAL REGULATION AND FUTURE PROSPECTS

Safet Krasniqi, Armend Podvorica and Valeri Qatani*

ABSTRACT

Background: *Cryptocurrencies have revolutionised the global financial sector, thus challenging traditional financial systems. They offer new opportunities for investments and fund transfers. However, the legal challenges associated with regulating cryptocurrencies are numerous, especially in the Western Balkans, where existing legal infrastructures are not suitable to address the decentralised nature of this financial system. This study provides an analysis of the legal obstacles to regulating cryptocurrencies in the region, examining the main legal issues and existing legal infrastructure that impact the development of this digital financial sector.*

Methods: *This scientific paper explores the legal spectrum of cryptocurrency regulation in the Western Balkan countries. The research objectives include examining the extent of legal regulation across the six countries and identifying legal shortcomings. Given the nature of the topic, the analytical method was employed to study existing regulations on cryptocurrencies and practical cases related to cryptocurrencies; the comparative method to contrast the legal approaches among Western Balkan countries; and the statistical method to quantify the scope and trends in crypto-related activity in the region.*

Results and Conclusions: *The Western Balkan countries have not yet developed a stable and harmonised framework for regulating cryptocurrencies. In some Western Balkan countries, this leaves room for abuse and misuse, largely due to technological barriers. The findings show that Kosovo and Bosnia and Herzegovina are particularly weak in the legal regulation of cryptocurrencies; the absence of relevant court cases or judicial precedents in these countries is directly linked to the lack of laws governing this sphere. Meanwhile, Serbia and Albania are a step further in the legal regulation of cryptocurrencies.*

The article examines whether there have been efforts to create a common legal framework across the Western Balkan region. The analysis reveals that no country has defined or specified the scope of cryptocurrency activity in law. Moreover, there are no efforts to create a common framework. These countries still require a much greater commitment to reform and strengthen their national legal infrastructures. In the case of Kosovo, the legislative gap is concerning, as it also reflects the inability to combat illegal acts associated with cryptocurrency use.

1 INTRODUCTION

Digitalisation is creating a new environment in which rapid technological development is advancing, and government policies must keep pace with this progress. Blockchain technology can transform financial markets and fundamentally change the way financial assets are issued, stored, accessed and traded.[1] Described as an electronic peer-to-peer system, Bitcoin came into being in 2008 as the first application of blockchain technology.[2] However, the industry's growth demonstrates that the fundamental principles of transparency and decentralisation are increasingly challenged by the socio-technical blockchain stack.[3]

One of the most commonly used terms in the field of crypto economics is "decentralisation," which is sometimes regarded as the primary purpose of blockchain[4]. Nonetheless, numerous dilemmas have surrounded blockchain technology and its challenges for law enforcement. These challenges have become prominent with the widespread adoption of blockchain—especially as it enabled the creation of cryptocurrencies. In this regard, it is worth emphasising that the type of blockchain technology determines how transactions with digital currencies (cryptocurrencies) are executed, and it also affects the speed of transaction execution.

The rapid transformation of the financial sector has gained significant importance, with new models or systems in the digital aspect of the financial spectrum, such as the concept of banking as a service and decentralised finance.[5] These impactful innovations are

1 Ittay Eyal, 'Blockchain Technology: Transforming Libertarian Cryptocurrency Dreams to Finance and Banking Realities' (2017) 50(9) Computer 38, doi:10.1109/MC.2017.3571042.

2 Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' [2008] Decentralized Business Review 1, doi:10.2139/ssrn.3440802.

3 Balázs Bodó and Alexandra Giannopoulou, 'The Logics of Technology Decentralization - the Case of Distributed Ledger Technologies' in Massimo Ragnedda and Giuseppe Destefanis (eds), *Blockchain and Web 3.0: Social, Economic, and Technological Challenges* (Routledge 2019) 114, doi:10.4324/9780429029530-8.

4 Vitalik Buterin, 'The Meaning of Decetralization' (*Medium*, 6 February 2017) <https://medium.com/@VitalikButerin/the-meaning-of-decentralization-a0c92b76a274> accessed 10 December 2024.

5 Thomaz Arruda, 'DeFi: A Path to Integration? The Strange Case for Centralization in EU Banking Law' (2022) 16 Bocconi Legal Papers 23.

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expanding in parallel with the increasing number of technology users, influencing the delivery of financial services.[6]

Digital finance plays a crucial role in economic growth, acting as a positive driver.[7] Without denying that the inclusion of finance in a digital way is offering numerous opportunities, it could once have been considered inaccessible. Purchases, payment execution, investments and others have expanded finance through digital systems. However, the digitalisation of financial relations also presents certain risks. Based on global practices, it is evident that such risks, in one way or another, diminish the positive impact that digital finance can present.

This paper will reveal the legal spectrum of cryptocurrencies in the countries of the Western Balkans. Scientific tasks are among the objectives that reflect the legal regulation of the six countries in the Western Balkans. Technological development has profoundly changed the way financial instruments are issued and traded.[8] Naturally, such evolutions necessitate that government policies remain consistent with such changes. Therefore, efforts must be made to ensure markets for the technology remain open and transparent,[9] especially given that advances in the financial field can undoubtedly impact the legal order. The absence of proper legal guarantees creates the risk that irresponsible actors may exploit the financial system.[10]

What challenges arise from the absence of legal harmonisation, regulatory uncertainty and technological barriers? This study examines the efforts to develop policies and laws that support the use of cryptocurrencies while ensuring consumer protection and financial stability. It seeks to answer these questions and proposes recommendations for advancing legal regulation in this regard.

2 LEGAL INFRASTRUCTURE OF THE WESTERN BALKAN COUNTRIES

After a long period since the issuance of Bitcoin, cryptocurrencies are still not widely understood in terms of their use or the purposes they serve. In countries undergoing transition, such as the six Western Balkan nations, there is a pressing need for well-thought-out policies regarding the legal regulation of cryptocurrencies in these countries. A group of researchers who, based on a survey, concluded that although the majority of respondents

6 Soumitra Dutta and Bruno Lanvin (eds), *The Network Readiness Index 2022: Stepping into the New Digital Era : How and Why Digital Natives Will Change the World* (Portulans Institute 2022).

7 Asep Risman and others, 'The Effect of Digital Finance on Financial Stability' (2021) 11 Management Science Letters 1979, doi:10.5267/j.msl.2021.3.012.

8 Parma Bains, Nobuyasu Sugimoto and Christopher Wilson, *BigTech in Financial Services* (Fintech Note, IMF 2022).

9 Benjamin K Sovacool and Dylan D Furszyfer Del Rio, 'Smart Home Technologies in Europe: A Critical Review of Concepts, Benefits, Risks and Policies' (2020) 120 Renewable and Sustainable Energy Reviews 109663, doi:10.1016/j.rser.2019.109663.

10 Gili Vidan and Vili Lehdonvirta, 'Mine the Gap: Bitcoin and the Maintenance of Trustlessness' (2018) 21(1) New Media and Society 42, doi:10.1177/1461444818786220.

had heard of cryptocurrencies, they have no or very little knowledge about blockchain technology.[11] This indicates a significant gap in public understanding of digital finance—especially when compared to other parts of the world, where technological adoption has advanced beyond imagination.

In particular, the state of Kosovo presents a deficiency in its legal framework concerning cryptocurrencies. The first and evident dilemma is the lack of legal clarity regarding the regulation of cryptoassets in Kosovo. Despite the rapid transformation of technology, particularly digital advancements in the financial sector, Kosovo has struggled to keep pace with global trends in this area.

Nonetheless, Kosovo, through the Law on Cryptoassets,[12] has made an effort to regulate some aspects of the development of this financial activity. The Law on Cryptoassets defines the term cryptoassets and further emphasises that operators providing crypto services are required to be registered and licensed by the competent authorities. Furthermore, the law attaches importance to the prevention of money laundering activities, requiring service operators to comply with established rules.

Despite the absence of a comprehensive legal act regulating cryptocurrencies, the Tax Administration of Kosovo on 13 December 2021[13] issued a notice regarding tax obligations for income generated from cryptocurrencies. According to Law No. 03-L/222 on Tax Administration and Procedures, the TAK notified the public that tax obligations for income generated from cryptocurrencies depend on the person's status.

In terms of judicial practice, Kosovo's courts have yet to develop a significant body of case law concerning cryptocurrencies. Among the court decisions analysed, only one decision indirectly appears to address the issue of cryptocurrencies. In Decision P.nr. 2021:233110,[14] the suspects were acquitted of the indictment, under the allegations of the Prosecution under allegations of organising pyramid schemes and engaging in illegal gambling. The case raised questions about the organisation of games of chance without a proper license; however, the court found insufficient grounds for conviction, and the suspects were acquitted.

At another level among the Western Balkan countries is Albania, which has taken legislative steps regarding digital finance, namely cryptocurrencies. Notably, Law 66/2020 on Financial

11 Simeana Beshi, Flaka Braha and Luan Vardari, 'Cryptocurrency Awareness in Kosovo' in Kıymet Tunca Çalıyurt (ed), *New Approaches to CSR, Sustainability and Accountability*, vol 3 (Springer 2022) 81, doi:10.1007/978-981-16-9364-9_6.

12 Law of the Republic of Kosovo No 08/L-295 'On Cryptoassets' (22 November 2024) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=99185> accessed 10 December 2024.

13 'Notice to Taxpayers – Tax Liabilities for Revenues Generated from Cryptocurrencies' (*Tax Administration of Kosovo*, 13 December 2021) <https://www.atk-ks.org/en/njoftim-per-tatimpagues-detyrimet-tatimore-per-te-ardhurat-e-realizuara-nga-kriptovalutat/> accessed 10 December 2024.

14 Case No 2021:126936, decision No 2021:233110 (Basic Court Ferizaj, 24 January 2023) <https://www.gjyqesori-rks.org/aktgjykimet/?r=M&lang=en> accessed 10 December 2024.

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Markets Based on Distributed Ledger Technology[15] was enacted to regulate the issuance of digital tokens or virtual currencies, as well as the licensing, monitoring and supervision of entities engaged in activities such as the distribution, trading and storage of digital tokens. Additionally, the law regulates digital token agents, innovative service providers and the automated undertaking of collective investments.

This law, which entered into force on 1 September 2020, was returned for review by the then-President of the Republic of Albania, Iliri Meta, through a presidential decree. Among the concerns raised in the decree were the law's shortcomings in addressing key issues such as the prevention of criminal activities, illegal transactions, money laundering and tax evasion.[16]

Complementary to this legislation, two other laws address the digital finance landscape:

1. Law No. 55/2020 "On Payment Services";
2. Law No. 62/2020 "On Capital Markets"

Although these normative acts do not directly include cryptocurrency as a digital currency, the Law on Financial Markets Based on Distributed Ledger Technology explicitly includes the issuance of virtual currencies within its regulatory scope.

However, a crucial question arises: Is it sufficient to regulate such financial activity with only these legal instruments, given the broad scope of cryptocurrencies?

Albania, in its judicial practice, also presents several criminal offences involving cryptocurrencies. Therefore, Albania appears to be making progress in preventing crypto-related crimes and sanctioning illegal acts that may be caused by cryptocurrencies.[17]

Bosnia and Herzegovina (BiH): In BiH, virtual currencies have only recently begun to attract legal attention, particularly following the amendment of the Law on the Securities Market. Considering that Bosnia and Herzegovina is divided into two administrative entities, such legal changes regulating digital currencies are known only in the Republic of Srpska (RS). However, they remain unknown to the rest of the Federation or other entities in BiH.

The amendments introduced in the Republic of Srpska, while marking an initial step towards regulating digital assets, do not provide comprehensive, proper legal coverage. Specifically, it does not specify the entire issue of cryptocurrencies in terms of taxation.

15 Law of the Republic of Albania No 66/2020 'On Financial Markets Based on Distributed Ledger Technology' (21 May 2020) <https://amf.gov.al/readLaw.asp?id=20347> accessed 10 December 2024.

16 Decree of the President of the Republic of Albania No 11518 of 22 June 2020 'On the Return of Law No 66/2020 "'On Financial Markets Based on Distributed Ledger Technology"' <https://arkiva.president.al/presidenti-meta-dekreton-kthimin-per-rishqyrtim-ne-kuvend-te-ligjit-nr-66-2020-arsyet-e-kthimit-per-rishqyrtim-te-ligjit/> accessed 10 December 2024.

17 'Press Release' (*SPAK Special Structure Against Corruption and Organized Crime*, 22 January 2025) <https://spak.gov.al/njoftim-per-shtyp-date-22-01-2025/> 25 January 2025.

However, in Bosnia and Herzegovina, there is no specific normative act that defines cryptocurrencies in detail.

A notable gap remains in the area of taxation. In practice, there is no tax on income generated through cryptocurrency transactions in Bosnia and Herzegovina.[18] This means that cryptocurrency transactions, regardless of volume or frequency, are not currently subject to taxation.

Therefore, the current situation in Bosnia and Herzegovina remains legally unclear and undefined. The lack of unified legislation, taxation policy and judicial precedent continues to hinder the development of a clear and consistent enforcement approach for cases of cryptocurrency misuse.

North Macedonia: With the new Law on Money Laundering and Financing of Terrorism, an attempt has been made to address aspects of cryptocurrencies, particularly from a criminal perspective. Since the dimension of violations of freedoms and human rights spans a broad spectrum, there is a significant need for legal regulation. North Macedonia, through the aforementioned law, has managed to prevent and sanction "crypto laundering".

However, this study revealed that the term "cryptocurrency" is not formally recognised by any current law in force. Despite this, North Macedonia has demonstrated a degree of regulatory awareness, especially through the role of the National Bank of the Republic of North Macedonia.[19]

When examining the country's legal frameworks, it is clear that North Macedonia does not yet have a regulation to determine and define the use of cryptocurrencies. In terms of financial oversight, North Macedonia's general perspective on cryptocurrencies aligns with that of European financial regulators.

Montenegro: Legal gaps also exist in Montenegro, as no normative rules define whether financial activities involving cryptocurrencies are legal or illegal.

In response, the government has initiated preparatory efforts by forming a working group under the Financial Stability Council,[20] tasked with drafting a Law on Digital Assets. This proposed legislation is expected to address the issuance of crypto assets and trading.

18 Maja Nišević, Chiara Zamboni and Bojan Kovačević, 'Cryptocurrencies: highlighting the perspective of Bosnia and Herzegovina' (2022) 36(2) International Review of Law, Computers & Technology 286, doi:10.1080/13600869.2021.2004759.

19 Law of the Republic of North Macedonia 'On the Prevention of Money Laundering and Financing of Terrorism' [2022] Official Gazette 151 <https://ufr.gov.mk/wp-content/uploads/2020/05/AML-CFT-Law-2022-adopted-Off.gazette-151.pdf> accessed 10 December 2024.

20 'Montenegro's 2024 Cryptocurrency Legislation Landscape' (*Cryptocurrency.law*, 9 December 2023) <https://cryptocurrency.law/montenegros-2024-cryptocurrency-legislation-landscape/> accessed 10 December 2024.

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Despite the legal vacuum, the Central Bank of Montenegro has cooperated with a crypto and blockchain solutions provider, aiming to develop a national strategy for launching the Central Bank's first digital currency.[21]

However, a fundamental dilemma emerges: How can collaboration on crypto be pursued while there is a legal gap in the legislation regarding the definition of cryptocurrencies?

Serbia: As one of the six countries in the Western Balkans, Serbia has several legal acts regulating digital assets. The Law on Digital Assets,[22] which entered into force in 2021, regulates the issuance and provision of services related to digital assets. This law also includes provisions for property rights, such as pledges and trusts over digital assets, and clearly delineates the competencies of the Securities Commission and the National Bank of Serbia in oversight and enforcement. Finally, the supervision and implementation of the law on digital assets is also regulated.

In the penal aspect related to cryptocurrencies, Serbia has taken proactive steps. The Regulations for the Prevention of Money Laundering and Financing of Terrorism[23] contribute to financial activities.

Furthermore, Serbia has amended its tax legislation to explicitly include provisions related to the taxation of cryptocurrency transactions.

3 THE NEED FOR LEGAL REGULATION OF CRYPTOCURRENCIES

For the six Western Balkan countries, a typical example of the closest alignment of local legislation is with that of the European Union, given that these countries aim to join the European Union.

Currently, in the European Union, Regulation (EU) 2023/1114 has been approved. As for assets, investment instruments or electronic money, these are regulated by European financial regulation.[24]

The European Commission published, on 24 September 2020, a proposal for a regulation on Markets in Crypto Assets. The European Commission took the first steps to assume its

21 'Central Bank of Montenegro Signs Agreement with Ripple to Develop a Digital Currency Strategy and Pilot' (*CBCG Central Bank of Montenegro*, 11 April 2023) <https://www.cbcg.me/en/public-relations/news/press-releases/central-bank-of-montenegro-signs-agreement-with-ripple-to-develop-a-digital-currency-strategy-and-pilot?id=2243> accessed 10 December 2024.

22 Law of the Republic of Serbia 'On Digital Assets' [2020] Official Gazette 153 <https://mfin.gov.rs/en/decrees-2/law-on-digital-assets-rs-official-gazette-no-1532020-translation-by-the-national-bank-of-serbia-2> accessed 10 December 2024.

23 Law of the Republic of Serbia 'On the Prevention of Money Laundering and the Financing of Terrorism' [2017] Official Gazette 113; [2019] 91; [2020] 153 <https://mfin.gov.rs/en/decrees-2/law-on-the-prevention-of-money-laundering-and-the-financing-of-terrorism-2> accessed 10 December 2024.

24 Valeria Ferrari, 'The Regulation of Crypto-Assets in the EU – Investment and Payment Tokens under the Radar' (2020) 27(3) Maastricht Journal of European and Comparative Law 325, doi:10.1177/1023263X20911538.

competence over all crypto assets within the EU and, after a comprehensive review of the entire crypto assets ecosystem, issued a proposal for a regulation on markets in crypto assets.[25] The document reflects the approach to digital assets as seen in the views and reports of several international organisations, advisory, and supervisory bodies.

The European Commission also acknowledged, for the first time, the need to assess the suitability of the EU regulatory framework regarding crypto assets.[26] The European Union has committed to assigning some of its regulatory bodies the task of monitoring crypto assets' implications, growth, and oversight. Additionally, the EU is considering the Anti-Money Laundering Directive in relation to crypto assets.

However, regulation within the European Union is not limited to this effort. Some European jurisdictions have taken independent initiatives to design 'solutions' within the framework of crypto assets. For example, Lithuania has followed the guidance approach by issuing guidelines on the Information Commissioner's Office and security token offerings.

Given the Western Balkan countries' aspirations toward European integration, these developments offer useful models for the alignment of local legal frameworks with those of the EU. Such alignment facilitates legal approximation and integration with the broader EU system.

***Table* 1. Revenue from Cryptocurrencies**[27]

Country	Revenue (2024)	Revenue per User (2024)	Projected Growth Rate (CAGR 2024-2025)	Revenue (2025)	Users (2025)	User Penetration (2024)
Albania	US$1,197.0k	US$9.5	-3.43%	US$1,156.0k	126.20k	4.44%
Bosnia and Herzegovina	US$1,709.0k	US$12.3	-3.10%	US$1,656.0k	139.10k	4.34%
Serbia	US$9.4m	US$32.0	-3.71%	US$9.1m	295.90k	4.15%
North Macedonia	US$0.00	US$0.00	0.00%	US$0.00	0.00k	0.00%
Montenegro	US$91.0k	US$3.1	-3.88%	US$87.5k	29.11k	4.60%

25 Agata Ferreira and Philipp Sandner, 'EU Search for Regulatory Answers to Crypto Assets And their Place in the Financial Markets' Infrastructure' (2021) 43 Computer Law & Security Review 105632, doi:10.1016/j.clsr.2021.105632.

26 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A new ERA for Research and Innovation' (SWD(2020) 214 final, 30 September 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0628> accessed 10 December 2024.

27 Data from the global data and business intelligence platform "Statista", see: 'Cryptocurrencies' (*Statista*, 2025) <https://www.statista.com/> accessed 25 January 2025.

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As reflected in the table, Serbia generates the highest income from cryptocurrencies among the Western Balkan countries taken into account, totalling US$ 9.4 million in 2024. This is coupled with a high number of users. However, the table illustrates that the country is expected to experience a decline in revenue of - 3.71% in 2025.

In contrast, Montenegro demonstrates both low income and a small user base, with an anticipated revenue decline of 3.88% in 2025. Similarly, Albania shows lower revenue and user numbers. Bosnia and Herzegovina, following Serbia, is characterised by high incomes and a growing user base.

The data source does not provide any figures for North Macedonia or the state of Kosovo, leaving a gap in understanding.

Nevertheless, crypto exchanges have gained millions of customers in a short period of time and are reportedly highly profitable, largely due to the unregulated nature of the market.[28] Notably, 2018 witnessed significant volatility in crypto asset valuation, from its peak of over US$800 billion in January 2018 to around US$200 billion in August of the same year.[29]

This raises a key question: Can crypto assets be restricted? Some authors argue that restricting or isolating cryptocurrencies could prevent innovation. Yet, the lack of regulation of cryptocurrencies in the six Western Balkan countries poses risks, especially given the uncertain legal environment surrounding financial activities involving crypto.

The dramatic price increase of cryptocurrencies, especially since the second half of 2016, has attracted the interest of investors who have poured millions of US dollars.[30] However, these added benefits do not necessarily outweigh the associated potential risks. For instance, inherent risk judgments are negatively correlated with cryptocurrency experience[31] as price dynamics can influence the market liquidity.[32]

One of the most pressing concerns posed by the lack of legal regulation is fraud, which, as a criminal category, can be a crime in itself in the case of crypto activities, such as consumer fraud or hacking. Fraud through hacking could potentially pose a problem to the

28 Michael Casey and others, *The Impact of Blockchain Technology on Finance: A Catalyst for Change* (Geneva Reports on the World Economy 21, CEPR Press 2018).

29 Guntram B Wolff and Maria Demertzis, 'The Economic Potential and Risks of Crypto Assets: Is a Regulatory Framework Needed?' (2018) 14 Bruegel Policy Contribution 1.

30 Nicola Borri, 'Conditional Tail-Risk in Cryptocurrency Markets'(2019) 50 Journal of Empirical Finance 1, doi:10.1016/j.jempfin.2018.11.002.

31 Steven A Harrast, Debra McGilsky and Yan (Tricia) Sun, 'Determining the Inherent Risks of Cryptocurrency: A Survey Analysis' (2022) 16(2) Current Issues in Auditing A10, doi:10.2308/CIIA-2020-038.

32 Sonia Arsi and others, 'Cryptocurrencies: Key Risks and Challenges' in Stephane Goutte, Khaled Guesmi and Samir Saadi (eds), *Cryptofinance: A New Currency for a New Economy* (WSPC 2021) 121, doi:10.1142/9789811239670_0007.

widespread adoption of cryptocurrencies, as the absence of recourse against a third party, such as a bank, concentrates risk in holders of crypto.[33]

Auditing also presents significant challenges. Cryptocurrencies present several risks that affect auditors' risk assessments. Inspection of cryptocurrencies will be vital, as financial activities involving cryptocurrencies also contribute to the increase in crime. By ranking the risk and assessing the impact of cryptocurrencies, the inspection or audit of such financial activities with crypto will also present difficulties in the audit.

Illustrative Example

***Table* 2. Data collection techniques**

Approach	Benefits	Disadvantages
Research findings	Cryptocurrencies are not susceptible to attack. Buying and selling through which the principle of efficiency and effectiveness is derived. Cryptocurrencies can be audited. The high impact of this financial inclusion with crypto also enables an inclusive market.	"Unlimited" population involvement. Financial decentralization through cryptocurrencies creates potential risks.
Legal power	Cryptocurrencies in some Western Balkan countries are still not being taxed as earned income. "Open Bank" for cryptocurrency consumers or users.	The absence of regulation creates a dilemma: "legal or illegal income" for cryptocurrency users. Non-definition and non-regulation of cryptocurrencies. The rise in income from cryptocurrencies may also lead to increased criminal activitiy. The challenge of the law and the financial transformation from the traditional system to a modern financial system.

33 Kelvin FK Low and Ernie Teo, 'Legal Risks of Owning Cryptocurrencies' in David Lee Kuo Chuen and Robert H Deng (eds), *Handbook of Blockchain, Digital Finance, and Inclusion*, vol 1: Cryptocurrency, FinTech, InsurTech, and Regulation (Academic Press 2018) 225, doi:10.1016/B978-0-12-810441-5.00010-5.

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4 FUTURE RESEARCH DIRECTIONS

Legal issues that do not specify, define and foresee financial activities involving cryptocurrencies leave numerous gaps, raising dilemmas about their future direction. A key question arises: In countries that lack normative provisions on cryptocurrency activities, will such activities be considered legal or illegal? This leads to further concerns—if crypto activities are considered illegal in the future, what responsibilities do legal entities hold if transactions involving cryptocurrencies contribute to an increase in crime or the appearance of criminal offences?

In some Western Balkan countries, these matters are foreseen by law. Can criminal liability be transferred, and can cases involving crypto and other activities be dealt with analogously if the countries consider them illegal? On what legal basis can cryptocurrency transactions be invoked if legal provisions do not regulate such a financial system? Is it considered an advantage or a disadvantage for cryptocurrency users?

The shift from a traditional financial system to a decentralised one represents a transformation of the financial market. However, given how the six Western Balkan countries—particularly Serbia—have treated crypto activities so far, it is clear that cryptocurrencies are a problematic dilemma and require the Western Balkan countries, especially Serbia, to accelerate steps towards legal regulation of cryptocurrencies. The urgent need for regulating cryptocurrencies is particularly important for the Western Balkan countries.

In this regard, the European Union's approach can serve as a model. As the Western Balkan countries aspire to join the European Union, it is essential for them to align with EU regulatory standards, including those related to cryptocurrencies. As discussed in the above section, the EU regulatory framework offers guidance that Western Balkan countries can incorporate into their domestic legislation. One significant precedent is the judgment of the Court of Justice of the European Union in Case C-264/14,[34] which ruled that the exchange of traditional currency for Bitcoin is exempt from VAT.

Another important dimension to highlight is the dimension of financial sector development. The European Banking Authority's report[35] not only emphasises the risks of lacking a clear legal framework—especially regarding security and consumer protection—but also notes the increasing popularity of crypto-assets and their increasing impact on global financial stability and security.[36]

34 Case C-264/14 *Skatteverket v David Hedqvist* (CJEU, 22 October 2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0264> accessed 10 December 2024.

35 European Banking Authority, *Report with Advice for the European Commission on Crytpo-Assets* (*EBA*, 9 January 2019) <https://www.eba.europa.eu/publications-and-media/press-releases/eba-reports-crypto-assets> accessed 10 December 2024.

36 'EIB Issues its First Ever Digital Bond on a Public Blockchain' (*European Investment Bank*, 28 April 2021) <https://www.eib.org/en/press/all/2021-141-european-investment-bank-eib-issues-its-first-ever-digital-bond-on-a-public-blockchain> accessed 10 December 2024.

5 CONCLUSION

The study on the legal regulation of cryptocurrencies in the Western Balkans and their future prospects presents a comprehensive review of the opportunities that cryptocurrencies offer and the legal challenges arising from their normative regulation in the region.

Regarding the legal infrastructure, it is important to highlight that the Western Balkan countries currently face a climate of legal uncertainty. The lack of a harmonised infrastructure of legal acts in the Western Balkans is a significant legal obstacle. The lack of legal regulation not only leaves room for deep legal gaps but also raises serious concerns regarding justice, the rule of law and consumer protection. In particular, the lack of legal regulation of cryptocurrencies exposes consumers to risks, including fraud, hacking, and other forms of exploitation. The lack of intergovernmental policies further hampers efforts to combat the negative phenomena that appear with crypto transactions.

This lack of legal transparency also challenges economic actors and limits the possibilities for a developed, stable, and competitive crypto market. Such legal loopholes can increase and may affect other potential risks for abuse and misuse, undermining the trust of users and investors in cryptocurrencies.

Among the countries in the region, Serbia stands out as it has made efforts to legally regulate or foresee such decentralised financial activities in many aspects. This is in contrast to other Western Balkan countries, which are seen as necessary for the application of measures for the need for regulation by normative acts.

At present, the Western Balkan countries are being challenged by cryptocurrencies. The lack of legal regulation in these countries remains a challenge in itself that requires urgent legislative commitment. Proper legal oversight would support the development of a secure and controlled market. Currently, such gaps leave many spaces for unmanageable risk.

The future perspective for cryptocurrencies for the six Western Balkan countries can be described as a new wave advancing throughout the region. However, the future of these countries in relation to crypto promises legal uncertainty and a lack of protection for consumer rights—potentially becoming an obstacle to the healthy development of the financial sector. The Western Balkan countries have not yet developed a stable and harmonised regulatory framework for cryptocurrencies. In some cases, this leaves room for abuse and misuse, largely due to legal gaps and existing technological barriers.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

КРИПТОВАЛЮТИ НА ЗАХІДНИХ БАЛКАНАХ: АНАЛІЗ ПРАВОВОГО РЕГУЛЮВАННЯ ТА МАЙБУТНІ ПЕРСПЕКТИВИ

Сафет Краснікі, Арменд Подворіца та Валері Катані*

АНОТАЦІЯ

Вступ. *Криптовалюти здійснили революцію у світовому фінансовому секторі, кинувши виклик традиційним фінансовим системам. Вони відкривають нові можливості для інвестицій та переказу коштів. Однак правові проблеми, пов'язані з регулюванням криптовалют, численні, особливо на Західних Балканах, де наявна правова інфраструктура не пристосована до децентралізованої природи цієї фінансової системи. У цьому дослідженні проаналізовано правові перешкоди у регулюванні криптовалют у регіоні, розглянуто основні правові проблеми та наявне правове регулювання, що впливає на розвиток цього цифрового фінансового сектору.*

Методи. *Ця стаття досліджує спектр правового регулювання криптовалют у країнах Західних Балкан. Метою дослідження є оцінка рівня правового регулювання в шести країнах та виявлення правових прогалин. З огляду на характер теми, аналітичний метод був використаний для вивчення чинних нормативних актів щодо криптовалют та практичних кейсів, пов'язаних з криптовалютами; порівняльний метод був застосований для зіставлення правових підходів країн Західних Балкан; статистичний метод*

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використовувався для кількісної оцінки масштабів та тенденцій діяльності, пов'язаної з криптовалютами, у регіоні.

Результати та висновки. *Країни Західних Балкан ще не розробили стабільної та гармонізованої системи регулювання криптовалют. У деяких країнах Західних Балкан це створює передумови для зловживань та неналежного використання, здебільшого через технологічні бар'єри. Результати дослідження свідчать про те, що правове регулювання криптовалют у Косові та Боснії і Герцеговині є особливо слабким; відсутність відповідних судових справ або судової практики у цих країнах безпосередньо пов'язана з браком правового регулювання. Натомість Сербія та Албанія випереджають на крок у правовому регулюванні криптовалют.*

У статті досліджується, чи були вжиті заходи для створення гармонізованої правової системи в регіоні Західних Балкан. Аналіз свідчить, що жодна з країн не визначила у своєму законодавстві чіткі рамки для діяльності, пов'язаної з криптовалютами. Більше того, не докладається жодних зусиль для створення гармонізованого регулювання. Ці країни все ще потребують набагато більшої наполегливості у реформуванні та зміцненні своєї національної правової інфраструктури. У випадку Косова законодавча прогалина викликає занепокоєння, оскільки вона також відображає нездатність боротися з незаконними діями, пов'язаними з використанням криптовалюти.

Ключові слова: *криптоактиви, вплив, законодавство, судові справи.*

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Case Study

PROCEDURAL RULES FOR SMART TRIALS IN THE UAE: ASPIRATIONS AND REALITY

Adel Salem Allouzi

ABSTRACT

Background: *This study analyses the procedural rules governing smart trials (digital litigation) in the UAE, with a particular focus on their current implementation and potential future development. It explores the legal and technical underpinnings of digital litigation and evaluates the compatibility of the UAE's framework with the goals of procedural efficiency and access to justice.*

Methods: *Structured into two chapters, this study first examines the conceptual foundations of smart trials and their modes of initiation, before turning to an analysis of litigation processes conducted via digital means. It employs a descriptive-analytical methodology to evaluate the technical feasibility and legal validity of these practices. It specifically focuses on Ministerial Decision No. 260 of 2019, assessing its framework for remote civil litigation and the extent to which it integrates electronic communication and procedural digitisation.*

Results and Conclusions: *The study evaluates the scope and effectiveness of the ministerial decision in regulating digital litigation, including lawsuit registration, procedural steps, judicial deliberations, issuance of judgments, and temporary orders. It identifies several gaps in the UAE's digital litigation system, particularly the lack of a comprehensive legislative framework and uniform digital procedures. The research concludes by recommending the enactment of dedicated legislation to standardise and regulate digital judicial proceedings. These recommendations include creating a secure digital system for litigation, clarifying procedural rules for third-party intervention, expanding digital appeal provisions, and defining the competent authority for system-wide implementation in exceptional circumstances.*

1 INTRODUCTION

The UAE legislature has shown a sustained commitment to judicial modernisation, aligning litigation processes with international best practices to improve efficiency and fairness. This includes providing litigation guarantees such as the right to litigation, the right to defence, and judicial safeguards that ensure fair legal proceedings.

In parallel, the UAE has systematically modernised its judicial framework to incorporate technological advancements, transforming both dispute resolution mechanisms and procedural approaches. As part of this procedural legislative evolution, it has recently introduced what is known as Smart Trials in judicial proceedings by amending or adding legal provisions that regulate the use of digitisation or modern technology in litigation. This shift aims to facilitate remote litigation without requiring parties—or, in some cases, the judge—to be physically present in the courtroom. This study uses this term distinctly from electronic litigation, which may refer more narrowly to filing or document processing systems.

The COVID-19 pandemic highlighted the significance of these amendments by enabling courts to function through remote mechanisms. Ministerial Decision No. 260 of 2019,[1] which predates the pandemic, provided the primary legislative foundation for electronic litigation in civil proceedings. Although this Decision was later supplemented by the Federal Decree-Law No. 42 of 2022,[2] it remains foundational for understanding the initial regulatory approach to smart litigation in the UAE.[3]

Traditionally, procedural laws required in-person case registration, document exchanges, and judgment issuance under judicial oversight. The shift toward digital justice preserves these safeguards while adopting flexible mechanisms that enhance efficiency.

This study assesses the adequacy of the procedural rules introduced by Ministerial Decision No. 260 of 2019 in regulating remote litigation. It seeks to balance litigants' rights with judicial effectiveness, highlighting how smart trials can enhance procedural efficiency and access to justice.

This study examines whether procedural rules in UAE legislation adequately regulate remote litigation. It explores how digital technologies have been integrated into litigation processes while safeguarding litigants' rights and enhancing judicial efficiency.

1 Decision of the Minister of Justice No 260 of 2019 'Concerning the Procedural Guide for Regulating Litigation Using Electronic Means and Remote Communication in Civil Procedures' [2019] Official Gazette 651.

2 Federal Decree-Law No (42) of 2022 'Promulgating the Civil Procedure Code' [2022] Official Gazette 737.

3 Maryam Mohammed Al-Shamsi, 'System of Remote Litigation in Accordance with the UAE Civil Procedure Law' (Master's thesis, UAE University 2022).

The significance of this study arises from two key aspects:

Theoretical Significance: This study is important for assessing the UAE's novel legislative approach to remote litigation, especially following the enactment of the Civil Procedure Law of 2022 and the 2019 Remote Litigation Guide. The COVID-19 crisis further highlighted the importance of remote litigation when physical attendance was not possible.

Practical Significance: Digital tools now play a vital role in modern life and judicial operations. Their use in litigation saves time and reduces the burden on the court. As UAE courts have applied remote litigation for over three years, this research includes a field study of Abu Dhabi courts to assess their practical effectiveness and procedural adequacy.

2 RESEARCH METHODOLOGY

This study employs a doctrinal legal research methodology, focusing on a structured analysis of the UAE's legal framework governing digital litigation. Central legislative instruments include Ministerial Decision No. 260 of 2019, which initiated formal regulation of remote procedures in civil cases, and the Federal Decree-Law No. 42 of 2022 on Civil Procedure, which consolidated and updated procedural norms in light of digital transformation. These sources are assessed to evaluate their effectiveness in: (1) enhancing procedural efficiency, (2) safeguarding litigants' rights, and (3) facilitating access to justice in a digitised courtroom setting.

To complement the doctrinal approach, the study integrates grounded institutional practices documented in Abu Dhabi courts between 2020 and 2024. According to official statistics from the Abu Dhabi Judicial Department (ADJD):

- 34,006 remote hearings were conducted in the first half of 2021, with a 100% digital hearing rate across all court types, including civil, labour, and family matters;[4]
- In Q1 of 2022, courts handled 150,507 remote applications and conducted 16,687 videoconference hearings;[5]
- By mid-2022, the figure had reached 169,908 digital applications, illustrating the deep entrenchment of digital litigation mechanisms;[6]

4 ADJD, '100% Remote Litigation in Abu Dhabi Courts Reflects Administrative, Technical Readiness: ADJD Under-Secretary' (*Emirates News Agency (WAM)*, 1 August 2021) <https://www.wam.ae/en/article/hszrcrut-100-remote-litigation-abu-dhabi-courts-reflects> accessed 1 June 2025.

5 ADJD, 'Abu Dhabi Courts Process 150,507 Remote Court Applications in 3 Months' (*Emirates News Agency (WAM)*, 17 April 2022) <https://wam.ae/en/details/1395303039964> accessed 1 June 2025.

6 ADJD, 'ADJD Processes 169,908 Remote Applications to Courts in 6 Months' (*Emirates News Agency (WAM)*, 11 September 2022) <https://www.wam.ae/en/article/hszrfgp9-adjd-processes-169908-remote-applications-courts> accessed 1 June 2025.

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- In H1 2024, the ADJD processed 394,800 court-related electronic requests, confirming sustained reliance on digital platforms for litigation services.[7]

These empirical indicators serve as institutional touchpoints to illustrate how judicial practice in the UAE has adapted to and implemented digital litigation infrastructure.

While individual case files remain confidential and are not publicly accessible, this study draws from publicly available court statistics, press releases, and procedural circulars issued by the ADJD. These sources enable a mapping of the practical evolution of digital proceedings in a manner that aligns with legal and ethical standards. No identifiable data or private litigant information is included.

3 SMART TRIALS IN UAE COURTS: CONCEPTUAL FOUNDATIONS AND OPERATIONAL FRAMEWORK

This section addresses the concept of digital justice and examines how digital adversarial processes function in UAE courts.

To understand digital justice, it is necessary to define digital litigation under UAE law, followed by a discussion of its advantages and disadvantages.

3.1. Definition of digital litigation

At the outset, it is essential to distinguish the key terms used throughout this chapter. The term "digital litigation" refers to the procedural conduct of judicial processes using electronic platforms—this includes electronic filing, remote hearings, and digital document management.[8] "Digital justice" is a broader policy and institutional concept that encompasses the transformation of judicial services through technology to improve access, transparency, and efficiency.[9] In contrast, "smart trials" are considered an advanced form of digital litigation that incorporates artificial intelligence, data analytics, and integrated platforms to automate or optimise litigation processes.[10] While these terms are interrelated, this study adopts "smart trials" to describe the aspirational, fully integrated model of digital litigation currently developing in the UAE.[11]

7 ADJD, 'ADJD Processes Over Half Million Electronic Requests in H1 2024' (*Emirates News Agency (WAM)*, 5 August 2024) <https://www.wam.ae/article/141vmgo-adjd-processes-over-half-million-electronic> accessed 1 June 2025.

8 Mhd Samer Al Kattan, 'Digital Justice "Model of The United Arab Emirates"' (2024) 18(1) Revista de Gestão Social e Ambiental e04945, doi:10.24857/rgsa.v18n1-091; Adel Salem Allouzi, 'Digital Justice and Its Impact on the Functioning of Procedural Rivalry in UAE Law' (2024) 5(4) Research Journal in Advanced Humanities 300, doi:10.58256/4f8zyx55.

9 Al Kattan (n 8) 1.

10 Ziad Kh Al-Enizi and Ahmad Ghandour, 'Introducing Smart e-Trials into the UAE Judicial System' (2021) 37(1-2) Arab Law Quarterly 194, doi:10.1163/15730255-BJA10045.

11 ibid.

The UAE legislature began regulating electronic transactions with Federal Law No. 1 of 2006 on Electronic Transactions and Commerce. This law defines terms such as "electronic information" (e.g., data in the form of text, code, audio, or images) and "electronic systems" (i.e., software and devices used to manage data electronically). [12]

Subsequent amendments, such as to the Law on Evidence (amendment No. 10 of 2006), introduced provisions related to electronic signatures, documents, and transmissions. Article 17/bis defines electronic editions as any transmission or storage of information via IT systems[13]

To enable remote litigation, the Civil Procedure Law was amended through Decree Law No. 10 of 2017,[14] leading to the issuance of Federal Law No. 42 of 2022.[15]

- Article 228 defines remote communication as visual or audiovisual interaction to support remote attendance, document exchange, and legal procedures.
- Article 229 reiterates the definitions of electronic documentation consistent with Federal Law No. 1 of 2006.

Ministerial Decision No. 260 of 2019 established a procedural guide for the use of electronic means and telecommunications in civil litigation.[16] It defines:

- Remote trial as proceedings initiated using telecommunications or electronic platforms for attendance, documentation, and judgment;
- Electronic media as modern devices such as smartphones, tablets, and computers with digital or electromagnetic capabilities;
- Electronic Information Systems as court-managed platforms for handling lawsuits, memos, and notifications electronically.

12 Federal Law No (1) of 2006 'On Electronic Commerce and Transactions' [2006] Official Gazette 442. The Emirate of Dubai has promulgated Law No. (2) of 2002 Concerning Electronic Transactions and e-Commerce. These laws are consistent with the UNCITRAL Model Law on Electronic Commerce of 1996.

13 Federal Law No (10) of 1992 'On Evidence in Civil and Commercial Transactions' [1992] Official Gazette 233. The Evidence Act No. (36) of 2006 amended the Evidence Act, which introduced electronic means into the Evidence Act by regulating electronic signatures, electronic editors, and electronic documents. The article was also amended in the amended Act No. 27 of 2020. See, Federal Law No (36) of 2006 'Amending Certain Provisions of the Law of Proof in Civil and Commercial Transactions Promulgated by Federal Law No (10) of 1992' [2006] Official Gazette 455, art 17(bis); Federal Decree-Law No (27) of 2020 'Amending some provisions of the Law of Evidence in Civil and Commercial Transactions issued by Federal Law No. 10 of 1992' [2020] Official Gazette 687.

14 Federal Law No (10) of 2017 'Amending Civil Procedure Code' [2017] Official Gazette 622. Under the amendment to the Civil Procedure Act, the UAE legislature added a new chapter entitled "The use of telecommunication technology in civil proceedings" from articles 332 to 343.

15 Federal Decree-Law No (42) of 2022 (n 2).

16 Decision of the Minister of Justice No 260 of 2019 (n 1) 121.

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Jurisprudential sources vary in their terminology. Some refer to these practices as electronic litigation, others as tele-litigation, and some use the broader term digital litigation. Although phrasing differs, the core idea remains consistent: the integration of technology in judicial procedures.[17]

One definition describes it as a new information-based judicial system in which litigation procedures are conducted through Internet-linked electronic courts,[18] using email to expedite case resolution and implement judgments electronically.[19] Another defines it as the electronic transmission of litigation documents, where a competent employee evaluates the documents and notifies the litigant of acceptance or rejection.[20]

Some scholars differentiate between partial and full digital adoption: the former includes limited use of electronic tools (e.g., document exchange), while the latter refers to fully virtual courts where all procedures are conducted electronically. In this broader sense, the virtual court replaces traditional services with digital transactions.[21]

A more advanced view defines it as an intelligent judicial system using official smart applications through secure networks, enabling litigation from initiation to enforcement.[22] This system integrates electronic files, automated processing, and communication technologies to expedite adjudication and streamline litigation.[23] From the above definitions, it is evident that both legislative and jurisprudential perspectives recognise electronic litigation as encompassing procedures such as evidence exchange, judgment issuance, and appeals conducted through digital means. The UAE legislature, in particular,

17 Amal Benazza and Sidi Mohamed Himmi, 'Privacy of Digital Litigation in Commercial Disputes' (2023) 11(9s) Russian Law Journal 545, doi:10.52783/rlj.v11i9s.1799; Andrii Shabalin and others, 'Use of Digital Technologies in Judicial Proceedings in Some Countries of Europe and the USA' (2024) 9(1) PETITA 1, doi:10.22373/petita.v9i1.224; Azad Sadeeq Mohammed, 'Electronic Litigation and Its Challenges' (Digital Media Effects on Society Security Under Domestic and International Laws: The Proceedings of the 2nd International Scientific Conference, Sulaimani Polytechnic University and Knowledge University, 27-28 April 2024) 398, doi:10.24017/dmedialaw24.17.

18 Nassif Jassim Muhammad Al-Karawi, *Remotely Litigation: A Comparative Study* (Al-Halabi Human Rights Publications 2017); Al-Shamsi (n 3).

19 Omar Latif Al-Obeidi, 'Electronic Litigation and its Implementation Mechanism: A Comparative Study' (2017) 1 University of Tikrit Law Journal 4.

20 Khaled Mamdouh Ibrahim, *Electronic Litigation: The Electronic Case and Its Procedures Before the Courts* (Dar Al-Fikr Al-Jamii 2007).

21 Ahmed Hindi, *Electronic Litigation, Use of Electronic Means in Litigation: A Comparative Study* (New University Publishing 2014).

22 Abdalla Mohammed Ali Salman Al Marzooqi, 'Electronic Litigation (Smart Litigation), and Electronic Litigation (Smart Judiciary): A Comparative Study of UAE Legislation with Certain Arab and Foreign Systems' (2021) 18(2) Sharjah University of Legal Sciences Journal 244, doi:10.36394/jls.v18.i2.7.

23 Hazem Mohammed Al-Sharaa, *Electronic Litigation and Courts* (Dar Al Thaqafa for Publishing and Distribution 2010); Farida Larqatt and Alawa Hwam, 'Electronic Litigation' (2021) 6(4) Research in Contracts and Business Law 183.

includes technological tools such as computers, smartphones, and video conferencing platforms (e.g., Zoom, Microsoft Teams) within the scope of electronic litigation, enabling virtual courts to operate fully via digital channels.

In the researcher's view, this approach is accurate. Technological integration in judicial processes began approximately two decades ago, progressing through three key stages:

Stage I: The initial introduction of computers into court operations—for printing transcripts, organising declarations, and managing procedures—served only as a support tool. While helpful, these applications did not constitute electronic trials, as traditional litigation procedures remained unchanged.

Stage II: Marked by remote litigation using smart applications and audiovisual media, this phase enabled electronic hearings, submission of evidence, and electronic issuance and appeal of judgments. It represents the operational core of what is now recognised as electronic trials, particularly in the UAE.

Stage III: This emerging phase—referred to as smart litigation or digital justice—goes beyond remote access. It involves a fully integrated system supported by artificial intelligence and centralised digital platforms that connect litigants, judges, and court officials. Proceedings are conducted entirely in cyberspace, from registration to enforcement. This virtual court model may signal a shift toward more automated judicial support systems—though the use of artificial intelligence in core adjudication functions remains subject to legal, ethical, and institutional safeguards. Comparative experiences, such as the use of AI-assisted decision tools in China and Estonia, highlight the potential benefits and challenges of integrating automation into judicial workflows—yet none fully replace judicial discretion.[24]

3.2. Advantages and Limitations of Digital Litigation

This section addresses the benefits and drawbacks of digital litigation, particularly in the UAE context, with comparative insights from international practices.

The application of smart trials—defined in this study as an advanced stage of digital litigation integrating intelligent technologies and centralised judicial platforms—has become a necessity aligned with global technological advancements. While often used interchangeably in broader discourse, this study distinguishes "digital litigation" as the operational aspect of electronically conducted procedures, "digital justice" as the institutional framework fostering technological transformation in judicial services, and "smart trials" as the aspirational, fully integrated model that incorporates AI and advanced analytics.

24 Zico Junius Fernando and Ariesta Wibisono Anditya, 'AI on the Bench: The Future of Judicial Systems in the Age of Artificial Intelligence' (2024) 13(3) Jurnal Hukum dan Peradilan 523, doi:10.25216/jhp.13.3.2024.523-550.

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The benefits of smart trials are apparent at both institutional and user levels. From a governmental and judicial standpoint, their implementation supports the UAE's strategic vision of modernised, technology-driven governance. It aligns national judicial procedures with international standards,[25] promotes cost efficiency by minimising reliance on paper-based processes and physical infrastructure,[26] and enhances transparency and procedural equality by reducing personal discretion and enabling traceable communications.[27]

Additionally, smart trials improve crisis resilience. During the COVID-19 pandemic, digital litigation ensured the uninterrupted delivery of judicial services, demonstrating the judiciary's adaptability.[28] Digital fee payments and integrated document systems have streamlined court operations.[29] Judges and staff benefit from immediate access to case files, communication tools, and workflow systems, thereby enhancing procedural efficiency and reducing delays.[30]

For litigants and lawyers, remote participation provides critical flexibility. Virtual attendance eliminates geographical barriers, facilitates access for individuals living abroad or in remote areas, and allows lawyers to manage cases across multiple jurisdictions without the need for physical relocation.[31] The availability of secure digital access to case files, real-time document exchange, and electronic notifications expedites litigation and improves transparency for all parties involved.[32]

From a comparative standpoint, the experience of other jurisdictions demonstrates how digital litigation may be effectively integrated into judicial systems while ensuring procedural safeguards. In the United Kingdom, the Civil Justice Council has issued detailed guidance to support remote hearings during and beyond the COVID-19 pandemic.[33] Courts have adopted telephone and video conferencing technology to facilitate civil proceedings, thereby maintaining continuity and efficiency in the administration of justice. Remote

25 Amir Farag Yusuf, *Electronic Courts and Electronic Litigation* (Modern Arab Office 2014).
26 Al Marzooqi (n 22).
27 ibid.
28 Eman Mohamed Al-Gethami, 'Remotely Litigation about a Practical Jurisprudential Study on the Saudi System' (2021) 84 Journal of Shari a Sciences and Islamic Studies 964; 'Mohammed bin Rashid directs 80% of Federal Court Cases to be Converted to Remote Litigation by the End of the Year' (*Emirates News Agency (WAM)*, 20 June 2021) <https://wam.ae/ar/details/1395302945495> accessed 17 May 2025.
29 Fateima Hayti and Hiba Nabila Heroual, 'Electronic Litigation System Between Improving the Quality of Judicial Work and the Challenges of Digital Space' (2021) 7(1) Journal of Comparative Legal Studies 138.
30 Al Marzooqi (n 22).
31 ibid.
32 Al-Karawi (n 18); Khaled Mamdouh Ibrahim, *Procedures for Remote Litigation in Civil and Criminal Subjects* (Al Fiker University House 2019).
33 Civil Justice Council, 'Civil Justice in England and Wales: Protocol Regarding Remote Hearings' (20 March 2020); HM Courts and Tribunals Service, 'Modernising Courts and Tribunals: Benefits of Digital Services' (*GOV.UK*, 24 March 2025) <https://www.gov.uk/guidance/modernising-courts-and-tribunals-benefits-of-digital-services> accessed 8 June 2025.

hearings are applied flexibly, depending on the case type and the circumstances of the parties, with judicial discretion remaining central to procedural fairness.

Similarly, Estonia stands out as a pioneer in judicial digitalisation. The Estonian e-File system enables litigants, judges, and court personnel to manage cases electronically, including filing, document exchange, and procedural notifications.[34] Estonia has further explored the application of artificial intelligence in adjudicating small claims, particularly in administrative matters, under strict legal and ethical constraints.[35] These practices reveal the practical feasibility and potential benefits of smart justice, while also underscoring the need for clear procedural frameworks and widespread technological literacy. The UAE can draw valuable lessons from these models to enhance the consistency, adaptability, and transparency of its own digital litigation system.

However, despite these advantages, digital litigation presents significant technical and legal challenges that must be addressed for sustainable adoption.

On the technical side, internet connectivity remains a concern, particularly for litigants in regions with unstable access.[36] Infrastructure costs and the continual need for platform upgrades require long-term investment.[37] Furthermore, disparities in digital literacy—especially among older populations or users unfamiliar with judicial systems—may impede accessibility.[38] Cybersecurity threats, including potential data breaches or hacking, are critical risks in a system reliant on digital infrastructure. Implementing robust protection protocols is thus essential.[39]

Legally, the rapid evolution of technology has outpaced the development of legislative frameworks. While flexible executive regulations offer temporary solutions, comprehensive and adaptive legal systems are necessary for long-term stability. Procedural guarantees—such as openness, adversarial fairness, and the right to defence—are harder to preserve in virtual settings.[40] Additionally, digital litigation complicates evidence verification. Although UAE law permits judges to request original documents, remote systems may increase vulnerability to forgery and reduce evidentiary reliability.[41]

34 'Justice & Public Safety' (*e-Estonia*, 2025) <https://e-estonia.com/solutions/e-governance/justice-public-safety/> accessed 8 June 2025; 'Estonian e-File System' (*European Commission*, 29 July 2019) <https://ec.europa.eu/digital-building-blocks/sites/pages/viewpage.action?pageId=533365926> accessed 8 June 2025.

35 Eric Niiler, 'Can AI Be a Fair Judge in Court? Estonia Thinks So' (*Wired*, 25 March 2019) <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/> accessed 17 May 2025.

36 Ibrahim (n 32).

37 Al Marzooqi (n 22).

38 Hayti and Heroual (n 29).

39 Al Marzooqi (n 22).

40 Al-Shamsi (n 3).

41 Article 12/2 of Ministerial Decision No 260 of 2019 stipulates that: "Electronic documents are accepted in remote trials. This does not preclude the court from requiring the submitting documents to submit their assets if they find it necessary to determine the case. In this case, the opponent shall send the original document to the clerk and file the case file".

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Despite these challenges, the researcher affirms that the expansion of digital justice in UAE courts is necessary and urgent.[42] The shortcomings identified should be addressed through a combination of updated legislative frameworks and practical measures—particularly through flexible executive regulations that can adapt to evolving technological contexts. Ongoing professional training should be a core requirement in selecting and preparing judges, staff, and lawyers for the era of smart justice.

3.3. Digital adversarial direct action

Digital litigation proceedings are initiated before the court, either by a decision of the competent authority to conduct the trial through digital procedures or by mutual agreement of the litigants. Accordingly, digital litigation initiated by decision of the competent authority is addressed first, followed by digital litigation based on the agreement of the litigants.

3.3.1. Initiation of Digital Litigation by Decision of the Competent Authority

According to Article 2 (2) of Ministerial Decision No. 260 of 2019, digital litigation may be applied either in whole or in part based on a decision by the competent authority, whether at the litigants' request or on the authority's own initiative. Article 3 further states that digital proceedings can be adopted at any stage of civil proceedings to ensure ease of litigation. The "competent authority" includes the President of the Court, the President of the Chamber, the supervising judge, or any assigned judge.

This means that the authority to implement digital litigation lies with the President of the Court for cases not yet assigned to a judge, and with the presiding judge or supervising judge once a case has entered the trial stage. However, the UAE legislature has not unified this mechanism across all courts.[43] In emergencies, such as the COVID-19 pandemic, leaving the decision to each court president or judge can lead to inconsistency and confusion. The researcher suggests that the Minister of Justice should be granted authority to issue a unified decision to apply digital litigation in exceptional circumstances (e.g., pandemics, disasters, force majeure),[44] while ensuring judicial independence and oversight mechanisms are maintained. Comparative legal frameworks—such as the UK's Coronavirus Act 2020—can offer guidance on maintaining the balance between emergency digital powers and rule-of-law safeguards.[45]

42 'The Judicial Department Reviews its Achievements during 2021 in a Media Forum' (*Emirates News Agency (WAM)*, 1 March 2022) <https://wam.ae/ar/details/1395303025742> accessed 17 May 2025.

43 Mohamed Essam Al-Tersawi, *Electronic Judiciary between Theory and Practice in the Light of the Experience of Egyptian and UAE Legislator* (Dar Al-Nahda Al-Arabiya 2019); Al-Shamsi (n 3).

44 Bakr Abdul Fattah Al-Sarhan, *Explanation of the UAE Civil Procedure Code under Federal Decree-Law No 42 of 2022* (Al-Hafiz Publishing 2024).

45 Coronavirus Act 2020: Chapter 7 (*UK Parliament*, 25 March 2020) <https://www.legislation.gov.uk/ukpga/2020/7> accessed 8 June 2025.

The competent authority may issue a digital litigation decision at various stages—before a case begins, during proceedings, or even during appeals or cassation. Such decisions may be temporary or permanent, depending on case-specific circumstances, such as illness, an emergency, or a party's absence. The application may also be general (e.g., during a national crisis) or specific (e.g., financial claims or parties residing abroad). Cases with simple, paper-based evidence are particularly suited for smart litigation.[46]

According to Al-Sarhan and Al-Gethami,[47] digital litigation should become the default method of adjudication, while traditional, in-person litigation should be reserved for exceptional cases as determined by the court. This model, in their view, enables broader application of smart justice and enhances the judiciary's responsiveness to modern procedural demands.

The decision to apply smart litigation is considered procedural—it cannot be appealed, as it does not affect the substantive aspects of the case. However, the same court can revisit and reverse its decision at any point, based on changing circumstances. While there is no formal appeal route, litigants may submit a reasoned request to the court for reconsideration.[48]

A legislative gap exists in the ministerial decision regarding the fate of a digitally litigated case if it is later referred to another court due to jurisdictional issues. Specifically, it remains unclear whether the digital litigation procedures, such as remote hearings, electronic submissions, and virtual case management, continue to apply in the receiving court or whether the proceedings revert to traditional physical hearings. The researcher recommends referring to Article 91(1) of Federal Civil Procedure Law No. 42 of 2022, which stipulates that litigants must appear before the court to which the case is referred on the scheduled date. While this provision departs from Article 85 of the repealed law,[49] it does not explicitly address the continuity of digital procedures post-referral. However, legal commentary has acknowledged the broader need for legislative coherence when cases transition across courts within a digital justice framework.[50] Furthermore, comparative legal analysis, such as studies on the U.S. multidistrict litigation (MDL) system and the UK's post-COVID reforms, suggests that jurisdictional transfers are typically treated as administrative events that should not disrupt the procedural format of the case. In MDLs, transfer is limited to coordinated pretrial tasks and does not

46 Al-Tersawi (n 43).

47 Al-Sarhan (n 44); Al-Gethami (n 28).

48 Al-Sarhan (n 44); Hayti and Heroual (n 29).

49 Article 85 (2) of the former Code of Civil Procedure provides that: "If the court finds that it has no jurisdiction, it shall order the referral of the case to the competent court, and the Office of Case Management shall declare the litigants to be sentenced". See, Federal Decree-Law No (42) of 2022 (n 2).

50 Rajaei Abdulrahman Abdulqader and Anmar Haitham Naama, 'The Extent to Which Digital Litigation Achieves Legal Protection for the Rights of Litigants' (2024) 7 Journal Port Science Research 505, doi:10.36371/port.2024.special.40; Allouzi (n 8).

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override consistent procedural handling across courts.[51] In contrast, in the UK, remote hearing frameworks established during the COVID-19 pandemic have been supported by case management rules that preserve digital processes across court venues.[52] These insights reinforce the recommendation that UAE courts should presume continuity in digital procedure after transfer—unless expressly overridden—pending further judicial clarification or ministerial regulation.

3.3.2. Agreement-Based Initiation of Digital Litigation

Article 4 of the Ministerial Decision allows litigants or their legal representatives to request digital litigation. Applications are submitted to either the Director of the Office of Case Management or the Secretary of the Court, depending on the stage of the case. The competent authority must decide on the request within one day, and the decision is final.

The legislature distinguishes two scenarios:

First, if the request is made after proceedings have started, the application must be submitted to the Secretary of the Court (if before the trial judge) or to the Director of the Case Management Office.[53] The responsible authority then refers the request to the supervising judge, who must issue a decision within one day. The decision may not be appealed and does not require justification.[54]

Second, if the litigants agree to pursue digital litigation before proceedings begin, the request is submitted directly to the President of the Court.[55] This typically occurs when there is prior agreement between the parties or their lawyers. The court must rule within one day. All litigants must agree—if even one of the parties objects, the request is invalid. However, the court may still initiate digital litigation on its own authority.[56]

The legislature does not address situations involving third-party intervention in digital litigation. If a third party joins the proceedings and agrees to the digital format, no issue arises. But if the intervening party refuses, the court must revert to physical proceedings, as unanimous consent is required for digital trials.

51 *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach*, 523 US 26 (1998) US Supreme Court <https://supreme.justia.com/cases/federal/us/523/26/> accessed 8 June 2025; Lauren E Godshall, 'Direct Filing in Multidistrict Litigation: Limiting Venue Options and Choice of Law for Plaintiffs' (2021) 29(1) George Mason Law Review 3.

52 Janet Clark, *Evaluation of Remote Hearings During the COVID-19 Pandemic: Research Report* (HMCTS 2021).

53 Al-Sarhan (n 44).

54 Al-Shamsi (n 3).

55 Al-Sarhan (n 44).

56 Al-Tersawi (n 43).

According to Abdulqader and Naama, Cabral, Allouzi, Al-Tersawi, and Al-Sarhan,[57] such applications are procedural in nature and do not directly alter substantive claims or outcomes, though they may influence how rights are exercised within the litigation process. An agreement to use digital litigation is essentially a procedural contract between the parties. Therefore, lawyers or agents may only consent on behalf of their clients if their powers of attorney specifically authorise such agreements.

4 THE FUNCTIONING OF LITIGATION THROUGH DIGITAL MEANS

While this section explored the foundations and initiation of digital justice, this chapter focuses on the judicial process from initiation to final judgment and its appeal under the UAE's digital litigation framework. It excludes traditional courtroom procedures and only addresses aspects covered by UAE digital justice legislation. This chapter is divided into two main parts: the first addresses adversarial procedures by digital means; the second covers digital judgments, orders, and their appeal mechanisms.

4.1. Digital adversarial procedures

Traditional litigation is defined in jurisprudence as a legal relationship between two parties arising from a judicial claim, forming a structured process aimed at resolving disputes. Some define it as a sequence of interrelated procedural actions, while others view it as a set of legal steps undertaken by parties and judges from case initiation to final judgment.[58]

Digital litigation adapts this structure using electronic systems. It begins when a litigant submits a digital case sheet—either as a form or an electronic document—to the court via the internet. The case is registered, and the plaintiff receives a case number. The court then notifies the defendant, who must respond within a defined period. This replaces traditional procedures such as physical address verification and manual service of notices by bailiffs, thus streamlining the litigation timeline.[59]

Other definitions emphasise electronic judicial protection—using digital tools to conduct litigation while preserving legal safeguards and procedural fairness under existing legal frameworks.

57 Abdulqader and Naama (n 50); Antonio Cabral, 'Designing Procedure by Contract: Litigation Agreements in Contemporary Civil Procedure' (2019) 9(2) International Journal of Procedural Law 363, doi:10.1163/30504856-00902009; Allouzi (n 8); Al-Tersawi (n 43); Al-Sarhan (n 44).

58 Ahmed Abu Al-Wafa, *Civil and Commercial Arguments* (Dar Al Maaref 1977); Wagdy Ragheb Fahmy, *Principals of Civil Justice* (Dar Al-Fikr Al-Arabi 1986); Ahmed Muslim, *Principles of Litigation: Judicial Organization, Procedures, and Rulings in Civil, Commercial, and Personal Matters* (Dar Al-Fikr Al-Arabi 1977).

59 Al-Obeidi (n 19).

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In the researcher's view, digital adversarial procedures consist of legal proceedings conducted through dedicated technical platforms,[60] covering all stages from case initiation to judgment.

Based on this, the analysis focuses on three interrelated components of digital adversarial procedures: the registration of cases and service of notice through digital means; the submission and exchange of evidence via electronic platforms; and the conduct of hearings and pleadings within a fully digital framework.

4.1.1. Case registration and service of notice via digital means

Digital proceedings

While the general procedural rules for filing cases still apply to digital litigation, this section focuses solely on the technical and digital mechanisms involved in registration and initial declarations.

For digital proceedings to function,[61] the court must operate a secure electronic system—typically a web-based platform or application—that allows lawyers, judges, and parties to access case files using encrypted credentials.[62] Article 1 of Ministerial Decision No. 260 of 2019 defines electronic registration as the filing of proceedings and requests in the court's digital records. Article 5 states that a case sheet may be submitted electronically to the Case Management Office, with all required data and supporting documents. This includes the email addresses of the plaintiff, the defendant, and their respective legal representatives. The case sheet must be signed electronically by the plaintiff or their counsel.

Under Article 6, the Case Management Office calculates and updates the required fees electronically, registers the case, and confirms the registration date. The plaintiff is notified of the hearing date, and the case record is stored digitally. The office then electronically serves the defendant with the case petition—if the defendant's email is provided. If not, alternative delivery (digital or paper) is used as outlined in the regulations.[63] The defendant has ten days to respond with a defence memorandum, which must be submitted electronically.[64]

60 ibid; Muhammad Saeed Ismail, 'Proof by Electronic Means', *Specialized Legal Encyclopedia*, vol 1 (2009) <https://arab-ency.com.sy/law/details/163257> accessed 8 June 2025; Tarjuman Nasima, 'Electronic Litigation Mechanism in the Digital Environment' (2019) 5(2) Journal of Legal Studies 121.

61 The United Arab Emirates' Code of Civil Procedure addresses the rules of the case sheet and the data to be provided in articles 44–49. These materials set out the data to be available in the case sheet and the court's registration proceedings through the Civil Proceedings Management Office. See, Federal Decree-Law No (42) of 2022 (n 2).

62 Al-Shamsi (n 3); Decision of the Minister of Justice No 260 of 2019 (n 1).

63 Ibrahim (n 32).

64 Al-Sarhan (n 44).

While Ministerial Decision No. 260/2019 operationalises the technical elements of case registration and digital initiation, its application must remain consistent with the broader procedural safeguards articulated in Federal Law No. 42 of 2022, which governs civil procedures at the legislative level.

Adversaries are granted a secure PIN to access the case platform and view or upload documents directly via the electronic system. All filings must be certified and, if in a foreign language, legally translated into Arabic. Additional applications—such as for intervention, amendment, or withdrawal—are also submitted and adjudicated digitally.[65]

In the researcher's view, a fully integrated digital litigation system should enable parties, particularly lawyers, to handle all procedures remotely without needing to visit the Case Management Office. This would require a centralised platform developed by the Ministry of Justice, with secure login access tied to each party or legal representative. Lawyers must be pre-registered and verified through the Lawyers Association in collaboration with the Ministry, with their credentials linked to their assigned cases.

Digital declaration of proceedings

Articles 6 to 8 of the UAE Civil Procedure Law (2022) govern judicial declarations, including timing, recipients, content requirements, and legal implications. Ministerial Decision No. 260 defines an electronic declaration as any notice sent using modern technical means by an authorised individual, whether a public official or private party.

An electronic declaration is valid if conducted through any of the following:

A. Email, SMS, or fax—provided the contact is recorded in the case file or declared during the proceedings. A copy of the message must be saved in the case record.[66]

B. Voice or video calls—if documented with the time, date, content, and recipient.

C. Any other method authorised by the Minister of Justice or mutually agreed upon by the parties.[67]

In the researcher's view, all declarations should be integrated into the same digital system used for other procedural actions. This system should track delivery status and confirm receipt (e.g., read receipts) of notifications. Any declaration made through the system would fulfil the legal requirement for notification of action and attached documents.

To ensure legal validity, the declarant must verify that the recipient is at least 18 years old and the message is sent directly to the recipient (not a proxy with a conflicting interest).

65 Al-Karawi (n 18).

66 Al-Shamsi (n 3).

67 Federal Decree-Law No (42) of 2022 (n 2) art 9.

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This can be confirmed via direct inquiry during calls or by reviewing alerts for messages sent electronically.[68]

While digital declarations must meet the content standards outlined in Article 8 of the Civil Procedure Law, they are exempt from formal signature, fingerprint, or official stamp requirements, as these requirements are impractical in digital formats.[69]

The legal effect of electronic communications is determined by specific timestamps associated with each mode of transmission.[70] For email and SMS messages, the determining factor is the date on which the message is sent. In the case of faxes, legal recognition is based on the time the document is received by the recipient's system.[71] For recorded telephone calls, the timestamp confirming the recording serves as the point of verification for legal purposes.[72] These standards ensure clarity in establishing the timing and authenticity of electronically transmitted communications in judicial procedures.

Though technically streamlined, digital declarations still carry the full legal effect of traditional judicial service. As such, failure to meet procedural notice requirements—

68 Abbas Al-Aboudi, 'Judicial Report on the Power of Electronic Communications and its Role in the Determination of Civil Proceedings' [1997] Al-Rafidain Journal of Rights.

69 See, Federal Decree-Law No (42) of 2022 (n 2).
Article 8 of the Code of Civil Procedure of 2022 stipulates that: "1.
A. Applicant's name, surname, occupation, job, home, mobile number, fax number, chosen home, place of business, name of representative, surname and occupation or his or her job, home and place of business if he or she works for another.
B. The name, surname, occupation, job, domicile or chosen domicile of the applicant if the applicant's home is not known at the time of the announcement, the last home, place of business, mobile number, fax number and e-mail if any.
C. The name, function and signature of the advertiser.
D. Date of day, month, year and hour of implementation of the Declaration.
E. The court's name, the subject matter of the declaration, the case number and the date of the hearing, if any.
F. The name, surname, signature, ring or fingerprint of the recipient's recipe for receipt or proof of omission.
In the case of a technical declaration, the data specified in paragraphs (a), (b), (d) and (e) of section (1) of this article shall be limited.
If the official language of the defendant's nationality is other than Arabic, the plaintiff is obliged to attach an approved English translation to the declaration, unless there is prior agreement between the parties to attach the translation to another language.
Section (3) of this article applies to all civil and commercial proceedings other than workers' labour and personal status proceedings.

70 Arief Satrya Budianto, Ika Fransisca and Dave David Tedjokusumo, 'Perluasan Dari Alat Bukti Tertulis Dalam Perspektif Hukum Acara Perdata' (2024) 7(2) Law, Development and Justice Review 124, doi:10.14710/ldjr.7.2024.124-140.

71 Auzan Qasthary, Al Muttaqien and T Yasman Saputra, 'Legalitas Penggunaan Bukti Elektronik Dalam Hukum Acara Perdata' (2023) 6(1) Jurnal Sosial Humaniora Sigli 276, doi:10.47647/jsh.v6i1.1613.

72 Budianto, Fransisca and Tedjokusumo (n 70).

such as ensuring proper delivery, acknowledgement, or translation—may raise due process concerns, especially in cases involving international litigants or parties with limited digital access.[73]

If a digital declaration is not possible, the case reverts to paper-based service in line with traditional procedures outlined in Articles 6 to 18 of the Civil Procedure Code. Importantly, timing restrictions under Article 7(1)—which normally prohibit service before 7 a.m. or after 9 p.m., and on holidays—do not apply to digital declarations. Electronic notifications may be issued outside traditional timeframes and directed to both individuals and legal entities.

4.1.2. Submission And Exchange of Evidence Digitally

The UAE's Law of Evidence and Federal Law No. 1 of 2006 on Electronic Transactions and Commerce authorise electronic signatures and documents as valid evidence, provided they meet specified legal criteria. Digital litigation, therefore, requires that all procedural actions—including submission of evidence—be conducted through electronic means.[74]

This section focuses not on the substantive rules of evidence but on the procedural mechanism for presenting evidence digitally. In remote trials, scanned or digital copies of documents are accepted. However, if the court deems it necessary, it may request the original documents.

While the UAE courts may accept scanned or digital copies of documents, this flexibility must be balanced against the need for evidentiary authenticity and the parties' right to contest such evidence. These procedural safeguards are critical to ensuring fairness in digital litigation and are protected under UAE procedural law as well as in comparative systems.[75] For instance, Estonia has adopted blockchain-based timestamping mechanisms to authenticate electronic submissions, enhancing trust and preventing tampering with digitally transmitted evidence.[76]

A party may not object to an electronic document simply because it is a copy, unless it is expressly denied or challenged as inauthentic.[77]

73 Fernando Gascón Inchausti, 'Electronic Service of Documents National and International Aspects' in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World* (Ius Gentium: Comparative Perspectives on Law and Justice 15, Springer 2012) 137, doi:10.1007/978-94-007-4072-3_8; John Sorabji, *A Model Civil Procedure Code for England and Wales* (OUP 2024) pt 10, 211, doi:10.1093/oso/9780192848680.003.0011.

74 Federal Law No (36) of 2006 (n 13) art 17(bis).

75 Budianto, Fransisca and Tedjokusumo (n 70).

76 Venkateshwarlu Velde, Fasi Ahmed Parvez and Jampala Chaitanya, 'A Blockchain Enabled System for Security, Non-Repudiation and Integrity of Judiciary Proceedings' (2022 First International Conference on Electrical, Electronics, Information and Communication Technologies (ICEEICT) 16-18 February 2022) doi:10.1109/ICEEICT53079.2022.9768427.
Zico Nagwa Abu Heiba, *Electronic Signature, its Definition: The Extent of its Evidential Validity* (Dar Al Nahda Al Arabiya 2012).

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If a denial of a document's authenticity arises, the matter is referred to the supervising judge, who may transfer the case to the competent court to assess the objection. The court may resolve the dispute in chambers or set a hearing if required. Should the denial be found unjustified and cause undue delay or expenses, the court may impose a fine between 1,000 and 10,000 AED on the party making the baseless objection.[78] This is without prejudice to the role of regulatory bodies overseeing legal conduct.

The court or supervising judge may also conduct witness examinations and interrogations via telecommunications. However, if necessary, the court may order physical appearance, specifying the place and time.[79]

Witnesses testify using approved electronic systems and can be cross-examined. Testimony may also be submitted in written form via a secure court platform.

If a witness or a party is non-Arabic speaking, the court may appoint an interpreter via remote communication. The order will specify the hearing date, and interpreters must ensure technical readiness to provide accurate and clear translation.[80] Proceedings are electronically recorded.

Additionally, the court may rely on remote expert testimony. Reports are submitted electronically and may be discussed via the same systems used for witness statements.[81]

4.1.3. Conduct of Hearings and Pleadings within a Digital Framework

Remote trial procedures in the UAE are regulated by the Civil Procedure Law and supplementary regulations, enabling hearings to be conducted digitally while preserving fundamental litigation rights. Litigants may request an in-person hearing if they can demonstrate a compelling reason, subject to the court's approval and with prior notification to all parties through electronic means.[82]

The Procedural Guide for Remote Trials (Article 8) outlines the responsibilities of all actors to ensure smooth digital proceedings. Judges must begin hearings promptly, while technical staff are tasked with preparing and maintaining equipment to avoid disruptions. Case Management Offices handle the electronic notification of parties, and lawyers are expected to participate from appropriate environments that uphold court decorum. Oral

78 Federal Decree-Law No (42) of 2022 on the Civil Procedure Law, *Article 49(1)*, which authorizes the court to impose a fine ranging from AED 1,000 to AED 10,000 on a party who unjustifiably denies the authenticity of a document, causing delay or unnecessary costs. This provision maintains a disciplinary mechanism previously embedded in Federal Decree-Law No (11) of 1992 (now repealed), and reinforced through subsequent Cabinet Decisions.

79 Decision of the Minister of Justice No 260 of 2019 (n 1) art 13.

80 ibid, art 14.

81 Al-Shamsi (n 3).

82 Muhammad Issam Al-Tarsaawi, *Judicial Proceedings in Electronic Courts* (Dar Al Nahda Al Arabiya for Publishing and Distribution 2013).

arguments are presented during live video sessions, which are recorded to preserve procedural integrity. Court secretaries document essential statements and compile an official hearing record. These sessions must remain public, aligning with the principles of transparency and open justice.

The absence of a party in digital hearings triggers the application of traditional rules: if the plaintiff is absent, the case may be dismissed; if the defendant is absent, the hearing proceeds in absentia.[83]

All legal submissions, procedural requests, and evidentiary documents are exchanged electronically via secure court platforms. Lawyers are granted login credentials and encryption keys by court officials,[84] which allow them to access and upload documents. The court secretary verifies receipt and ensures that submissions are shared with the opposing party. These exchanges are conducted securely, and all case files are accessible through the court's digital system using encrypted authentication.[85]

Electronic records of hearings are prepared and signed by the judge and court clerk. Although litigants do not sign these records, authenticated paper copies can be issued upon request.[86] In the case of a settlement, the agreement is either digitally signed or submitted in writing through the system and becomes part of the court record with the enforceability of an executive bond.[87]

While Ministerial Decision No. 260 does not explicitly regulate the conduct of oral pleadings in digital environments, current practice closely parallels that of physical hearings. Plaintiffs may upload written submissions or present oral arguments via court-approved platforms such as Webex. Judges moderate the exchange and may pose clarifying questions before concluding the session.[88] The defendant subsequently presents their argument using the same format.[89] Given the centrality of oral pleadings in adversarial systems, the researcher emphasises the need to codify these digital mechanisms formally through an amendment to Ministerial Decision No. 260, ensuring clarity, procedural balance, and the preservation of parties' rights in digital trials.

83 Al-Sharaa (n 23).

84 Decision of the Minister of Justice No 260 of 2019 (n 1) art 9.

85 Al-Shamsi (n 3).

86 Decision of the Minister of Justice No 260 of 2019 (n 1) art 10.

87 Ahmad Khalil, *Civil Procedures* (Beirut Al-Halabi Legal Publications 2001).

88 Mohammed Mamoun Suleiman, *Electronic Arbitration: E-commerce, Arbitration Agreement, Arbitration Process, Arbitration Award* (New University House 2011).

89 Carolina Mancuso, 'Remote Justice and Civil Proceedings: The New Principle of Orality in the Post-Pandemic Era' (2024) 14(2) International Journal of Procedural Law 298, doi:10.1163/30504856-14020004; Davide Turroni, 'Oral Hearing Management Under the ESCP Regulation' (2021) 11(2) International Journal of Procedural Law 273, doi:10.1163/30504856-01102005.

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4.2. Judgments and Orders by Digital Means and Their Appeal

Judicial deliberation in remote trials occurs via a secure, confidential platform accessible only to the presiding judges. Deliberation follows procedural norms, with the junior judge offering their opinion first, followed by the more senior judges.[90]

Judgments are issued electronically and include all legal justifications, facts, and reasoning. They are signed by the President and the panel of judges using pre-approved electronic signatures stored within the judicial information system.[91] If necessary, the President may opt for a manual signature. Once finalised, the judgment is filed electronically and made accessible to authorised court personnel.[92] Opponents and their legal representatives may obtain copies of the electronic judgment upon payment of the required fees.

Parties may submit electronic petitions for judicial orders via the court's digital platform. These are addressed to the presiding judge or chamber head, include supporting documents, and are processed electronically, including fee payment and timestamped registration. Once received, the judge issues a digitally signed order within one day, which is stored in the electronic case file. No additional announcements or enforcement formats are required.[93]

For performance orders, the creditor submits a petition electronically through the same system. If all legal conditions are met, the petition is forwarded immediately to the supervising judge, who submits it to the performance judge for adjudication.[94]

The case is entered into the performance order registry, including the date of filing and the identities of the parties.[95] Legal fees are processed digitally, and the petition takes effect from the date of submission—even if jurisdiction is later contested.[96]

The competent judge must issue a decision within three days, fully or partially accepting or rejecting the petition, and sign the order electronically.

Appeals in digital litigation require that the Courts of Appeal, Cassation, and the Federal High Court provide secure digital platforms to receive, process, and adjudicate electronic appeals. This ensures procedural continuity from the trial court to the appellate stage.[97] An electronic appeal functions similarly to a traditional appeal, except that it is submitted via the court's online system. It allows the litigant to request the review, amendment, or annulment of a judgment within the legally prescribed period.[98]

90 Al-Shamsi (n 3).
91 Yusuf (n 25).
92 Decision of the Minister of Justice No 260 of 2019 (n 1) art 16.
93 ibid, art 17.
94 Suleiman (n 88).
95 Decision of the Minister of Justice No 260 of 2019 (n 1) art 19.
96 ibid, art 20.
97 Al-Karawi (n 18); Al-Shamsi (n 3).
98 Dadyar Hamid Sulaiman, *The Legal Framework for Civil Litigation via the Internet: A Comparative Analytical Study* (Dar Al Thaqafa for Publishing and Distribution 2015).

Under Article 24 of Ministerial Decision No. 260 of 2019, the procedural rules for remote trials also apply to federal appellate courts and the Federal High Court. Electronic appeals must comply with the general legal requirements of appeal as outlined in the UAE Civil Procedure Code, including rules on deadlines, jurisdiction, and the types of judgments that may be appealed.

The appeal process involves registering the case electronically with the appellate court, opening a digital file, and submitting appeal arguments and related documents through the court's information system. Once declarations are completed, the Court of Appeal proceeds with review and judgment.[99] General procedural rules still apply, such as those governing third-party interventions, new evidence, and appellate hearing conduct. The same structure is followed in cassation or privilege courts, which must also have functional digital systems to manage appeals electronically.[100]

In the researcher's view, while digital litigation has advanced at the trial level, the UAE legislature has not adequately regulated appeals through electronic systems. Article 24 offers limited coverage, and additional legal provisions are required to govern electronic appeals comprehensively. This includes digital filing systems, appeal submission procedures, and interactions with the court at the appellate level.

The absence of detailed procedural norms for appellate digital litigation reflects a legislative gap. Comparative jurisdictions, such as the UK and Singapore, have developed specific protocols for remote appellate review, ensuring that procedural safeguards—including the right to a fair hearing and judicial scrutiny—remain intact across all levels of adjudication.[101]

5 CONCLUSIONS

This study aimed to evaluate whether the UAE's emerging framework for "smart trials"—an advanced form of digital litigation that relies on integrated platforms, remote hearings and, increasingly, AI-enabled tools—meets the basic demands of procedural efficiency, access to justice and litigant safeguards. Drawing on a doctrinal analysis of Ministerial Decision 260/2019, Federal Decree-Law 42/2022 and related circulars, as well as institutional data from the Abu Dhabi Judicial Department (ADJD), four broad findings stand out.

99 Al-Shamsi (n 3).

100 Al-Sharaa (n 23).

101 Tomasz Demendecki, 'De-Formalization and Electronicization of Civil Proceedings and Procedural Guarantees of Its Subjects' (2024) 59(5) Journal of Modern Science 21, doi:10.13166/jms/194481 Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) Modern Law Review 995, doi:10.1111/1468-2230.12300; Terence Etherton, 'Rule-Making for a Digital Court Process: The Civil Procedure Rules—20th Anniversary Conference, 2019' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020) 57, doi:10.1093/oso/9780198863182.003.0003.

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First, the statutory architecture remains fragmented. Ministerial Decision 260/2019 operationalises many technical aspects of e-filing and remote hearings, but it does so piecemeal and without the authority of primary legislation. In practice, this leaves judges to improvise when rules are silent: press releases issued by the ADJD (May 2022; October 2023) show courts handling fully remote hearings while still resorting to paper service or ad-hoc video links when digital rules prove ambiguous. A single, comprehensive Digital Procedures Act would provide a stronger legal footing, codify uniform standards for jurisdictional transfers and appellate review, and mandate a secure, centralised case-management platform.

Second, persistent terminological overlap ("electronic", "digital", "smart") obscures the deeper conceptual divide between (1) merely converting paper steps into electronic form and (2) redesigning the procedure for a native-digital environment. Future legislation should therefore begin with a clear statutory definition: digital litigation as the fully integrated, end-to-end conduct of cases through an official online environment; smart trials as that same environment enhanced by AI-driven support tools.

Third, current instruments designate multiple "competent authorities" (court presidents, supervising judges) to activate remote procedure, yet provide no unified trigger in national emergencies. Empowering the Minister of Justice to issue time-limited activation orders could solve this coordination gap—provided two safeguards are written in law: (a) each order must be subject to ex-post review by the Federal Supreme Court; and (b) the order must lapse automatically after a fixed period unless renewed by the legislature. Such sunset-and-review clauses mirror the approach adopted in the UK's Coronavirus Act 2020 and help preserve judicial independence.

Fourth, the oft-cited aspiration that digital hearings become the "default" must be approached with more nuance. Certain matters—family, juvenile and most criminal proceedings—raise privacy, evidentiary and welfare concerns that weigh in favour of physical appearance or, at minimum, hybrid formats. The comparative experience of England and Wales (where Family Division judges retained broad discretion to require in-person attendance) and Singapore (which distinguishes criminal from commercial e-hearings) underscores the need for tailored carve-outs rather than a blanket default rule.

In light of these findings, the study recommends that the UAE:

1. Enact a dedicated Digital Procedures Act. This statute would consolidate dispersed ministerial rules, define terminology, and extend digital procedure smoothly from first instance through cassation.

2. Create a single, encrypted national e-court platform. Building on ADJD's system, such a platform should support filing, service, evidence exchange, hearing management and appellate workflows, with blockchain-backed time-stamping for evidentiary integrity.

3. Introduce emergency-activation powers with sunset clauses and judicial review, balancing administrative coordination with constitutional checks.
4. Specify subject-matter carve-outs (e.g., family, juvenile, sensitive criminal cases) where in-person or hybrid hearings remain presumptive, leaving judges discretion but requiring reasoned orders when deviating.
5. Address third-party participation and inter-court transfers by stipulating that any matter initiated digitally continues digitally unless a party demonstrates concrete prejudice; referral courts should inherit the existing electronic file and hearing format.
6. Strengthen appellate provisions. Detailed protocols for electronic records transmission, remote oral argument and secure deliberation rooms are needed to fill the gap left by Article 24 of Decision 260/2019.
7. Maintain continuous professional training for judges, clerks and advocates, with certification tied to demonstrated digital-procedure competence.

By transitioning from a patchwork of ministerial decisions to a coherent statutory framework, the UAE can complete its transition from experimental "smart trials" to a mature digital-justice system that matches its ambitions for efficiency while safeguarding procedural fairness for all litigants.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ПРОЦЕСУАЛЬНІ ПРАВИЛА ДЛЯ СМАРТСУДОЧИНСТВА В ОАЕ: ПРАГНЕННЯ ТА РЕАЛЬНІСТЬ

Адель Салем Аллузі

АНОТАЦІЯ

Вступ. *Це дослідження аналізує процесуальні норми, що регулюють «розумне» (електронне) судочинство в ОАЕ, з акцентом на їх поточне впровадження та потенційний майбутній розвиток. Воно досліджує правову та технічну основу електронного судочинства та оцінює сумісність системи ОАЕ з цілями процесуальної ефективності та доступу до правосуддя.*

Методи. *У цьому дослідженні, яке складається з двох розділів, спочатку розглядаються концептуальні засади електронного судочинства та способи їх ініціювання, а потім здійснюється аналіз судових процесів, що проводяться за допомогою цифрових засобів. У роботі також було використано описово-аналітичну методологію для оцінки технічної доцільності та юридичної обґрунтованості цих практик. Особлива увага приділяється Міністерському рішенню № 260 від 2019 року та оцінюється система для дистанційного цивільного судочинства, ступінь інтеграції електронного зв'язку та процесуальну цифровізацію.*

Результати та висновки. *У дослідженні оцінюється обсяг та ефективність міністерського рішення щодо регулювання електронного судочинства, включно з реєстрацією позовів, процесуальними рішеннями, судовими обговореннями, винесенням рішень та тимчасовими заходами. У статті було виявлено кілька прогалин у системі електронногго судочинства ОАЕ, зокрема відсутність комплексної законодавчої бази та уніфікованих цифрових процедур. Дослідження завершується рекомендацією щодо прийняття спеціального законодавства для стандартизації та регулювання цифрових судових проваджень. Ці рекомендації передбачають створення безпечної цифрової системи для судового процесу, уточнення процесуальних норм для вступу третіх осіб, розширення положень про цифрове оскарження, а також визначення уповноваженого органу, відповідального за системне впровадження в умовах надзвичайних ситуацій.*

Ключові слова: *цифрове правосуддя, електронне судочинсвто, судовий спір, судова влада, цивільне процесуальне право.*

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We also welcome and encourage submissions from other regions that explore comparative perspectives or offer insights into global trends and developments related to access to justice.

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