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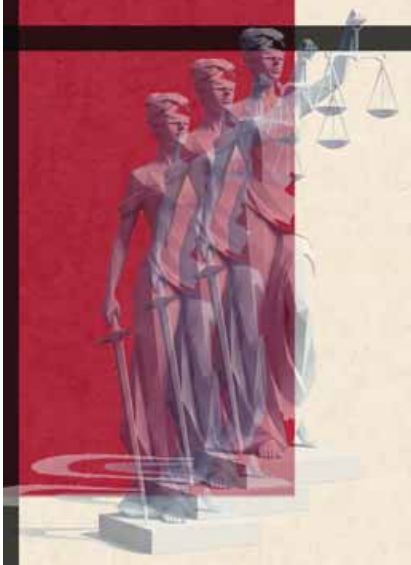
Access to Justice in Eastern Europe

Editor-in-Chief's Note
Iryna Izarova

Research Article
Anca Parmena Olimid, Cătălina Maria Georgescu and Cosmin Lucian Gherghe
Transitional Justice Mechanisms and Societal Reconciliation for Rule of Law and Democracy Consolidation in Post-Communist Romania.

Case Study
Marina Kamenecka-Usova, Maxym Tkalych and Elina Greine
Legal Challenges in Eastern European Football: Lex Sportiva and its Regional Specificities



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ACCESS TO JUSTICE IN EASTERN EUROPE

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

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EDITORIAL

Editorial

INTRODUCTORY REMARKS: NAVIGATING NEW LEGAL PARADIGMS

Iryna Izarova

ABSTRACT

The first issue of Access to Justice in Eastern Europe in 2026 presents a collection of research from a diverse international cohort of scholars representing Bulgaria, Kazakhstan, Latvia, Lithuania, Romania, Saudi Arabia, the United Arab Emirates, and Ukraine. This issue explores the evolving landscape of contemporary justice through four primary lenses: the pursuit of transitional justice and post-mortem dignity; the development of child-sensitive procedural models for the most vulnerable; the regulation of emerging technologies, including artificial intelligence and autonomous weapons; and specialized regional legal challenges in sectors such as agriculture, corporate governance, and sports law. By bridging historical perspectives with future-oriented legal analysis, this issue underscores the journal's commitment to advancing the rule of law and fostering global scholarly dialogue amidst a shifting legal paradigm.

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As we mark the beginning of 2026, we are pleased to present the first issue of the year. This issue of Access to Justice in Eastern Europe exemplifies our commitment to international scholarly exchange, bringing together diverse perspectives from across the globe. We are proud to feature contributions from esteemed researchers based in Bulgaria, Kazakhstan, Latvia, Lithuania, Romania, Saudi Arabia, the United Arab Emirates, and Ukraine, among others.

This geographical breadth ensures a rich, comparative dialogue on the most pressing legal challenges facing our regions today. The variety of topics is broad but clearly addresses the fundamental challenges of humanity; these are reflected in the shifting boundaries of human dignity, the pursuit of transitional justice, and the protection of the most vulnerable members of our global society.

Our contributors navigate the complexities of modern governance by exploring the intersection of law and emerging technologies, from the ethical integration of artificial intelligence to the regulation of autonomous weapons systems. Furthermore, the issue delves into the intricacies of specialized legal regimes, examining the evolution of property rights, the nuances of international sports law, and the necessity of robust compensation mechanisms in the face of nuclear risks. Together, these studies provide a critical lens through which we can better understand the ongoing transformation of legal systems in a world characterized by both rapid innovation and persistent conflict.

As always in my introductory remarks, I would like to highlight the specific contributions that define the scholarly depth of this issue and have particularly caught the attention of the editorial team and invited experts during our work, as each author offers a unique vantage point on the legal transformations currently shaping our global landscape.

I would like to specifically recommend them in my opening words.In the article "*Transitional Justice Mechanisms and Societal Reconciliation for Rule of Law and Democracy Consolidation in Post-Communist Romania. Jurisprudential Perspectives on Reparatory Rights, Lustration and Regime of Property*," **Anca Parmena Olimid, Cătălina Maria Georgescu, and Cosmin Lucian Gherghe** provide a comprehensive look at the reparatory rights and lustration processes that have shaped Romania's democratic path. Thirty-five years after the 1989 Revolution, the authors analyze the uneven evolution of the normative framework, from property restitution to the investigation of communist crimes. By examining jurisprudential perspectives from the ECHR and the Constitutional Court of Romania, the study offers a vital framework for understanding how societies in transition can develop a legal culture focused on human rights and the consolidation of the rule of law.

The boundaries of legal protection are further explored in "*Post-Mortem Justice: Human Dignity and Legal Protections in the European Union*" by **Andreea-Nicoleta Dragomir** and her co-authors. This timely research assesses whether human dignity has justiciable implications beyond death, particularly in the face of digitalized warfare and hybrid conflicts. Using Ukraine as a poignant case study—where the digital dissemination of images of the deceased has raised urgent concerns—the authors highlight the fragmented

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nature of EU law regarding post-mortem rights. They advocate for deeper integration and a systematised framework to bridge the gap between the formal recognition of dignity and its effective protection in the digital age.

The protection of the most fragile participants in the justice system is the central focus of **Iva Pushkarova**'s research, *"Procedurally Relevant Vulnerabilities of Children in Criminal Proceedings: Adapted and Child-Sensitive Procedural Models."* The author develops a conceptual framework grounded in the notion of "procedurally relevant vulnerabilities"—understood as durable intrinsic conditions that impair a child's ability to understand, participate in, or cope with the legal process. The study proposes a functional typology of these vulnerabilities and evaluates their procedural implications through the examination of two distinct models: adapted procedures for juvenile offenders and child-sensitive procedures for victims and witnesses. By analyzing these models through a structure of core rights, procedural safeguards, and options, the article offers a matrix tool for mapping vulnerability-sensitive responses, providing a foundation for the harmonization of European criminal justice involving children.

Complementing this, **Jamal Barafi** and colleagues present a comparative study, "*The Child's Right to Be Heard During Administrative and Judicial Proceedings*." By analyzing the legislation of Finland, France, and Belgium, the authors address the practical challenges of implementing Article 12 of the UNCRC, calling for clear mechanisms to ensure that the child's voice is not only heard but truly considered in legal outcomes.

In the realm of international safety, the article "*Exceptional Compensation for Nuclear Damage: Comparative Insights from International Nuclear Liability Regimes and the Laws of Ukraine and Saudi Arabia*" by **Salih Luhaibi** and co-authors provides a critical comparative analysis of nuclear liability in Ukraine and Saudi Arabia. The research tackles the limitations of the "exclusive operator liability" principle in cases of armed conflict or insolvency. While Ukraine is found to have a more structured statutory framework for state intervention, the study emphasizes the need for clearer institutional arrangements in Saudi Arabia to align with international standards and ensure adequate victim protection.

The dark side of technological progress is examined by **Ramunė Jakštienė** in "*Digitally Tracked Victims and Abusers: Lithuanian Case Law on Technology-Facilitated Partner Stalking*." Through an analysis of national case law, the author identifies typical tactics of "tech stalking" and the deficiencies in current anti-stalking legislation. The study highlights how the success of criminal proceedings often unfairly depends on the active involvement of victims and calls for increased digital literacy among legal professionals and expanded responsibilities for technology developers.

The cover, created by our new artist, serves as a powerful visual metaphor for the evolving nature of justice in an era of transition. At its center is a highly detailed, graphic eye, representing the vigilant oversight of the law and the clarity required to navigate complex social changes. It is not merely a passive observer but is integrated into a network of

geometric lines and digital-like fragments, symbolizing how modern justice is increasingly intertwined with technological advancement and data-driven reality.

To the left, the classic silhouette of Themis, or Lady Justice, appears in a layered, almost ethereal form. This juxtaposition of classical statues with modern, abstract graphics illustrates the continuity of fundamental legal principles—fairness, balance, and the rule of law—even as our methods of achieving them undergo radical transformation. This paradoxical, traditional manner of visualizing justice remains vital, yet it appears almost hidden within the new digital forms of its performance.

The composition utilizes a bold color palette of deep red and muted parchment tones, divided by sharp vertical and horizontal axes. This structure reflects the cyclical patterns of existence mentioned in our opening remarks: the rise and fall of regimes, the passing of generations, and the unceasing search for truth. The wire-mesh texture in the background suggests the barriers and complexities that often hinder "access" to justice, while the open space at the top, occupied by a single bird, hints at the hope for liberation and the renewal that a paradigm shift can bring, along with deserved peace and sustainability.

In its entirety, the design reminds us that while we navigate well-worn paths, our fundamental understanding must remain adaptive while maintaining a strong foundational basis. It is a reminder to preserve our core principles while remaining open to the radical renewal necessary to address the challenges of the 21st century.

Finally, I would like to express my sincere gratitude to our editorial team and our reviewers for their exceptional professionalism and objective assessment. In an era where the complexity of legal scholarship continues to evolve, their rigorous peer review remains the cornerstone of our publication's quality. I am confident that our authors trust our opinion and recognize that every critique is offered as a collaborative effort to refine their work and elevate the legal discourse. Together, we strive to ensure that the findings presented in these pages—ranging from institutional integrity to the transformation of legal culture—serve as reliable foundations for both theoretical advancement and practice-oriented solutions. It is through this shared commitment to excellence that we continue to foster a deeper understanding of justice in an increasingly interconnected world.

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Corresponding author, solely responsible for preparing the Editorial. I thank my colleagues, the Managing Editors of AJEE, for their help, thoughts, and comments on my piece, which helped me to improve it.

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ABOUT THIS ARTICLE

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Слово редактора

ВСТУПНІ ЗАУВАЖЕННЯ: НАВІГАЦІЯ У НОВИХ ПРАВОВИХ ПАРАДИГМАХ

Ірина Ізарова

АНОТАЦІЯ

У першому випуску журналу «Access to Justice in Eastern Europe» за 2026 рік представлено результати напрацювань міжнародної когорти науковців із Болгарії, Казахстану, Латвії, Литви, Румунії, Саудівської Аравії, Об'єднаних Арабських Еміратів та України. Матеріали номера аналізують мінливий ландшафт сучасного правосуддя крізь чотири основні призми: запровадження перехідного правосуддя та захист посмертної гідності; розробку процесуальних моделей, орієнтованих на інтереси дитини та найбільш вразливих верств населення; регулювання новітніх технологій, зокрема штучного інтелекту та автономних систем озброєння; а також спеціалізовані регіональні правові виклики у таких секторах, як сільське господарство, корпоративне управління та спортивне право. Поєднуючи історичні перспективи з футуристичним правовим аналізом, в дослідженнях підкреслюється важливість дотримання концепції верховенства права та сприяння глобальному науковому діалогу в умовах зміни правових парадигм.

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RESEARCH ARTICLE

Research Article

TRANSITIONAL JUSTICE MECHANISMS AND SOCIETAL RECONCILIATION FOR THE RULE OF LAW AND DEMOCRACY CONSOLIDATION IN POST-COMMUNIST ROMANIA. JURISPRUDENTIAL PERSPECTIVES ON REPARATORY RIGHTS, LUSTRATION AND REGIME OF PROPERTY

Anca Parmena Olimid*, Cătălina Maria Georgescu and Cosmin Lucian Gherghe

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ABSTRACT

Background: *The collapse of the communist regime in Romania in December 1989 triggered a stage of profound and complex legislative changes aimed at repairing abuses, discrimination and violations of rights, with challenges for the justice reform process and for institutional and social governance. The reform of the state and the process of European integration have engaged in social debates and legal initiatives aimed at guaranteeing citizens' rights and freedoms and promoting social reconciliation. In this context, the condemnation of communist crimes, the recognition of abuses, the restitution of*

property, and the lustration attempts represented two central levels of political and judicial reform in post-communist Romania. This study aims to investigate how these legislative initiatives, as well as other associated regulatory approaches, have been legislated in accordance with the standards and commitments for European and Euro-Atlantic integration.

Methods: *The study proposes a qualitative approach, which addresses both the documentary analysis of legislative proposals and initiatives, grouping three main themes: (1) transitional justice, recognition and granting of rights to politically persecuted persons and honouring the memory of the heroes-martyrs in the December 1989 Revolution; (2) legislative initiatives on the restitution of properties, the legal situation of residential buildings previously transferred to state property, the regulation of the status of judges and prosecutors; and (3) legislative preparations on integration into European and Euro-Atlantic structures and initiatives for the establishment of institutional structures on the investigation of communist crimes and the analysis of the communist dictatorship. For the research of these topics, the research will use methods specific to the legal study such as: (a) normative analysis and examination of the texts of laws, decree-laws and ordinances of the executive adopted and issued during the communist period; (b) the analysis of the jurisprudence by studying the decisions of the European Court of Human Rights (ECHR), the analysis of the exceptions of unconstitutionality raised by the Constitutional Court of Romania in the matter of property restitution and the application of the law in the field and (c) the historical-legal analysis necessary for correlating the legislative reforms and initiatives with the political and historical context by conforming to three chronological frameworks of analysis: the fall of the regime, political transition and integration into European and Euro-Atlantic structures.*

Results and conclusions: *The research indicates an uneven evolution of the normative framework, marked by fragmentation challenges in the legislative reform process regarding the recognition of victims, the restitution of property, and social reconciliation. Despite these legal, political and social contexts, the research highlights both the legislative progress and the societal benefits for transitional justice in Romania, but also the opportunity of such an analysis carried out thirty-five years after the December 1989 Revolution for the development of a legal culture focused on respect for human rights and the consolidation of the rule of law in societies in transition.*

1 INTRODUCTION

Over 35 years since the Romanian Revolution of December 1989, studying transitional justice in Romania requires two parallel processes to configure the analysis of the field. An initial approach configures the role of the legislation newly adopted in post-communist Romania, intended to build and engage trust in state institutions after the fall

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of communism and to define the status and role of the rule of law.[1] The second approach addresses multiple facets that configure both the search for truth, criminal justice, restorative justice, and institutional reform, as well as the judicial and non-judicial mechanisms of constitutional and legal reform in the democratisation process,[2] intended to confirm Romania's commitment to integration into European and Euro-Atlantic structures in the period 2004-2007.

The study is hence designed as a unifying research of Romania's post-communist transition in terms of historical context, political will and legal developments. The fall of communism in Romania in 1989 placed the country on a winding path of transition, with complex **perspectives on reparatory rights, lustration endeavours and the regime of property redress compared to other former communist countries in Central and Eastern Europe.**[3] Thus, this research is relevant and appropriate for addressing transitional justice in Romania in its hypostasis as an essential mechanism for addressing past issues.

The relevance of transitional justice mechanisms globally stems from their efforts to address abuses committed by former regimes against human rights, property rights, and democracy. The study is rooted in a broad understanding of transitional justice mechanisms, providing a strong conceptual foundation aimed at employing a focused legal analysis encompassing legislation on victims' reparations, lustration attempts, and property restitution efforts, among others, thus following both a legal and societal approach of reconciliation for rule of law and democracy consolidation.

1 For a broad overview, see Ilir Kalemaj, 'Transitional Justice and Democratic Consolidation in Post-communist Eastern Europe: Romania and Albania' (2021) 12(1) Eastern Journal of European Studies 81. doi:10.47743/ejes-2021-0104; Camilla Orjuela, 'Passing on the Torch of Memory: Transitional Justice and the Transfer of Diaspora Identity Across Generations' (2020) 14(2) *International Journal of Transitional Justice* 360. doi:10.1093/ijtj/ijaa005; Liviu Damsa, 'Transitional Justice in Post-communist Romania: The Politics of Memory' (2015) 67(7) Europe-Asia Studies 1155. doi:10.1080/09668136.2015.1066621. A comprehensive analysis with theoretical, analytical and practical implications can be found in Iryna Izarova, Yuliia Hartman and Silviu Nate, 'Mechanisms for the Compensation of War Damages: Toward a Fair Solution for Ukraine' (2024) 10(1) International Comparative Jurisprudence 29. doi:10.13165/.icj.2024.06.003.

2 For a detailed analysis of the memorization policy see also Lavinia Stan, *Transitional Justice in Post-communist Romania: The Politics of Memory* (CUP 2013); Lavinia Stan, 'Civil Society and Post-communist Transitional Justice in Romania' in Olivera Simić and Zala Volčič (eds), *Transitional justice and civil society in the Balkans* (Springer 2012) 17. doi:10.1007/978-1-4614-5422-9_2; Cynthia M Horne, 'What is Too Long and When is Too Late for Transitional Justice? Observations from the Case of Romania' (2020) 2(1) Journal of Romanian Studies 109. doi:10.3828/jrns.2020.2.1.06; Raluca Grosescu, 'Judging Communist Crimes in Romania: Transnational and Global Influences' (2017) 11(3) International Journal of Transitional Justice 505. doi:10.1093/ijtj/ijx016.

3 For a detailed assessment of transitional justice effectiveness and fairness in Romania see Lavinia Stan, 'Neither Forgiving nor Punishing? Evaluating Transitional Justice in Romania' in Vesselin Popovski and Mónica Serrano (eds), *After Oppression: Transitional Justice in Latin America and Eastern Europe* (United Nations University Press 2012) 363; Lavinia Stan, 'Transitional Justice Research: An Overview of Latest Trends' (2021) 21(2) Studia Politica: Romanian Political Science Review 369.

The study addresses the need for a legal analysis circumscribing legislation (among others, the adoption of Law No. 10/2001 for restitution and also lustration attempts), institutional changes, jurisprudential outcomes identifying the mechanisms consolidating the rule of law, free access to justice and guaranteeing democratic rights and freedoms, but also revealing their gaps in implementation. Moreover, the research on the ECHR and the Constitutional Court of Romania jurisprudence aims to uncover the need for legal certainty, reparatory measures, and property rights, as well as the recognition of rights for social justice, reconciliation, and the consolidation of democratic legitimacy in line with the prerequisites for the European and Euro-Atlantic integration.

Subsequently, the objectives and scope of this study are limited to analysing the framework of transitional justice in Romania from legal, jurisprudential, historical, political, and social perspectives, and to sharpening the following directions: focus on addressing reparatory rights, lustration struggles, and property restitution, with the aim of societal reconciliation and democratic consolidation. The research scope involves reviewing the consolidation of transitional justice mechanisms aimed at societal reconciliation, the enhancement of the rule of law, and the strengthening of democratic governance in Romania after the fall of communism. The research is oriented towards the examination of jurisprudential buildout and legal readings in the following directions: 1) compensation rights to victims of abuses of the former communist regime; 2) lustration initiatives and legal consequences; and 3) property restitution measures and reform of the property regime, as agents of judicial remedy.

Q1. How have the mechanisms of transitional justice been employed in Romania after the fall of communism in 1989?

Q2. To what degree have these policies carried through their goals of restorative justice, rule of law enactment and democratisation?

Q3. What strains manifest between individual reparatory rights and the broader societal reconciliation and consolidation of democracy?

Q4. To what extent were national legal provisions correlated to European normative standards in the matter of transitional justice?

Q5. To what extent have the policy reforms systematically contributed to the overall outcomes of transitional justice in Romania?

Hence, an expected outcome of the research, as stated by the hypothesis, is that, in Romania, the selection and evolution of transitional justice mechanisms depended on both the political context and the will of political actors and civil society.

The following section presents the guiding methodological principles and tools and outlines the key research questions for interpreting transitional justice mechanisms and societal reconciliation.

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2 METHODOLOGY

The present study is based on a set of legal methods specific to transitional justice analysis. The research will analyse regulations adopted in post-communist Romania, including laws, decree-laws, and ordinances issued by the executive during the transition period. The advantage of this method is evident in the focus on how the principles of the rule of law have been promoted and implemented. By applying this type of analysis, the research has an interpretative and systematic character. It identifies both the legal terminology and the formulation of descriptive findings regarding the operational legal concepts of the transition. At the same time, the rigorous examination of the normative framework generates a complex analysis of the structural and functional directions of the judicial reform as well as the conformation of the systemic limits of each initiated legislative project.

Secondly, the study associates and integrates the analysis of the jurisprudence of national and European courts regarding the restitution of property, the violation of fundamental human rights and freedoms and the rights of revolutionaries. By applying this component of jurisprudential analysis, a doctrinal examination of the legal principles of convergence between transitional justice in post-communist Romania and the normative standards of the European framework for the protection and guarantee of human rights is undertaken. Secondly, by correlating national legal provisions with European jurisprudential reasoning, the research evaluates and contextualises the legal adequacy of the legislative projects adopted by transitional justice in post-communist Romania. At the same time, a narrative-descriptive vision is outlined, necessary for understanding the fundamental directions of reform that have influenced the evolution of judicial practice, the reparative mechanisms and instruments, the accountability of the authorities, and institutional governance.

The third methodological dimension calls for historical-legal analysis. It correlates the stages of legislative reforms with the consolidation of the rule of law and the process of European and Euro-Atlantic integration. In this context, the research will also use the teleological method to analyse the role of legislative initiatives in relation to the declared goals, namely social reconciliation, recognition of abuses, reparation of injustices, legal reform, and consolidation of the rule of law and democracy. This methodological approach allows the detailed examination of the conformity between the normative purpose of the legislative project and the legal and societal effects produced at the regulatory and implementation level. At the same time, the analysis assesses how Romanian society calibrated and shaped institutional governance during the reform process, examining in depth the concordance and conformity between the teleology of the argumentation and its consequences in implementation and application.

The research methodological perspective adopts a triple analytical and operational framework.

(1) The first section delimits and formats the challenges of the legal transition of Romanian post-communism and focuses on the legal approaches of the institutional system in the extraordinary circumstances of the 1990s, as well as the mechanisms of access to justice and the consolidation of human rights. The first section of "reconciliation" focuses on the period 1990-2003 and orders the restoration of the right of the knowledge society and the recognition of the truth through social dialogue, legislative initiatives and legal reform. It is part of the initiation and search for reconciliation in Romanian society that calls for a holistic approach to institutional responses in the justice sector and to reform.[4]

(2) The second section that we generically call "accountability" targets the lustration initiatives and the stages of the judicial process regarding the temporary limitation of access to some public functions and dignities for persons members of the power structures and the repressive apparatus of communism. Lustration legislation identifies and debates the status of mechanisms for claiming access to certain public functions and dignities and launches an in-depth analysis of the accountability process carried out from June 2005 to March 2013.

(3) The third section of "claiming" and assuming addresses the impact of legal reforms on democratization and Euro-Atlantic (2004) and European (2007) integration, associating initiatives and symbolic gestures of decision-makers, denouncing the crimes of the former communist regime, as well as guarantees of constitutional rights aimed at restoring the trust of citizens and society in the rule of law. This part analyses the legislative and restorative initiatives that marked the period 2004-2009.

To analyse the course of transitional justice in Romania, this section highlights the main normative acts that regulate the entire spectrum of processes and legal instruments associated with the period after the December 1989 Revolution, intended to serve justice, seek and reconstruct the truth, repair, and effect reconciliation.

The analysis employed rigorous selection criteria based on legislative judicial practice related to the post-1989 regime of reparations, property restitution, and public office eligibility: 1) legislation and judicial decisions on reparatory rights for victims of communist repression; 2) lustration initiatives; 3) legislation and judicial decisions on restitution and property regime. Hence, the content selection stage proceeded to analyse laws, decrees, legislative initiatives, constitutional and judicial practice (Constitutional Court of Romania, ECHR decisions involving Romania). Moreover, the analysis of the selected content follows

4 For a general analysis of the justice sector and reform see the extensive approaches and legal references on the question of how to deal of the communist legacy and major scepticism of the transitional governments, see Andrei Shleifer, 'Government in Transition' (1997) 41(3-5) European Economic Review 385. doi:10.1016/S0014-2921(97)00011-1; Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2(1) The International Journal of Transitional Justice 23. doi:10.1093/ijtj/ijn004.

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a chronological and topical logic; the legislative documents and outcomes of judicial practice under scrutiny fall under different sections addressing post-communist reconciliation, restitution and accountability, including lustration initiatives.

These state search mechanisms on normative bases include the main legal provisions adopted for the reconstruction of the truth, the execution of criminal justice, compensatory measures for persons politically persecuted by the communist dictatorship, the establishment of national commissions and the search for truth, the granting of compensation for war invalids and veterans, the regulation of the status of a martyr city of the December 1989 Revolution, the legal status of the houses confiscated by the communist regime, but also the process of retrocession of buildings that belonged to ethnic minorities and religious cults in Romania. Thus, this part investigates how various normative acts were adopted, amended, and republished during the post-communist transition, and examines the role of transitional justice initiatives in memorialising the past, protecting victims and descendants, and permanently mobilising the torch of memory to prevent new human rights violations.

3 POST-COMMUNIST TRANSITIONAL CHALLENGES AND THE 3RS OF TRANSITIONAL JUSTICE: RESTORATIVE, RECONSTRUCTIVE AND RECONCILABLE

The initiative to analyse transitional justice in Romania aims to identify and investigate the relevant legal acts adopted by the Romanian authorities after the Romanian Revolution of December 1989. In this sense, the first measures transitional justice through the exploratory approach of the legal field of transitional justice and through a chronological positioning of normative acts intended to detail the process of adoption and implementation, but also to explore the legal effects of their implementation at the level of political entities, states, and societies.[5]

This approach highlights the degree of systematisation and adaptation of the normative acts adopted in the field of transitional justice in Romania to the post-communist legal reality, as a key element of the law-creation process after the fall of communism in December 1989.[6] In this perspective, the first part proposes a legislative analysis of the main ten legislative initiatives for regulation in the field of transitional justice, namely

5 For a detailed analysis on the typology of the normative acts in0 transitional justice see Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117(3) Harvard Law Review 761. doi:10.2307/4093461.

6 More particularly, the term "law creation" in transitional justice included the sum of process and legal instruments shaping "postconflict and postauthoritarian justice", see Leslie Vinjamuri and Jack Snyder, 'Law and Politics in Transitional Justice' (2015) 18(1) Annual Review of Political Science 303. doi:10.1146/annurev-polisci-122013-110512.

human rights and freedoms, the rights of persons politically persecuted during the communist dictatorship, the honouring of the heroes-martyrs of the Romanian Revolution of December 1989 and the rights of their descendants, the legal status of confiscated properties, denial and prohibition of symbols.

Thus, the normative acts adopted to regulate social relations set out the main benchmarks of legal reform based on legal, social, and political pluralism, compliance with the democratic norms of a free society, and a fair mechanism for reporting and guaranteeing rights and freedoms.

3.1. Amnesty for Some Crimes and Pardoning Others (Decree-Law No. 3/1990)

The Decree-Law (D.-L.) No. 3/1990, adopted by the Council of the National Salvation Front on 4 January 1990,[7] amnesties the political offences ordered and provided for by the Penal Code, as well as the political offences regulated by other special laws and which were committed after 30 December 1947.[8] D.-L. No. 3/1990 lists and exemplifies in Article 1 the amnestied political offences as follows: expressing forms of protest against the communist dictatorship regime, with express reference to terror and abuse of power by those who exercised political power in the state.[9]

A defining note establishes the positioning in the legal reality, shaping social life and explaining and guaranteeing the fundamental rights and freedoms of the citizen. From the perspective of transitional justice, the express regulation of the acquisition of "civil and political, economic, social and cultural rights"[10] serves to order the system of

7 Decree-Law of CFSN no 3 of 4 January 1990 'On the Amnesty of Certain Crimes and the Pardon of Certain Punishments' (Decree-Law no 3/1990) [1990] Monitorul Oficial al României 2.

8 In the same context, in the first month of 1990, other Decree-Laws were issued by the Council of the National Salvation Front (CFSN) that regulate aspects of social life, the relations between the different institutional actors, but also highlight the new benchmarks of good practice of transitional justice, see: Decree-Law of CFSN no 1 of 1 January 1990 'On Some Measures Following the Cessation of Activity or Reorganization of Some Central and Local State Bodies' [1990] Monitorul Oficial al României 1; Decree-Law of CFSN no 2 of 3 January 1990 'On the Organization of Public Assemblies' [1990] Monitorul Oficial al României 1; Decree-Law of CFSN no 6 of 7 January 1990 'On the Abolition of the Death Penalty, for the Modification and Abrogation of Certain Provisions of the Criminal Code and Other Normative Acts' [1990] Monitorul Oficial al României 4; Decree-Law of CFSN no 7 of 7 January 1990 'On the Establishment of Extraordinary Military Tribunals for the Trial and Punishment of Terrorist Acts' [1990] Monitorul Oficial al României 4; Decree-Law of CFSN no 12 of 10 January 1990 'On the Abrogation and Modification of Certain Provisions of the Criminal Code and the Code of Criminal Procedure' [1990] Monitorul Oficial al României 7; Decree-Law of CFSN no 19 of 12 January 1990 'On the Establishment of the National Commission for the Resolution of Citizens' Complaints and Grievances' [1990] Monitorul Oficial al României 8; Decree-Law of CFSN no 21 of 12 January 1990 'On Amending Article 50 of Decree no 207/1976 Regarding the Material Liability of the Military' [1990] Monitorul Oficial al României 8.

9 Decree-Law no 3/1990 (n 7) art 1 a).

10 ibid

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regulating rights and substantiate the role of the legal function in the incipient period of Romanian post-December democracy. Punishments of up to 3 years, such as measures of sending to work school and re-education ordered in the case of minors, are completely pardoned, with the exception of repeat offenders under the conditions expressly mentioned in Article 4.[11] Another provision of a reparative nature regulates the contravention sanctions, which, according to the new regulation, are no longer applied, and if applied, are no longer executed.

After the evaluation of the provisions on amnesty for some crimes and pardoning others (Decree-Law No. 3/1990), the following stages examine the subsequent legislative drafts on the analysis of the draft regulations on the protection and rights of persecuted persons and the configuration of the needs of restorative and symbolic justice of a reparatory nature introduced between March 2020 and July 2024 (Decree-Law No. 118/30 March 1990, Law No. 42 of 18 December 1990 and Law No. 341/12 July 2004 and Law No. 242/8 October 2021).

3.2. Granting Rights to Persons Persecuted for Political Reasons by the Communist Dictatorship (Decree-Law No. 118/30 March 1990)

In a succinct manner and to supplement the legal provisions of Decree-Law No. 3/1990, Decree-Law No. 118/30 March 1990 was adopted by the Provisional Council of National Unity to grant certain rights to persons who were persecuted for political reasons by the communist dictatorship, effective as of 6 March 1945.[12]

The reparative legislation provided for by Decree-Law No. 118/1990 refers to and regulates the legal situation of persons deported abroad, as well as of persons who, at the time of applying, no longer have Romanian citizenship, regardless of the location of their residence, provided that the legal conditions strictly regulated by this decree-law are met. Decree-Law No. 118/1990 regulates the length of service of a person who, for political reasons, served a prison sentence,[13] was hospitalised in psychiatric hospitals,[14] had a mandatory residence[15] or was relocated to another locality.[16]

11 ibid, art 4.

12 Decree-Law of CFSN no 118 of 30 March 1990 'On the Granting of Rights to Persons Persecuted for Political Reasons by the Dictatorship Established Starting from March 6, 1945' (Decree-Law no 118/1990) [1990] Monitorul Oficial al României 50. Subsequently, the text was republished under art. III of Law No. 232/2020. Decree-Law was previously amended in 2009, 2013, 2014, 2015, 2016, 2017, 2018, 2019. The last amendment ordered by Government Emergency Ordinance no 115 of 14 December 2023 provides for a percentage increase of 13.8% of the level granted for the indemnities ordered by Decree-Law No. 118/1990 compared to the amount due for December 2023.

13 ibid, art 1 a).

14 ibid, art 1 b).

15 ibid, art 1 c).

16 ibid, art 1 d).

3.3. Honouring the Memory of the Heroes-Martyrs and Granting Rights to the Descendants and the Wounded in the December 1989 Revolution (Law No. 42 of December 18, 1990)

Law No. 42/1990 provides important regulations for the valorisation of the memory of the past and the honouring of those who lost their lives in the Revolution of December 1989.[17] For transitional justice, the valuation of the past, the search for and reconstruction of historical and political truth, the consolidation and guaranteeing of citizens' rights and the rule of law represent fundamental values seen as a set of norms, practices and social-legal rules intended to ensure and substantiate the functionality of the society in transition.

In this context, Law No. 42/1990 adopted one year after the Revolution of December 1989, represented a necessary condition for reporting to the new social and legal order based on a system of rules and provisions arranged as a step of reconciliation with the past and of responsibility towards the present and the future that engages two essential principles of transitional justice; reparation and reform. The most important provisions refer to the area of responsibility and the establishment of a commission for conferring the title of "Fighter for the Victory of the Romanian Revolution of December 1989". Valorising the past and cherishing memory configures Article 1 of Law No. 42/1990 by legitimizing and establishing the title of "Hero-martyr of the Romanian Revolution of December 1989."[18] The two titles are conferred by the President of Romania upon the proposal of a commission whose structure and organization are provided for by the annex to the law and in accordance with a regulation drawn up and adopted by a decision of the Romanian Parliament.[19] In this perspective, another defining note in the transitional justice sphere, provided by Law no. 42/1990, emphasises the commitment to the descendants of the martyred heroes[20] and the wounded from the December 1989 Revolution.[21]

17 Law of Romania no 42 of 18 December 1990 'On Honoring the Martyred Heroes and Granting Rights to their Descendants, the Wounded, as Well as Fighters for the Victory of the December 1989 Revolution' [1990] Monitorul Oficial al României 147.

18 ibid, art 1.

19 ibid, art 4.

20 ibid, art 5.

21 ibid, art 6. Other legal provisions regarding the declaration of Brașov and Sibiu as martyr cities of the December 1989 Revolution were provided for by the provisions of Law No. 128/1992. By Laws Nos. 138/1994, 690/2001, 766/2001, 351/2002, 572/2003, the following localities were declared martyr cities: Arad, Brăila, Buzău, Târgoviște, Reșița, Alba-Iulia, Cugir, and Lugoj.

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3.4. Gratitude for the Heroic Deeds of the Martyr Heroes (Law No. 341/12 July 2004 and Law No. 242/8 October 2021)

In the complex activity of drafting and adopting normative acts, an important place is occupied by Law No. 341/12 July 2004[22] regarding the gratitude for the heroic deeds of the martyr heroes, in recognition of the prominent role of the fighters participating in the Romanian Revolution of December 1989, as well as from other localities in Romania, where the repression of the riots by the forces of order resulted in deaths, injuries or arrests.[23]

From the perspective of the challenges of transition and transitional justice, the text of the law amended in 2014 expands on the initial explanation and consolidates society's gratitude towards the martyred heroes of the December 1989 Revolution.[24]

On 11 October 2021, the new regulation provided for by Law No. 242/8 October 2021 provides clarity and order within the inter-societal relations between the state, citizen, society and the past and establishes and confers the Romanian Revolution of December 1989 the character of a "crucial moment in the country's history" through the disposition attributed to the concept of "deeply anti-communist."[25] The predominant position of Law No. 242/2021 in the evolution of transitional justice in Romania is also determined by a similar argument regarding the role of the Romanian Revolution of 1989 in gaining freedom, establishing a democratic regime and initiating the process of legal reforms.[26]

The analysis of this normative framework represents a fundamental stage of transitional justice in post-communist Romania. It extends the framework of analysis to subsequent regulations on the accountability of authorities for the repair of damages and the restitution of victims' fundamental rights. In this approach, the next section addresses the legal rules governing the situation of residential buildings transferred to state ownership (Law No. 112 of November 25, 1995).

22 Law of Romania no 341 of 12 July 2004 'On Gratitude to the Martyred Heroes and Fighters Who Contributed to the Victory of the Romanian Revolution of December 1989' [2004] Monitorul Oficial al României 654. The text of the Law was modified through Law No. 199 of 4 November 2016 which changed its title 'On Gratitude for the Victory of the Romanian Revolution in December 1989, for the Anti-communist Workers' Uprising in Brașov in November 1987 and for the Anti-communist Workers' Uprising in the Jiu Valley - Lupeni – August 1977.'

23 These amendments were introduced by Art 1 of Law of Romania no 242 of 8 October 2021 'On the Amendment and Completion of the Law no 341/2004' (Law no 242/2021) [2021] Monitorul Oficial al României 965.

24 The amendments to the initial legal text of Art 2 were made on December 30, 2014 by Governmental Emergency Ordinance no 95 of 29 December 2014 'On Amending and Supplementing the Law no 341/2004' [2014] Monitorul Oficial al României 969, art 1, para 3.

25 Law no 242/ 2021 (n 23) art 1, para 1.

26 ibid, art 1.

3.5. Legal Situation of Residential Buildings, Transferred to State Ownership (Law No. 112 of November 25, 1995)

One of the most challenging issues in transitional justice jurisprudence and practice is the legal status of homes, buildings and properties.[27] In Romania, the first regulation of the field was ordered by Law No. 112/25 November 1995.[28]

In this context, the law regulates the sector of reparative measures and provides legal provisions regarding former owners, individuals who were owners of real estate (housing) and whose property was transferred to state property after 6 March, with title. The second condition of the first article of the 1995 regulation, issued sixteen years after the 1989 Revolution, refers to the possession exercised of these properties on December 22, 1989. Thus, the law provides for remedial measures for properties transferred to the state's possession between 6 March 1945 and 22 December 1989. The third condition provided for by the new regulation is the provision in the first article, the second paragraph of which states that the heirs of the former owners also benefit from the new provisions under the conditions expressly provided for by the 1995 law.

The remedial measures in the second article refer to the restitution in kind provided for by the reacquisition of the right of ownership. The fourth condition, substantiated by Article 4 of Law 112/1995, provides that Romanian citizens benefit from the provisions of this law.[29] The provisions of the fourth section provide for the reparative measures and substantiate the legal framework for the establishment and granting of compensation to the former owners or, as the case may be, their heirs according to the provisions of Article 12. The two categories of persons (former owners and their heirs) are entitled to request compensation for the "unreturned apartments". The former owners and their heirs are also entitled to request compensation for the related lands or, if restitution in kind is not possible, to opt for compensation. The institutional governance mechanisms provide that the payment of compensation is made by the Romanian state, through the Ministry of Finance, via the decentralised public services of the ministry. The compensation procedure is triggered after 12 months from the conclusion of the evaluation works. In this case, the maximum term is 24 months. From the point of view of compensation value, these are established under the previous conditions and updated as of the payment date.

27 For a comprehensive analysis of the conceptual and analytical nexus between housing, land and property rights of individuals and communities in transitional justice see Jon D Unruh and Musa Abdul-Jalil, 'Housing, Land and Property Rights in Transitional Justice' (2021) 15(1) International Journal of Transitional Justice 1. doi:10.1093/ijtj/ijab004.

28 Law no 112 of 25 November 1995 'On Regulating the Legal Situation of Certain Residential Properties Transferred to the State' [1995] Monitorul Oficial al României 279.

29 ibid, art 4.

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The basis for the remedial measures taken is the average wage in the economy from the last month of the previous quarter.[30]

Another area of regulation during the Romanian transition period was reflected in the restitution of immovable property of communities of citizens belonging to national minorities (Emergency Ordinance No. 83/ 8 June 1999). For this legal context, the set of compensatory measures was ordered by Emergency Ordinance No. 83/ 8 June 1999,[31] which regulates the legal situation of the properties that belonged to the communities of national minorities in Romania and that were taken over with or under the title of the Romanian State or by cooperative organisations or other legal entities. From the point of view of the regulatory framework, the Emergency Ordinance No. 83/ 8 June 1999 provides for the measure of restitution to the former owners under the conditions provided for in Article 1 and Article 2 of this ordinance. In this case, the institutional governance mechanism refers to the procedure for submitting the restitution application to the Special Restitution Commission.[32]

In 2001, the new legal status of buildings confiscated abusively between 6 March 1945 and 22 December 1989 (Law No. 10/2001)[33] defines the properties taken over abusively during this period and regulates with priority the following situations: nationalized properties with reference to the "nationalization of industrial, banking, insurance, banking and insurance, mining and transport enterprises,"[34] the situation of real estate taken over following the confiscation of property, the situation of real estate donated to the state or other legal entities.[35]

Other important regulations were issued by Law No. 165 of 16 May 2013[36] which has in its first article the important provision regarding the principle of restitution in kind of real

30 For a detailed overview, see *Dickmann and Gion v Romania* App ns 10346/03, 10893/04 (ECtHR, 24 October 2017) <https://hudoc.echr.coe.int/eng?i=001-177927> accessed 28 September 2025. In this judgment, the European Court of Human Rights (ECtHR) summarised the relevant provisions and principles on reparation measures.

31 Law 112/1995 was approved with amendments by Law no 66/2004 (Monitorul Oficial al României I 278/30 March 2004), and was further amended and supplemented in 1999, 2000 and 2004.

32 The Special Restitution Commission was established pursuant to Government Emergency Ordinance no 94 of 29 June 2000 'On Regulating the Restitution of Immovable Property that Belonged to Religious Denominations in Romania' [2005] Monitorul Oficial al României 797.

33 Law of Romania no 10 of 8 February 2001 'On the Legal Regime of Real Estate Taken Over Abusively Between March 6, 1945 and December 22, 1989' (Law no 10/2001) [2001] Monitorul Oficial al României 75.

34 ibid, art 2(1)(a)

35 ibid, art 2(c).

36 Law of Romania no 165 of 16 May 2013 'On Measures for Completing the Process of Restitution, in Kind or by Equivalent, of Real Estate Abusively Taken Over During the Communist Regime in Romania' (Law no 165/2013) [2013] Monitorul Oficial al României 278.

estate taken over abusively during the communist regime in Romania.[37] In the context of the analysis of the conceptual and legal landmarks of transitional justice in Romania, Article 2 and Article 3 of Law No. 165 of 16 May 2013 hold particular importance. Article 2 establishes the four principles governing the measures for completing the restitution process of properties taken abusively during the communist period in Romania[38] namely The principles underlying the granting of the measures provided for by this law are 1) the principle of the prevalence of the measure of restitution in kind of the property taken back abusively;[39] 2) the principle of equity;[40] 3) the principle of transparency;[41] d) the principle of "maintaining a fair balance" between the individual interest of the former owners and the general interest at the level of society.[42] Article 3 presents and defines the legal expressions and terms provided for in the new regulation, namely: requests, "person who feels entitled", as well as regulations regarding the "entity vested by law" with reference to the process of restitution of abusively taken properties and the framework for ordering and establishing remedial measures.[43]

Twelve years after the adoption of Law No. 165/2013, the Constitutional Court of Romania decided by a majority of votes to issue the exception of unconstitutionality, judging as unconstitutional sentence "taking into account the technical characteristics of the building and the category of use on the date of its takeover" as regulated by the provisions of Article 21 of Law No. 165/2013.[44] The latest decision of the Constitutional Court of Romania was communicated through the press release of 18 February 2025.[45] The 2025 decision of the Constitutional Court of Romania concerns measures ordered to complete the restitution process, taking into account both regulated situations, namely restitution in kind or by equivalent, of real estate taken over abusively during the communist dictatorship in Romania.

37 See, for instance, the decisions of the ECtHR, namely: *Văleanu and Others v Romania* App nos 59012/17 and 29 others (ECtHR, 8 November 2022) <https://hudoc.echr.coe.int/eng?i=001-220571> accessed 28 September. For a more general context but also to highlight the circumstances of the case, see: *Maria Atanasiu and Others v Romania* App nos 30767/05, 33800/06 (ECtHR, 12 October 2010) <https://hudoc.echr.coe.int/eng?i=001-100989> accessed 28 September 2025. The ECtHR judgment describes in detail the complex mechanisms of restitution, by indicating to Romania, in its capacity as respondent State, the need to impose the adoption of measures for the more efficient processing of applications in the field.

38 Law no 165/2013 (n 36) art 2.

39 ibid, art 2 (a).

40 ibid, art 2 (b)

41 ibid, art 2 (c).

42 ibid, art 2 (d).

43 ibid, art 3.

44 ibid, art. 21(6).

45 Curtea Constituțională a României, 'Comunicat de presă, 18 februarie 2025' (*Constitutional Court of Romania*, 18 February 2025) <https://www.ccr.ro/comunicat-de-presa-18-februarie-2025/> accessed 30 September 2025.

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In essence, the Court assessed that by reporting and correlating the method of calculating the compensations that the state must offer for the buildings taken over abusively during the communist regime in Romania[46] with the technical characteristics and the category of use they had at the time of the takeover, the constitutional provisions regulated by the provisions of Article 44 of the Romanian Constitution[47] are violated, which explicitly refer to the guarantee and protection of property rights private. assessed that by reporting and correlating the method of calculating the compensations that must be offered by the state for the buildings taken over abusively during the communist regime in Romania with the technical characteristics and the category of use they had at the time of the takeover, the constitutional provisions regulated by the provisions of Article 44 of the Romanian Constitution are violated, which explicitly refer to the guarantee and protection of private property rights.

The next section of the research is dedicated to the legal-doctrinal analysis of lustration measures centred on application criteria, individualisation of responsibility, access to public offices and dignities. The analysis also integrates a review of constitutionality and the limits of the normative framework's application in the exercise of civil and political rights.

4 LUSTRATION LEGISLATION INNITIATIVES IN ROMANIA

Several legislative proposals for an organic law on lustration, on the temporary limitation of access to public dignities and positions for persons who were members of the power structures of the former communist regime and of the repressive apparatus of the Romanian Communist Party,[48] some scholars referred to the entire process after 1989 as a failure.[49] Others opposed such projects, arguing that such an endeavour would not benefit a democratic society.[50] In 2005, a legislative proposal was laid down by three deputies and one senator.

46 For a comparative and comprehensive analysis see Evan Hochberg, 'Toward a Fair and Just Comprehensive Property Restitution Law in Poland' (2019) 41(3) Loyola of Los Angeles International and Comparative Law Review 727.

47 In its original form, the Constitution of Romania was adopted at the meeting of the Constituent Assembly on November 21, 1991, see: Constitution [1991] Monitorul Oficial al României 233.

48 For a comprehensive examination of the legislative process and parliamentary practices in Romania, see Pl no L642/2005 'Legislative proposal regarding the Lustration Law, regarding the temporary limitation of access to certain public functions and dignities for persons who were part of the power structures of the communist regime and of the repressive apparatus of the Romanian Communist Party' <https://www.senat.ro/legis/lista.aspx?nr_cls=L642&an_cls=2005> accessed 2 October 2025.

49 Lavinia Stan, 'Lustration in Romania: The Story of a Failure' (2006) 6(1) Studia Politica: Romanian Political Science Review 135; Dragoș Petrescu, 'Dilemmas of Transitional Justice in Post-1989 Romania' in Vladimira Dvořáková and Anđelko Milardović (eds), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Political Science Research Centre Zagreb 2007) 127.

50 For a comparative analysis of lustration programs in Romania and Poland see Cynthia M Horne, 'Late Lustration Programmes in Romania and Poland: Supporting or Undermining Democratic Transitions?' (2009) 16(2) Democratization 344. doi:10.1080/13510340902732581.

The project had a 60-day term in the Senate, as the first reported chamber, where it received a negative opinion from the Commission on public administration, territorial organisation, and environmental protection. The Senate further approved the extension of the term of tacit adoption to 60 days; the Commission for equal chances rejected the project, while it received a favourable opinion from the Commission for human rights, cults and minorities and the Juridical Commission for appointments, discipline, immunities and validations.[51]

In April 2006 the Senate adopted the lustration legislative proposal with 69 votes in favour, 49 against and 9 abstentions, under the title "Legislative proposal on lustration, regarding the temporary limitation of access to some public positions and dignities to persons part of power structures and the repressive apparatus of the communist regime"[52] while the Deputies' Chamber adopted the proposal in May 2010 under the form "Lustration law, regarding the temporary limitation of access to some public positions and dignities to persons which were members of power structures and the repressive apparatus of the communist regime during 6 March 1945 – 22 December 1989."[53]

The act was sent to the President of Romania for promulgation; however, 29 senators and 58 deputies declared it unconstitutional. In its decision no 820/2010, the Constitutional Court declared some legislative provisions as unconstitutional.[54] Throughout October 2010-April 2011, the law was placed on the agenda of the Senate plenary session, which rejected the project. The Constitutional Court ruled against the constitutionality of some legislative provisions in its Decision No. 308/2012.[55] In February 2013, the Senate rejected the project, and in March 2013, the Deputies' Chamber rejected it.

For comparison, in other post-communist states, the analysis of the lustration regime also requires evaluating both constitutional requirements and the relevance of ECtHR jurisprudence, as in *Matyjek v. Poland*.[56] In this case, the ECtHR has established a

51 For a general analysis of the regulatory framework, stages, procedures, and debates within the legislative process in Romania, see Pl no L642/2005 (n 48).

52 According to the Senate meeting transcript, see Pl no L642/2005 (n 48).

53 Camera Deputatilor, 'Sittings of the Chamber of Deputies of May 19, 2010' <https://www.cdep.ro/pls/steno/steno.stenograma?ids=6833&idm=3> accessed 3 October 2025.

54 Decision no 820 'On Regarding the Objection of Unconstitutionality of the Provisions of the Lustration Law, Regarding the Temporary Limitation of Access to Certain Public Functions And Dignities For Persons Who Were Part Of The Power Structures And The Repressive Apparatus Of The Communist Regime During the Period 6 March 1945 - 22 December 1989' (Constitutional Court of Romania, 7 June 2010) [2010] Monitorul Oficial al României 420.

55 Decision no 308 'On Regarding the Notification of Unconstitutionality of the Provisions of Art 1 Lit g) of the Lustration Law Regarding the Temporary Limitation of Access to Certain Public Functions and Dignities for Persons Who Were Part of the Power Structures and the Repressive Apparatus of the Communist Regime During the Period 6 March 1945 - 22 December 1989' (Constitutional Court of Romania, 28 March 2012) [2012] Monitorul Oficial al României 309.

56 For a detailed overview, see *Matyjek v Poland* App no 38184/03 (ECtHR, 24 April 2007) <https://hudoc.echr.coe.int/fre?i=001-80219> accessed 28 September 2025. By this judgment, ECtHR stated the need for lustration procedures to provide sufficient procedural guarantees by virtue of European guarantees on the right to a fair trial.

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European standard to ensure and guarantee compliant and adequate procedural protection with respect to access to the file, preparation of the defence, and equality of the parties. Another relevant case for the analysis of the lustration regime is *Sidabras and Džiautas v. Lithuania*.[57] The ECtHR decision adopted in this case on 27 July 2004 highlights the importance of striking a balance between institutional governance mechanisms and the protection of individual rights.

5 PREPARATIONS FOR THE INTEGRATION INTO THE EUROPEAN AND EURO-ATLANTIC STRUCTURES

A set of restorative justice measures was adopted by Romanian authorities in line with the country's preparations for integration into the European and Euro-Atlantic structures, as part of legal reforms in the democratization endeavours. Retributive justice in Romania thus followed the path of further public declarative condemning the communist past crimes while compensating the victims of the communist regime. Consequently, Romanian constitutional democracy relied on its reconciliation with the communist past in regulating the access to the judiciary, further redistributive and reparatory measures for victims abused by the communist regime, opening and granting access to the study of the former Securitate archives, investigating the communist crimes in Romania and publicly condemning the communist regime.

5.1. Regulating the Statute of Judges and Prosecutors (Law 303/2004)

Since 2004, Law 303/2004 on the statute of judges and prosecutors (amended on 8 October 2007) has made it impossible for former Securitate collaborators to access the status of judge or prosecutor. It imposed an obligation on judges, prosecutors, and magistrates to declare any activity of the secret service political police as collaboration with the former Securitate organs, a declaration verified by the National Council for the Study of the Securitate Archives (CNSAS).[58]

57 For a comprehensive overview, see *Sidabras and Džiautas v Lithuania* App nos 55480/00, 59330/00 (ECtHR, 27 July 2004) <https://hudoc.echr.coe.int/eng?i=001-61942> accessed 28 September 2025. The ECtHR judgment notes the circumstances of access to positions according to the provisions of Lithuanian legislation, stating the need for uniform application of the principle of equal treatment in the context of transition.

58 Law of Romania no 303 of 28 June 2004 'On the Statute of Judges and Prosecutors' (amended 8 October 2007) art 6 <https://legislatie.just.ro/Public/DetaliiDocument/53074> accessed 2 October 2025.

5.2. Creating the Property Fund (2005) (Governmental Decision 1481/2005 on the Creation of the Property Fund)

At the end of December 2005, the Government created the Property Fund ("Fondul Proprietatea") as a joint stock company listed on the Bucharest Stock Exchange in 2011, aiming to ensure the financial means to compensate the former victims abusively expropriated by the communist regimes in case the restitution in nature was not possible.[59] Thus, policy-making undertook this form of compensatory property restitution for shareholders whose properties were violently nationalised by the communist state. For this purpose, the legislature created the Central Commission for Establishing Compensation through Law 247/2005 regarding the reform in the field of property and justice. It instituted an extensive set of reparatory measures for persons whose properties were abusively taken over between 6 March 1945 and 22 December 1989,[60] for the restitution of buildings belonging to religious cults,[61] for the restitution of buildings belonging to national minorities in Romania,[62] and for the regime of quantifying the payments of compensations for buildings taken abusively.[63] Furthermore, in 2007, the Government adopted the Governmental Emergency Ordinance 81/2007 for accelerating the procedure of granting compensations for abusively confiscated properties. The act regulates the functioning of the Property Fund as a closed investment joint stock company "with the state as its initial sole shareholder, until the transmission of shares from state property to natural or legal persons".[64]

5.3. Extending the Study of Securitate Archives and the activity of the National Council for the Study of the Securitate Archives (GEO 149/2005 and GEO 16/2006)

During 2005-2006, Romania reinforced its efforts to denounce the activities of the former secret police and to make public the identities of former collaborators and informers. In 2005, through Governmental Emergency Ordinance 149/2005 on Measures Extending the

59 For a detailed presentation of the institution and the regulatory framework, see 'Despre Fondul Proprietatea' (*Fondul Proprietatea*, 2025) <https://www.fondulproprietatea.ro/ro/despre-fond/despre-fondul-proprietatea> accessed 2 October 2025.

60 Law of Romania no 247 of 19 July 2005 'On Regarding Reform in the Field of Property and Justice, as Well as Some Adjacent Measures' [2005] Monitorul Oficial al României 653, title I.

61 ibid, title II.

62 ibid, title III.

63 ibid, title VII.

64 Governmental Emergency Ordinance no 81 of 28 June 2007 'On Accelerating the Procedure of Granting Compensations for Abusively Confiscated Properties' [2007] Monitorul Oficial al României 446, art 7 (1).

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Activity of the National Council for the Study of Securitate Archives,[65] the Government extended the activity of the National Council for the Study of the Securitate Archives, whose mandate was set to expire six years after its establishment in 1999.[66] Also, through Governmental Emergency Ordinance No. 16/2006 of 22 February 2006 on the amendment of Law No. 187/1999 regarding the access to one's personal file and denouncement of Securitate as political police by granting the access on demand to "the identity of agents and collaborators who have contributed with information to the completion of the file."[67] Also, the amendments regulate the denouncing of this quality and informing "the written press and the audio-visual, political parties, legally constituted NGOs, public authorities and institutions on demand" as regards candidates to presidential elections[68] and other positions or dignities, such as those within prefectures, mayoralties and county de-centralized public services,[69] management positions within the Romanian Information Service (SRI), External Information Service (SIE), Protection and Guard Service (SPP), Special Telecommunication Service (STS), General Direction of information and Internal Protection, the Ministry of Administration and Interior,[70] management positions within the police,[71] judges, prosecutors, prime-registrars, lawyers and public notaries,[72] diplomatic and consular staff,[73] management and execution positions in the Legislative Council and other national authorities and agencies,[74] members of the press and political analysts,[75] members of the academia,[76] inspectors and management of schools and education units and members of cultural institutions,[77] leadership of political parties,[78] military and civil leadership within the Ministry of National Defence and the army.[79]

65 Governmental Emergency Ordinance no 149 of 10 November 2005 'On Regarding Some Measures to Ensure the Continuation of the Activity of the National Council for the Study of Securitate Archives' [2005] Monitorul Oficial al României 1008.

66 Law of Romania no 187 of 7 December 1999 'On Regarding the Access to One's Personal File and Denouncement of Securitate as Political Police' [1999] Monitorul Oficial al României 603, art 22.

67 Governmental Emergency Ordinance no 16 of 22 February 2006 'On the Amendment of Law no 187/1999 Regarding the Access to One's Personal File and Denouncement of Securitate as Political Police' [2006] Monitorul Oficial al României 182, art 1(2).

68 ibid, art 2.

69 ibid, art 2 (e).

70 ibid, art 2 (f).

71 ibid, art 2 (g).

72 ibid, art 2 (i).

73 ibid, art 2 (î).

74 ibid, art 2 (k).

75 ibid, art 2 (n).

76 ibid, art 2 (r).

77 ibid, art 2 (s).

78 ibid. art 2 (ş).

79 ibid, art 2 (t).

6 CREATION OF THE INSTITUTE FOR THE INVESTIGATION OF COMMUNIST CRIMES IN ROMANIA (2005) AND PRESIDENTIAL COMMISSION FOR THE ANALYSIS OF COMMUNIST DICTATORSHIP IN ROMANIA (2006)

In 2005, the Government issued Decision No. 1724 to create the Institute for the Investigation of Communist Crimes in Romania, subordinated to the Government and coordinated by the prime minister.[80] Endowed with legal personality, the institute's mandate empowers its employees "to investigate and identify crimes, abuses and violations of human rights during the entire duration of the communist regime in Romania" and to further submit these data and evidence related to crimes and persons to institutions capable of following legal penal action in this respect[81] and to the public opinion.[82] To this end, the institute's mandate encompassed the classification of crimes and criminals,[83] the identification of former nomenklatura activists, Securitate members, and political police,[84] and the systematisation of regulations that organised the coercive system.[85]

On 20 April 2006, a Presidential Commission was established by presidential Decree to analyse the communist dictatorship in Romania and produce a report. Following its investigative analysis of communist archives, the Commission issues its final report. In more than 600 pages, the report[86] structures accounts on the Romanian Communist Party, fraudulent elections, external Soviet involvement, civil society destruction and communist society transformation, the Repression, purges, concentration system, communist genocide, Security crimes and methods and dissidence movements and society, economy, and culture with evidence on demography, economic crisis, ideology and culture, repression and total control, and brings forward the arguments for the official condemnation of the regime.[87]

80 Government Decision no 1724 of 21 December 2005 'On the Establishment of the Institute for the Investigation of the Crimes of Communism in Romania' [2005] Monitorul Oficial al României 1195, art 1(1).

81 ibid, art 2.

82 ibid, art 3 (h).

83 ibid, art 4 (a).

84 ibid, art 4 (b).

85 ibid, art 4 (c).

86 At present, the Report can be accessed at the following site: Vladimir Tismăneanu and others, *Final Report of the Presidential Commission for the Analysis of the Communist Dictatorship in Romania* (București, USA 2006) <https://coilink.org/20.500.12592/7k1kz49> accessed 13 November 2025.

87 For discussions on the Presidential Commission's activity, see Monica Ciobanu, 'Criminalising the Past and Reconstructing Collective Memory: The Romanian Truth Commission' (2009) 61(2) Europe-Asia Studies 313. doi:10.1080/09668130802630870; Cosmina Tanasoiu, 'The Tismaneanu Report: Romania Revisits Its Past' (2007) 54(4) Problems of Post-communism 60. doi:0.2753/PPC1075-8216540405; Mihai Stelian Rusu, 'Transitional Politics of Memory: Political Strategies of Managing the Past in Post-communist Romania' (2017) 69(8) Europe-Asia Studies 1257. doi:10.1080/09668136.2017.1380783.

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Consequently, on 18 December 2006, during a solemn session within the Parliament of Romania in which the Presidential Commission for the Analysis of the Communist Dictatorship in Romania presented its Report, the Chief of State delivered a message in which he announced the accomplished mission of the Commission to identify "the reasons whereby I can condemn the communist regime" after a "rigorous analysis of the components of the totalitarian system, of the principal institutions that made this tragedy possible, and of the personages decisively implicated in the system"[88] evidence which thus allows to "expressly and categorically condemn the communist system in Romania, from its foundation, on the basis of dictate, during the years 1944 to 1947, to its collapse in December 1989. Taking cognizance of the realities presented in the Report, I affirm with full responsibility: the communist regime in Romania was illegitimate and criminal."[89] Moreover, the message delivered "public apologies" claiming that "in the name of the Romanian State, I ask the forgiveness of those who suffered, of their families, of all those who, in one way or another, saw their lives ruined by the abuses of dictatorship."[90] Thus, the message of the establishment of the Presidential Commission, the adoption of the Commission Final Report and the condemnation of the former communist regime must be understood within the logic of the political climate.[91]

A noticeable movement of remembering through tourism and artwork has been developing through the organisation of guided tours, museums, and various artistic manifestations of memory and cultural anamnesis.[92] In addition, education, rewriting school curricula, memorials and museums contributed to the public acknowledgement of communist crimes.

88 For implications of the use of "genocide" concept see Sabina-Andreea Grigore, 'The Narrow Definition of Genocide & Its Role in Investigating and Prosecuting Charges of Genocide in Romania' (2025) 72(1) Problems of Post-Communism 97. doi:10.1080/10758216.2024.2337944.

89 For a thorough analysis of the establishment of communism in Romania see Vladimir Tismăneanu (ed), *Stalinism Revisited: The Establishment of Communist Regimes in East-Central Europe* (Central European UP 2009). Also, for a view on the fall of communism see Vladimir Tismaneanu, 'Eastern Europe: The Story the Media Missed' (1990) 46(2) Bulletin of the Atomic Scientists 17. doi:10.1080/00963402.1990.11459793.

90 Traian Băsescu, *Speech delivered within the Parliament of Romania*, 18 December 2006, to mark the Presentation of the Report by the Presidential Commission for the Analysis of the Communist Dictatorship in Romania, see: Traian Basescu, 'Discursul presedintelui Traian Basescu' (*HotNews.ro*, 18 December 2006) <https://hotnews.ro/discursul-presedintelui-traian-basescu-826051> accessed 2 October 2025.

91 Alexandru Gussi, 'Some Thoughts on the Transitional Justice Dilemmas in the Romanian Post-communist Context' (2015) 15(2) Studia Politica: Romanian Political Science Review 211.

92 For the use of tourism in communism remembrance see Ducan Light, Remus Creţan and Andreea-Mihaela Dunca, 'Transitional Justice and the Political "Work" of Domestic Tourism' (2020) 24(6) Current Issues in Tourism 742. doi:10.1080/13683500.2020.1763268. For the concept of "recuperative memory" see Simona Mitroiu, 'Recuperative Memory in Romanian Post-communist Society' (2016) 44(5) Nationalities Papers 751. doi:10.1080/00905992.2016.1182144.

7 CONCLUSIONS

The current research argues that transitional justice in Romania served as an integrative element of the country's democratic journey after the Revolution of December 1989 and contributed fundamentally to its integration into European and Euro-Atlantic structures. The study also identifies that transitional justice played an essential role in the process of sustainable development and in the construction of a viable, valid, and legitimate political and social pluralism after the collapse of the communist regime. Thus, the results of the legal analysis demonstrate that transitional justice addressed social exclusion and provided redress for the victims who suffered under the communist dictatorship, whose fundamental human rights and freedoms had been violated. Second, the construction, reform and reconfiguration of a judicial system addressed both structural and social injustices and contributed to strengthening the rule of law, guaranteeing free access to justice and protecting democratic rights and freedoms.

The research has succeeded in providing a rigorous chronological and topical description of transitional justice mechanisms and legal reforms, including recent Constitutional Court decisions, by showing the synchrony between these policies, ventures of restorative justice, rule-of-law enactment, and democratisation, and Romania's goals of European and Euro-Atlantic integration. It highlighted the principles of balancing individual restitution interest and the general societal reconciliation goals outlined in the legislative reasoning of several legal and judicial measures. Within the jurisprudential analysis, the doctrinal examination pointed out the extent to which national legal provisions were correlated to European normative standards in the matter of transitional justice for the protection and guarantee of human rights, the reform that shaped the evolution of judicial practice and the installation of reparative mechanisms and instruments, as well as the institutional governance. The narrative-descriptive discussion of the policy-making process, implementation criteria and the limits of the application of the normative framework, pointing out the extent of achieving the outcomes of transitional justice in Romania.

At the same time, the study also highlights several limitations that have affected the impact of transitional justice, including the institutional and functional cleavages between the reformist judicial system and the various administrative, social and political structures and mechanisms. Second, the postponement or delayed adoption of reform initiatives in the judicial system and the factors for the justice reform process and for institutional and social governance influence the democratic consolidation of the state.

Throughout the study, the discussion of the evolution of transitional justice mechanisms embedded in the Romanian legislative framework and constitutional and judicial practice relating to reparations, property restitution, accountability, and human rights was intended to assess their contribution to the consolidation of democracy, trust in public institutions, and civic reconciliation. The research discussed the limitations of some policy initiatives and vulnerabilities to the political will of Romanian transitional justice mechanisms in

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establishing accountability for the crimes and abuses of the former totalitarian regime. These impediments had considerable societal impact, considering the restoration of truth and lustration expectations and the actual progress, the recognition of communist victims and martyred revolutionaries, public awareness and the perils of oblivion, trust in state institutions. The political impact of transitional justice measures is salient considering lustration's mild effects, judicial accountability of former communist offenders and the uncovering of collaborators to the Securitate secret police. These aspects influenced governmental stability on some occasions, but also, depending on the political context, determined the handling by political decision-makers of initiatives to denounce the communist crimes and abuses, and to claim a democratic path for the Romanian state. Hence, transitional justice became an agent of calibration to European standards to strengthen democratisation and the rule of law.

Accordingly, the research substantiated the hypothesis stating that, in Romania, regulations regarding the accountability of the authorities, regarding the reparation of damages and the restitution of the fundamental rights of victims rested on political will and were contingent on the overall political context, thus contributing to the scholar's vision on transitional justice and post-communist transition.

Therefore, this research concludes that the mechanisms of transitional justice have fundamentally changed the way democracy, rights, and freedoms have been consolidated in post-communist Romania, with implications and effects across the political and social spectrum. First, encouraging social cohesion and social pluralism has become a main objective for configuring the new system of social governance. Second, assessing the impact of restoring rights and establishing the social rights of citizens. Third, the reform of the judicial system has confronted both institutional causes and systemic causes generated by concerns for systemic stability and security.

Future research on transitional justice in Romania could highlight the stage of implementation of legal provisions regarding the rights of victims of the communist dictatorship, but also of legislation regarding the recognition of rights and gratitude to the martyred heroes of the Romanian Revolution of December 1989. A second aspect necessary for future research is the role of authorities in institutional reform, with consequences for transitional measures and social justice. The third aspect will monitor the stage of implementation of decisions of national and European courts regarding the rights of individuals and communities affected by the abusive takeover of real estate.

REFERENCES

1. Basescu T, 'Discursul presedintelui Traian Basescu' (*HotNews.ro*, 18 December 2006) <https://hotnews.ro/discursul-presedintelui-traian-basescu-826051> accessed 2 October 2025
2. Ciobanu M, 'Criminalising the Past and Reconstructing Collective Memory: The Romanian Truth Commission' (2009) 61(2) Europe-Asia Studies 313. doi:10.1080/09668130802630870
3. Daly E, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2(1) The International Journal of Transitional Justice 23. doi:10.1093/ijtj/ijn004
4. Damsa L, 'Transitional Justice in Post-communist Romania: The Politics of Memory' (2015) 67(7) Europe-Asia Studies 1155. doi:10.1080/09668136.2015.1066621
5. Grigore SA, 'The Narrow Definition of Genocide & Its Role in Investigating and Prosecuting Charges of Genocide in Romania' (2025) 72(1) Problems of Post-Communism 97. doi:10.1080/10758216.2024.2337944
6. Grosescu R, 'Judging Communist Crimes in Romania: Transnational and Global Influences' (2017) 11(3) International Journal of Transitional Justice 505. doi:10.1093/ijtj/ijx016
7. Gussi A, 'Some Thoughts on the Transitional Justice Dilemmas in the Romanian Post-communist Context' (2015) 15(2) Studia Politica: Romanian Political Science Review 211
8. Hochberg E, 'Toward a Fair and Just Comprehensive Property Restitution Law in Poland' (2019) 41(3) Loyola of Los Angeles International and Comparative Law Review 727
9. Horne CM, 'Late Lustration Programmes in Romania and Poland: Supporting or Undermining Democratic Transitions?' (2009) 16(2) Democratization 344. doi:10.1080/13510340902732581
10. Horne CM, 'What is Too Long and When is Too Late for Transitional Justice? Observations from the Case of Romania' (2020) 2(1) Journal of Romanian Studies 109. doi:10.3828/jrns.2020.2.1.06
11. Izarova I, Hartman Yu and Nate S, 'Mechanisms for the Compensation of War Damages: Toward a Fair Solution for Ukraine' (2024) 10(1) International Comparative Jurisprudence 29. doi:10.13165/.icj.2024.06.003
12. Kalemaj I, 'Transitional Justice and Democratic Consolidation in Post-communist Eastern Europe: Romania and Albania' (2021) 12(1) Eastern Journal of European Studies 81. doi:10.47743/ejes-2021-0104

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13. Light D, Creţan R and Dunca AM, 'Transitional Justice and the Political "Work" of Domestic Tourism' (2020) 24(6) Current Issues in Tourism 742. doi:10.1080/13683500.2020.1763268

14. Mitroiu S, 'Recuperative Memory in Romanian Post-communist Society' (2016) 44(5) Nationalities Papers 751. doi:10.1080/00905992.2016.1182144

15. Orjuela C, 'Passing on the Torch of Memory: Transitional Justice and the Transfer of Diaspora Identity Across Generations' (2020) 14(2) *International Journal of Transitional Justice* 360. doi:10.1093/ijtj/ijaa005

16. Petrescu D, 'Dilemmas of Transitional Justice in Post-1989 Romania' in Dvořáková V and Milardović A (eds), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Political Science Research Centre Zagreb 2007) 127

17. Posner EA and Vermeule A, 'Transitional Justice as Ordinary Justice' (2004) 117(3) Harvard Law Review 761. doi:10.2307/4093461

18. Rusu MS, 'Transitional Politics of Memory: Political Strategies of Managing the Past in Post-communist Romania' (2017) 69(8) Europe-Asia Studies 1257. doi:10.1080/09668136.2017.1380783

19. Shleifer A, 'Government in Transition' (1997) 41(3-5) European Economic Review 385. doi:10.1016/S0014-2921(97)00011-1

20. Stan L, 'Civil Society and Post-communist Transitional Justice in Romania' in Simić O and Volčič Z (eds), *Transitional justice and civil society in the Balkans* (Springer 2012) 17. doi:10.1007/978-1-4614-5422-9_2

21. Stan L, 'Lustration in Romania: The Story of a Failure' (2006) 6(1) Studia Politica: Romanian Political Science Review 135

22. Stan L, 'Neither Forgiving nor Punishing? Evaluating Transitional Justice in Romania' in Popovski V and Serrano M (eds), *After Oppression: Transitional Justice in Latin America and Eastern Europe* (United Nations University Press 2012) 363

23. Stan L, *Transitional Justice in Post-communist Romania: The Politics of Memory* (CUP 2013)

24. Stan L, 'Transitional Justice Research: An Overview of Latest Trends' (2021) 21(2) Studia Politica: Romanian Political Science Review 369

25. Tanasoiu C, 'The Tismaneanu Report: Romania Revisits Its Past' (2007) 54(4) Problems of Post-communism 60. doi:0.2753/PPC1075-8216540405

26. Tismaneanu V, 'Eastern Europe: The Story the Media Missed' (1990) 46(2) Bulletin of the Atomic Scientists 17. doi:10.1080/00963402.1990.11459793

27. Tismăneanu V (ed), *Stalinism Revisited: The Establishment of Communist Regimes in East-Central Europe* (Central European UP 2009)

28. Tismăneanu V and others, *Final Report of the Presidential Commission for the Analysis of the Communist Dictatorship in Romania* (Bucureşti, USA 2006) <https://coilink.org/20.500.12592/7k1kz49> accessed 13 November 2025

29. Unruh JD and Abdul-Jalil M, 'Housing, Land and Property Rights in Transitional Justice' (2021) 15(1) International Journal of Transitional Justice 1. doi:10.1093/ijtj/ijab004

30. Vinjamuri L and Snyder J, 'Law and Politics in Transitional Justice' (2015) 18(1) Annual Review of Political Science 303. doi:10.1146/annurev-polisci-122013-110512

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

МЕХАНІЗМИ ПЕРЕХІДНОГО ПРАВОСУДДЯ ТА СУСПІЛЬНЕ ПРИМИРЕННЯ ДЛЯ ВЕРХОВЕНСТВА ПРАВА ТА КОНСОЛІДАЦІЇ ДЕМОКРАТІЇ В ПОСТКОМУНІСТИЧНІЙ РУМУНІЇ. ЮРИСПРУДЕНЦІЙНІ ПЕРСПЕКТИВИ ЩОДО ПРАВ НА ВІДШКОДУВАННЯ, ЛЮСТРАЦІЇ ТА РЕЖИМУ ВЛАСНОСТІ

Анка Пармена Олімід*, Каталіна Марія Джорджеску та Космін Лучіан Герге

АНОТАЦІЯ

Вступ. *Крах комуністичного режиму в Румунії в грудні 1989 року спричинив етап глибоких та складних законодавчих змін, спрямованих на усунення зловживань, дискримінації та порушень прав, що спричинило виклики для процесу реформування системи правосуддя та для інституційного та соціального управління. Реформа держави та процес європейської*

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інтеграції призвели до дебатів у суспільстві та правових ініціатив, спрямованих на гарантування прав і свобод громадян та сприяння соціальному примиренню. У цьому контексті засудження комуністичних злочинів, визнання зловживань, відновлення права власності та спроби люстрації представляли два центральні рівні політичної та судової реформи в посткомуністичній Румунії. Це дослідження має на меті дослідити, як ці законодавчі ініціативи, а також інші пов'язані з ними регуляторні підходи, були законодавчо закріплені відповідно до стандартів та зобов'язань щодо європейської та євроатлантичної інтеграції.

Методи. *У дослідженні пропонується якісний підхід, який охоплює як документальний аналіз законодавчих пропозицій, так і ініціатив, об'єднуючи три основні теми: (1) перехідне правосуддя, визнання та надання прав особам переслідуваним з політичних міркувань та вшанування пам'яті героїв-мучеників грудневої революції 1989 року; (2) законодавчі ініціативи щодо відновлення права власності, правового стану житлових будинків, раніше переданих у державну власність, регулювання статусу суддів та прокурорів; та (3) законодавча підготовка щодо інтеграції в європейські та євроатлантичні структури, а також ініціативи щодо створення інституційних структур з розслідування комуністичних злочинів та аналізу комуністичної диктатури. Для вивчення цих тем було використано методи, характерні для правового дослідження, такі як: (a) нормативний аналіз та вивчення текстів законів, декретів-законів та постанов виконавчої влади, ухвалених та виданих у комуністичний період; (b) аналіз судової практики, здійснений за допомогою вивчення рішень Європейського суду з прав людини (ЄСПЛ), аналіз винятків щодо неконституційності, висунутих Конституційним судом Румунії у питанні реституції майна та застосування закону в цій галузі, та (c) історико-правовий аналіз, необхідний для зіставлення законодавчих реформ та ініціатив з політичним та історичним контекстом, відповідно до трьох хронологічних меж аналізу: падіння режиму, політичний перехід та інтеграція в європейські та євроатлантичні структури.*

Результати та висновки. *Дослідження вказує на нерівномірну еволюцію нормативної бази, що характеризується проблемами фрагментації в процесі законодавчої реформи щодо визнання жертв, реституції майна та соціального примирення. Незважаючи на ці правові, політичні та соціальні контексти, дослідження підкреслює як законодавчий прогрес, так і суспільні переваги перехідного правосуддя в Румунії, а також можливість такого аналізу, проведеного через тридцять п'ять років після грудневої революції 1989 року, для розвитку правової культури, зосередженої на повазі до прав людини та консолідації верховенства права в суспільствах перехідного періоду.*

Ключові слова. *Перехід Румунії до демократії, реституція майна, історико-правовий аналіз, перехід від комуністичної диктатури, права людини.*

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Research Article

POST-MORTEM JUSTICE: HUMAN DIGNITY AND LEGAL PROTECTIONS IN THE EUROPEAN UNION

Dragomir Andreea-Nicoleta*, Vesmaș Daiana-Maura and Ana Morari (Bayraktar)

ABSTRACT

Background: *The handling of bodies after death has increasingly become a controversial topic in European legal discourse, not least at the crossroads of human dignity, data protection, and forensic justice. Although human dignity is enshrined as one of the fundamental principles offered for protection under EU law, the exploration of such a principle and its extension to post-mortem interests is patchy and divergent within different Member States. The article (i) assesses whether, in the European legal framework, human dignity has justiciable implications beyond death; and (ii) examines how the EU might reconcile growing expectations regarding post-mortem rights in the context of digitalised warfare, big data and hybrid conflicts. To illustrate these challenges in practice, the analysis incorporates Ukraine as a contextual case study, where the Russia–Ukraine armed conflict has exposed large-scale casualties, the digital dissemination of images of deceased persons, and the limitations of existing European protection mechanisms.*

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Methods: *The paper presents a comparative legal analysis of EU law, specific legislation in selected Member States, and limitations in international human rights norms with a focus on the jurisdiction of the European Court of Human Rights. It also builds on interdisciplinary research, bringing together legal doctrine, bioethics, and the study of digital governance. The methodology is predominantly doctrinal and analytical, supported with cases illustrating different national approaches to the protection of posthumous dignity and rights.*

Results and Conclusions: *The article highlights that EU law lacks a systematised framework for post-mortem dignity, thus leaving Member States free to regulate in a fragmented and sometimes contradictory manner. National solutions vary considerably, from strong protection of post-mortem personality rights with specific remedies (Germany, France) to the lack of any existing legal remedy (United Kingdom). This continuing digital legacy in contemporary wars—illustrated by the case of Ukraine, where mass graves and images of deceased persons distributed online have raised urgent concerns—points to the limitations of current mechanisms, including the GDPR and the Digital Services Act. These trends indicate that the EU could adopt deeper integration, integrating non-binding legislative and judicial cooperation instruments, in line with prevailing international standards, with a view to reducing an identified gap between the formal recognition of human dignity and its effective post-mortem protection.*

1 INTRODUCTION

The legal and philosophical underpinnings of post-mortem dignity can be found in the more general notion of human dignity, which has been at the heart of human rights discussions since the Universal Declaration of Human Rights.[1]

The question is whether dignity persists after death, even though it is usually associated with living human beings. *According to Kantian philosophy, autonomy and rational agency are equated with dignity,* ***implying that the dead, lacking these qualities, are deprived of dignity***. Writers such as Scarre disagree with this suggestion on the basis that *"memory and respectful treatment of human remains*" are symbolic ways in which dignity continues.[2] Legal systems are significantly affected by this view, particularly regarding digital inheritance, burial rights and forensic investigations.[3]

1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 26 September 2025.

2 Geoffrey Scarre, 'Archaeology and Respect for the Dead' (2003) 20(3) Journal of Applied Philosophy 237. doi:10.1046/J.0264-3758.2003.00250.X.

3 Lydia de Tienda Palop and Brais X Currás, 'The Dignity of the Dead: Ethical Reflections on the Archaeology of Human Remains' in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology* (Springer 2019) 19. doi:10.1007/978-3-030-32926-6_2.

As these debates increasingly arise in the context of contemporary armed conflicts, the article uses Ukraine as an illustrative case study. The Russia–Ukraine armed conflict has produced extensive documentation of mass casualties, significant forensic obstacles and the widespread digital circulation of images of deceased persons. These developments offer a particularly relevant backdrop for examining the interaction between post-mortem dignity, digital exploitation and the limitations of the current European legal framework.

In crisis settings, post-mortem questions intersect doctrinally with human rights, extending beyond traditional life-bound interests. The dissemination of images of deceased persons raises identifiable legal issues concerning posthumous privacy, reputation, and data governance, including in contexts of propaganda and disinformation on weakly moderated platforms.

Similarly, the practices of identifying victims of disasters, migration crises and the investigation of war crimes require a balance between forensic procedures, legal accountability and cultural sensitivity. In addition, the commercialisation of the dead human body—for artistic purposes, educational projects or scientific research—raises issues of possible exploitation and challenges established legal concepts of dignity.

Although the primary focus of international human rights regimes remains on the living, emerging legal arguments suggest that post-mortem reputation and symbolic dignity also deserve protection. What are the main obstacles to harmonising EU legislative frameworks on post-mortem dignity? This study will assess whether current EU data protection legislation is adequate to regulate posthumous digital presence and privacy, given the importance of social media, artificial intelligence-generated content and digital memories.

While this study primarily focuses on the European legal framework, it includes Ukraine as an illustrative example of how post-mortem dignity is challenged in contemporary conflicts. Future research may extend this analysis to other contexts, such as the management of mass graves in the former Yugoslavia, to provide a broader comparative perspective on the role of forensic investigations in accountability for war crimes and the influence of digital platforms on posthumous rights.

2 LITERATURE REVIEW. INTERDISCIPLINARY PERSPECTIVES ON POST-MORTEM DIGNITY

The study of post-mortem dignity flows from a number of disciplinary lines, each covering a different aspect of how the dead preserve important moral, symbolic, and legal legacies.

For philosophers, the challenge of Kant's insistence that human beings must never be reduced to mere instruments is a starting point for arguments—an idea several scholars go beyond even death, based on which an interest in the dignity of human remains grows into

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moral inquiry and respect for human remains is justified as a matter of interest.[4] Others have maintained that dignity is exclusively reserved for the living and cannot really last after death.[5] Later ethical writings draw attention to the symbolic importance of death rituals and the enduring value society places on the deceased. According to Scarre, respect for the remains is not only an obligation of the ritualists but is a sign of their worth to persons through time.[6] In the same way, Tienda Palop and Currás point out, in archaeology there is an ethical tension between scientific investigation and respect for the body of the dead.[7]

Recent studies—particularly in the area of Eastern European transitional justice—indicate a rise in interest in posthumous rights in an environment where the phrase "post-mortem justice" is not overtly used. Kvit discusses posthumous reproductive law uncertainties in the context of wartime Ukraine, arguing for clear systems to accommodate the reproductive rights of dead soldiers.[8] B. Abdurrahmani and T. Abdurrahmani investigate modes of truth-telling in post-communist Albania and demonstrate how the unresolved disappearances and unidentified remains still affect memory, justice and social reconciliation.[9] Related literature on unrelated areas, such as Makauskaite-Samuole's analysis of transparency obligations articulated in the EU AI Act, also touches on the post-mortem implications of technology regulation, suggesting the cross-sectoral nature of the concern.[10]

ECtHR jurisprudence offers indirect but increasingly relevant protection against post-death dignity damage, particularly regarding burial rights, exhumation, and the emotional integrity of members of the deceased family.[11] Further down the line, digital inheritance literature also highlights the challenges associated with identity, data, and memory protection after death. Given that deceased persons are explicitly excluded from the scope of GDPR (Recital 27),[12]

4 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, ed, CUP 1997).
5 John Harris, *The Value of Life: An Introduction to Medical Ethics* (Routledge 1985).
6 Scarre (n 2).
7 Tienda Palop and Currás (n 3).
8 Nataliia Kvit, 'Prospects for Regulating the Right to Posthumous Reproduction in the Context of War in Ukraine: Foreign Experience and Formation of Legal Support for the Realisation of Reproductive Rights of Military Personnel' (2023) 6(2) Access to Justice in Eastern Europe 82. doi:10.33327/AJEE-18-6.2-a000222.
9 Bledar Abdurrahmani and Tidita Abdurrahmani, "Truth Revelation Instruments in Post-Communist Albania: Transitional Justice Non-Feasance in Investigating Communist Crimes and the Fate of Missing Persons" (2024) 7(2) Access to Justice in Eastern Europe 10. doi:10.33327/AJEE-18-7.2-a000215.
10 Gintare Makauskaite-Samuole, 'Transparency in the Labyrinths of the EU AI Act: Smart or Disbalanced?' (2025) 8(2) Access to Justice in Eastern Europe 1. doi:10.33327/AJEE-18-8.2-a000105.
11 *Sabanchiyeva and Others v Russia* App no 38450/05 (ECtHR, 6 June 2013) <https://hudoc.echr.coe.int/eng?i=001-120070> accessed 26 September 2025.
12 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 - GDPR) [2016] OJ L 119/1, recital 27; Remigius N Nwabueze and Matthew White, 'Privacy and Death Law – a Reappraisal' (2024) 16(2) Journal of Media Law 468. doi:10.1080/17577632.2024.2438395.

scholars such as Harbinja,[13] Buitelaar,[14] Allen and Rothman[15] argue that "post-mortem privacy" is a natural extension of the privacy and dignity interests held during life, which continue to have legal and ethical relevance after death, notwithstanding the GDPR's explicit exclusion of deceased persons. Cases such as In *re Ellsworth* exemplify the practical realities for families when digital platforms prioritise contractual obligations over family dignity or interests.[16] To address this regulatory gap, scholars suggest drawing on end-of-life legal instruments—most notably living wills—as a basis for hybrid statutory and contractual mechanisms that could govern post-mortem digital rights.

The forensic anthropology and humanitarian law-based research, such as Finegan et al.,[17] Gillett and Fan,[18] and Guarascio et al.,[19] document the forensic procedures, humanitarian obligations, and ethical challenges involved in managing human remains during armed conflicts and large-scale fatality incidents. International frameworks such as the Bournemouth Protocol set standards for the identification, chain of custody, respectful handling of, and protection for bodies and mass graves.[20] Complementing these, the United Nations Minnesota Protocol on the Investigation of Potentially Unlawful Death establishes internationally recognised minimum requirements for the documentation, recovery and forensic examination of the dead, including safeguards for dignity, transparency, and accountability in conflict-related deaths.[21] This literature embeds dignity in the practical and highlights how forensic truth-seeking, family rights, and cultural practices intertwine when bodies must be recovered, acknowledged, and repatriated.

A closing body of writing considers how contemporary warfare, most notably Russia's war in Ukraine, has changed how the dead operate digitally. Astuti et al., for example, study how

13 Edina Harbinja, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31(1) International Review of Law, Computers & Technology 26. doi:10.1080/13600869.2017.1275116.

14 JC Buitelaar, 'Post-Mortem Privacy and Informational Self-Determination' (2017) 19(2) Ethics and Information Technology 129. doi:10.1007/s10676-017-9421-9.

15 Anita L Allen and Jennifer E Rothman, 'Postmortem Privacy' (2024) 123(2) Michigan Law Review 285. doi:10.36644/mlr.123.2.postmortem.

16 *Estate of Ellsworth* No 2005-296, 651-DE (Michigan Probate Court, 4 March 2005); Rebecca G Cummings, 'The Case Against Access to Decedents' E-mail: Password Protection as an Exercise of the Right to Destroy' (2014) 15(2) Minnesota Journal of Law, Science & Technology 897.

17 Oran Finegan and others, 'International Committee of the Red Cross (ICRC): General Guidance for the Management of the Dead Related to COVID-19 (2020) 2 Forensic Science International: Synergy 129. doi:10.1016/j.fsisyn.2020.03.007.

18 Matthew Gillett and Wallace Fan, 'Expert Evidence and Digital Open Source Information' (2023) 21(4) Journal of International Criminal Justice 661. doi:10.1093/jicj/mqad050.

19 Dario Guarascio, Andrea Coveri and Claudio Cozza, 'War in the Time of Digital Platforms' (*Social Europe*, 10 January 2023) <https://www.socialeurope.eu/war-in-the-time-of-digital-platforms> accessed 14 March 2025.

20 Melanie Klinkner and Ellie Smith, *The Bournemouth Protocol on Mass Grave Protection and Investigation* (Bournemouth University 2020).

21 OHCHR, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (UN 2017).

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graphic images propagate widely on social media as a weapon of propaganda, harassment or psychological warfare.[22] However, scholars have not shied away from acknowledging the limitations of platform governance and the growing use of OSINT methods to verify war crimes, even within institutional European responses (EUvsDisinfo, East StratCom Task Force).[23] These trends disclose how representations of the dead are made into weapons at the digital level, and the way that dissemination undermines established legal and ethical foundations of honour with respect to dignity in the time of war.

Consisting of five recurring themes, the literature demonstrates convergence on the recognition that a more coherent conceptualisation and regulation of post-mortem dignity are required. However, a unified body of literature has yet to establish such a system under the term "post-mortem justice." Instead, what exists are a variety of philosophical arguments, human-rights doctrines, digital governance disputes, forensic standards and evidence related to conflicts in a parallel pattern, drawing toward the same normative void in European law.

3 METHODOLOGY AND RESEARCH METHODS

This article combines doctrinal analysis and a comparative approach to the treatment of dignity and justice post-mortem in European and international law. The methodology integrates: (i) a theoretical discussion based on the philosophical literature on human dignity[24] (e.g. Kantian ethics) and contemporary debates on posthumous interests;[25] (ii) a comparative analysis of national legislation on post-mortem data, digital heritage and the treatment of human remains;[26] (iii) an analysis of the case law of the European Court of Human Rights on exhumations, burial rights and the rights of relatives;[27] and (iv) a contextual analysis of mass graves in the Balkans and the digital circulation of images of the dead during the Russia-Ukraine conflict.

The study does not include interviews or empirical surveys; its method is hermeneutic and text-based. A major limitation is that most sources come from European jurisdictions, which limits universal generalisation. However, the results aim to demonstrate the existence of a normative gap and support the emergence of post-mortem justice as a principle of European law.

22 Yanti Dwi Astuti, Rahmah Attaymini and Maya Sandra Rosita Dewi, 'Digital Media and War: Social Media as a Propaganda Tool for the Russia-Ukraine Conflict in the Post-truth Era' (Advances in Social Science, Education and Humanities Research, Proceedings of the Annual International Conference on Social Science and Humanities (AICOSH 2022)) 19. doi:10.2991/978-2-494069-87-9_4.

23 *EUvsDisinfo* <https://euvsdisinfo.eu> accessed 25 September 2025; *DisinfoChronicle* <https://disinfo.detector.media > accessed 25 September 2025.

24 Kant (n 4).

25 Scarre (n 2).

26 Tienda Palop and Currás (n 3).

27 *Sabanchiyeva and Others v Russia* (n 11).

To ensure methodological transparency, the selection of jurisdictions (France, Germany, Lithuania, Slovenia, the United Kingdom and Moldova) followed cumulative criteria: normative diversity, relevance to post-mortem personality rights, and the presence of either strengthened protections or significant legislative gaps. The ECtHR cases were chosen for their explicit involvement in post-mortem dignity or in relatives' rights under Article 8 of the ECHR.[28] The analysis of Ukrainian digital materials was based exclusively on open-source content disseminated between 2022 and 2024 on publicly accessible Telegram channels. These materials were correlated with investigations carried out by NGOs, international media and OSINT researchers and were included only when they showed clear implications for post-mortem dignity in armed conflicts.

During the analysis of digital content from the war, ethical safeguards were applied. Only publicly available materials were examined, and no personally identifiable data of victims or their relatives was collected, stored, or analysed. Graphic content was reviewed with restrictive criteria and included only when necessary to illustrate models relevant to post-mortem dignity; materials that risked unnecessary exposure of victims were excluded. Authenticity was assessed using open-source verification methods, including correlation with NGO reports, international media investigations and OSINT repositories. No unreported illegal content was identified during the research process, and all analysed materials concerned events already documented by recognised investigative bodies.

By combining doctrinal, comparative and contextual analyses, the study tests normative concepts against concrete legal and technological realities and highlights structural divergences that may guide future harmonisation efforts at the EU level.

4 RESULTS AND DISCUSSIONS

4.1. Comparative Legal Frameworks on Post-mortem Dignity in the EU

The post-mortem status of individuals in EU law is a complex and evolving notion, particularly with respect to data protection, human dignity, and personal information. As for the dead, they have no explicit rights under GDPR, yet some EU Member States have introduced national rules to provide certain safeguards for post-mortem data. Finally, legal scholarship remains divided and unclear regarding the posthumous disposition of biometric data, digital legacy, and personal dignity.

28 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) art 8.

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4.2. Post-mortem Dignity in EU and National Legal Frameworks

For the sake of clarity, however, this study makes a distinction between civil jurisdictions like France, Germany, Ireland, Slovenia, Lithuania, and Moldova, which are codified civil-law jurisdictions where post-mortem rights are generally provided for in comprehensive statutory codes, and those countries that are unifying under common law principles, such as the UK, in this regard.

Such differences have implications for how all aspects of post-mortem dignity should be viewed. There are other contrasts within this divide. For example, post-Soviet legal systems in the sample display residual procedural features and drafting ambiguities identified in prior commentary; by contrast, Western European jurisdictions tend to articulate post-mortem issues within constitutional and ECtHR-informed frameworks. These historical, cultural, and procedural divergences show why a comparative framework is needed to capture how different European countries establish or preserve post-mortem dignity.

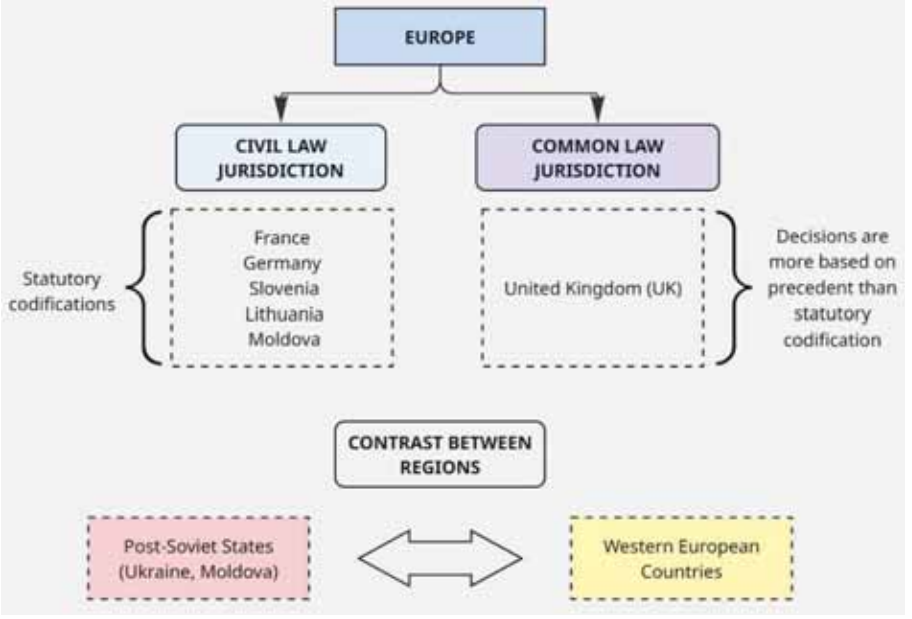

Figure 1. Comparative frameworks on post-mortem dignity[29]

The principle of human dignity is a cornerstone of EU law, enshrined in Article 1 of the Charter of Fundamental Rights of the European Union.[30] However, its scope is limited to the living, leaving unresolved whether dignity continues after death. This lacuna is reflected

29 Figure 1 is the authors' own elaboration.
30 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 1.

in the General Data Protection Regulation (GDPR), which explicitly excludes deceased persons (Recital 27),[31] leaving Member States to regulate posthumous data and digital identities. Recent analyses continue to underline the regulatory lacuna for deceased persons' data, despite limited national carve-outs.

While France grants individuals the right to determine the fate of their digital legacy through the 2016 Digital Republic Act,[32] Slovenia restricts the disclosure of posthumous data to heirs or research institutions, provided the deceased did not object to it in life.[33] By contrast, most Member States still lack clear legal frameworks, resulting in a fragmented landscape of protections. The absence of harmonisation is particularly visible in the treatment of biometric data, digital inheritance, and personal dignity after death.[34]

International human rights instruments, particularly the European Convention on Human Rights (ECHR), provide indirect protection. The European Court of Human Rights (ECtHR) has held that state actions concerning the dignity and memory of the dead may affect the rights of surviving relatives under Article 8 (private and family life). In *Sargsyan v. Azerbaijan*,[35] the Court recognised denial of access to family graves as a violation of Article 8,[36] while in *ML v. Slovakia*,[37] defamatory statements about the deceased were deemed to impact the privacy and reputation of relatives.[38] Similarly, end-of-life cases such as *Lambert v. France*[39] have reaffirmed that human dignity must be safeguarded irrespective of medical condition, including in states of persistent vegetative state (PVS).[40]

31 Regulation (EU) 2016/679 (n 12) recital 27.

32 Law of the French Republic No 2016-1321 of 7 October 2016 on Digital Republic 'Pour une République numérique' [2016] JORF 235 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033202746> accessed 25 September 2025.

33 Personal Data Protection Act of the Republic of Slovenia 'Zakon o varstvu osebnih podatkov' (ZVOP-1) [2004] Uradni list RS 86 (unofficial consolidated text no 5) <https://pisrs.si/pregledPredpisa?id=ZAKO3906> accessed 25 September 2025.

34 David Erdos, 'Dead Ringers? Legal Persons and the Deceased in European Data Protection Law' (2020) 40 Computer Law & Security Review 105495. doi:10.1016/j.clsr.2020.105495.

35 *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015) <https://hudoc.echr.coe.int/eng?i=001-155662> accessed 3 March 2025.

36 The ruling confirms that dignity after death may only be protected indirectly, via the rights of the living, revealing the doctrinal gap in EU law where no direct posthumous rights are articulated.

37 *ML v Slovakia* App no 34159/17 (ECtHR, 14 October 2021) <https://hudoc.echr.coe.int/eng?i=001-212150> accessed 3 March 2025.

38 This reinforces the point that European protection remains derivative and fragmented, dependent on family members' rights rather than a recognition of the deceased as rights-bearing subjects.

39 *Lambert and Others v France* App no 46043/14 (ECtHR, 5 June 2015) <https://hudoc.echr.coe.int/fre?i=001-155352> accessed 3 March 2025.

40 Persistent Vegetative State. It is a medical diagnosis that designates a condition in which a person is awake, but there are no signs of self-awareness or awareness of the environment. In the case law of the ECHR and other European courts, the term appears in cases concerning the right to life, human dignity and the right to a dignified death, for example, in cases related to the disconnection of the device or medical care in terminal situations.

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A key structural tension in the European framework concerns the intersection between Article 8 and Article 10 of the ECHR. Although the Court does not recognise autonomous rights of the deceased, the treatment of the body and the preservation of the deceased's memory fall within the scope of Article 8 through their impact on the dignity, emotional integrity and identity of surviving relatives. Conversely, the dissemination of images of deceased persons—whether through traditional media or digital platforms—engages freedom of expression and the public's right to information under Article 10, creating a conflict between privacy-based protection and press/public interest considerations.

Although originally developed for cases involving living claimants, these balancing criteria, by analogy, guide the Court's assessment of images of deceased persons when their dissemination affects the private life, cultural identity, or emotional integrity of surviving relatives.

In its landmark judgments *Axel Springer AG v. Germany*[41] and *Von Hannover v. Germany*,[42] the Court developed a set of balancing criteria that, although originally applied to living individuals, operate mutatis mutandis in post-mortem contexts. These include the contribution to a matter of public interest, the degree of identifiability, the circumstances in which the material was obtained, the claimant's prior conduct, and the severity of the interference with dignity. When applied to images of deceased persons—particularly graphic, decontextualised or propagandistic materials - these criteria demonstrate that the public interest alone cannot justify symbolic harm to dignity or emotional harm inflicted on surviving relatives. This confirms that post-mortem dignity receives functional protection through Article 8, even though the Convention does not explicitly regulate the dead.

The ECtHR has since developed an interpretative approach that does not explicitly translate to "post-mortem dignity," however, it recognises that the treatment of the dead remains legally relevant under the Convention. In consequence, the Court can neither recognise posthumous rights in an absolute sense (as the ECHR is based solely on the rights of those currently living). Nonetheless, its case law reflects a fairly consistent recognition that the process of a body being handled, identified, returned, or interred can affect an individual's posthumous dignity, through the rights, emotions, and cultural identity of all those who survive it.

Lambert v. France does not address post-mortem rights, but it is useful for reading the Court's conception of human dignity more broadly.[43] In such a case, the ECtHR addressed end-of-life questions regarding a patient in a persistent vegetative state and held that,

41 *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) <https://hudoc.echr.coe.int/fre?i=001-109034> accessed 3 March 2025.

42 *Von Hannover v Germany (No 2)* Apps nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) <https://hudoc.echr.coe.int/fre?i=001-109029> accessed 3 March 2025.

43 *Lambert and Others v France* (n 39).

irrespective of an individual's physical or cognitive status, human dignity must remain protected. Although the judgment concerns a living patient, its reasoning—that dignity must guide all humane treatment—suggests that this requirement does not simply vanish at the moment of death. *Sabanchiyeva and Others v. Russia is a clear example* where the authorities refused to take back a person's remains for burial and hid information about where this body lay.[44] The Court ruled this was illegal under Article 8, underlining family obligations, on grounds of personal, religious and cultural tradition, to bury their dead. The case demonstrates a basic tenet: the State's interference in human remains is not just an administrative or public order issue but also possibly a violation not only of the dignity of the dead but also of the living. By connecting the treatment of the deceased and the emotional and moral character of their relatives implicitly, the Court acknowledges that dignity does not simply vanish at the point of death.

Similar reasoning emerged in *Sargsyan v. Azerbaijan*, in which the Court found that preventing a family from accessing and maintaining graves in a conflict-affected territory violated Article 8. Graves are much more than just places to bury people; they are sites on which identity, continuity, and the enduring connection between living families and their dead members are secured.[45] For the living, therefore, denial of access means denial of the memories they have and their ability to honour the dead as well as to keep their cultural and spiritual connections. This is again consistent with the Court's position that respect for the dead, including their place of burial, is part of human dignity that is indirectly safeguarded by the rights of those left behind. Altogether, the current cases illustrate a common theme: the ECtHR protects post-mortem dignity by examining State behaviour in the context of human dignity, cultural identity, and the emotional integrity of the living. Even without specifically identifying Convention rights for the dead, the Court's case law makes clear that the disposal and handling of bodies, funerary customs and memorials have a legal and moral content. This body of case law lays down essential groundwork for acknowledging post-mortem dignity as a core value embedded within European human-rights standards. Also, it establishes the jurisprudence on the necessity of clearer, more harmonised protection in EU law.

This jurisprudence illustrates that the ECtHR treats post-mortem dignity as an extension of the rights of the living, especially in relation to family life and cultural or religious practices. The cases demonstrate a functional recognition of posthumous dignity, even if the Convention does not explicitly regulate the status of the deceased. This approach strengthens the argument that post-mortem dignity should be conceptualised as a protected value within European human rights law and supports the article's broader finding that the EU lacks a harmonised framework capable of reflecting the Court's evolving standards.

44 *Sabanchiyeva and Others v Russia* (n 11).

45 *Sargsyan v Azerbaijan* (n 35).

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In the UK, ecclesiastical law still requires episcopal faculty for exhumations in consecrated spaces,[46] while Northern Europe increasingly regulates burial through secular principles of equality and pluralism.[47] Islamic law, influential in Bosnia and elsewhere, forbids exhumation except where necessary to identify victims of mass atrocities,[48] reflecting the overlap of dignity, religion, and humanitarian necessity.

Across Europe, the trend is a gradual shift from ecclesiastical to civil responsibility for funeral and exhumation practices, with increasing emphasis on pluralism, equality, and human rights. Yet divergences remain wide, shaped by cultural traditions, historical experiences of dictatorship or conflict, and national attitudes towards privacy, dignity, and forensic truth-seeking.

At the national level, approaches remain diverse. In Ukraine, Article 239 of the Criminal Procedure Code outlines a clear procedure for exhumations, which requires prosecutorial authorisation and forensic supervision. In contrast, Moldova's vague terminology in criminal procedure hampers proper forensic practice.[49] Lithuania links exhumation rules to heritage and memory laws, mandating archaeological and forensic expertise, especially for remains from the Soviet era.[50] This case illustrates that national frameworks can ensure rigorous standards in forensic investigations, but the lack of EU-level rules leaves cross-border situations without consistent guarantees of post-mortem dignity.

4.3. Legal and Political Challenges in Establishing a Harmonised Framework

There has been growing awareness in European discussions that the legal status of the deceased, as far as the EU is concerned, needs clarification. This is especially important given the growing concerns between jurisdictions, particularly in the context of increased cross-border practices in burial, digital identity and forensic practice, as well as various forensic protocols and the need to clarify the legal status of dead persons. Human dignity, rooted in the constitutional traditions common to all EU Member States and expressly affirmed in the Treaties, finds clear normative expression in Article 1 of the Charter of

46 Rupert Bursell, 'Aspects of Burial and Exhumation' (2017) 19(2) Ecclesiastical Law Journal 169. doi:10.1017/S0956618X17000059.

47 Helena Nordh and others, 'Rules, Norms and Practices: A Comparative Study Exploring Disposal Practices and Facilities in Northern Europe' (2021) 88(1) OMEGA 171. doi:10.1177/00302228211042.

48 Julie Lefolle, 'Identification of the Dead Under Islamic Law and International Humanitarian Law: A Mini Review' (2022) 10(2) Malaysian Journal of Syariah and Law 38. doi:10.33102/mjsl.vol10no2.394.

49 Dinu Ostavciuc and Constantin Rusnac, 'Legislative, Doctrinal and Practical Challenges Regarding the Examination of the Body at the Scene in the Republic of Moldova' (2024) 18(2) AGORA International Journal of Juridical Sciences 124. doi:10.15837/aijjs.v18i2.6983.

50 Gediminas Petrauskas, Lijana Muradian and Augustina Kurilienė, 'Archaeology of Modern Conflict and Heritage Legislation in Lithuania During Thirty Years of Restored Independence' in Alex Hale and Thomas Kersting (eds), *New Challenges: Archaeological Heritage Management and the Archaeology of the 18th to 20th centuries* (Occasional Paper no 19, EAC 2024) 81. doi:10.11141/ia.66.13.

Fundamental Rights of the European Union. However, efforts to develop a uniform standard of protection at the EU level have encountered cultural, doctrinal and political resistance. This is a reminder that the legal determination of death, burial, and post-mortem identity under the sun and national sovereignty are interlinked with national, historical, and cultural identity. More often than not, therefore, dignity serves as a nominal constitutional value, not a real post-mortem right and its practical consequences are largely determined by domestic legal culture.[51]

In civil-law systems, personality rights extend to the deceased themselves, allowing relatives to preserve the deceased's honour, reputation, and image. French law, based on the principle of droits moraux, grants heirs the right to sue in instances of defamation, the abuse of an image, or assault on memory.[52] German jurisprudence goes even further: in the landmark Mephisto case, the Federal Constitutional Court also recognised a postmortales Persönlichkeitsrecht, thereby ensuring that dignity and reputation remain important legal rights even when weighed against freedom of expression.[53]

These examples show a robust national commitment to posthumous protection but also expose a lack of an equivalent EU-level mechanism. Common-law jurisdictions, by contrast, outright reject posthumous reputation and hold that personality rights extinguish at death. Under UK law, as demonstrated in the Defamation Act 2013[54], and in Common-Law jurisdictions, by contrast, reject the very idea of posthumous personality rights, holding that defamation, privacy, and reputation claims extinguish upon death. Under UK law, as clarified in *In re Kennedy* 2009UKHL 38,[55] where the House of Lords reaffirmed that Article 8 ECHR does not extend to the reputation or privacy of a deceased person, no action can be brought to protect the dignity or reputation of the dead. Thus, unlike many civil law systems, the UK provides no posthumous legal protection for reputation. This structural schism between civil and common law represents the key structural obstacle to achieving a harmonised approach at the EU level.

In post-Soviet states, the regulation of the treatment of deceased persons belongs mainly to the sphere of criminal procedure, not to an autonomous regime of "post-mortem dignity".[56]

51 George P Smith, '"Dignity in Living and in Dying": The Henry H H Remak Memorial Lecture' (2018) 25(1) Indiana Journal of Global Legal Studies 413.

52 Thierry Vansweevelt and Lana Bubalo, 'Post-mortal Protection of the Right to Reputation: A Comparative View' (2019) 10 Journal of European Tort Law 1. doi:10.1515/jetl-2019-0101.

53 *Mephisto Case* BVerfGE 30, 173 [1971] Federal Constitutional Court (First Division) <https://www.quimbee.com/cases/mephisto-case> accessed 14 March 2025.

54 Defamation Act 2013 (UK), Explanatory Notes <https://www.legislation.gov.uk/ukpga/2013/26/notes/division/5?view=plain> accessed 14 March 2025.

55 *R v Kennedy* (No 2) [2007] UKHL 38 <https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/kenny-1.htm> accessed 14 March 2025.

56 Jairo Enrique Lucero Pantoja, 'El juez multinivel y la transversalidad de garantías: Un acercamiento a los escenarios fácticos en América y Europa' (2021) 20(41) Opinión Jurídica 71. doi:10.22395/ojum.v20n41a2.

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Ukraine, the clearest normative model, contains detailed provisions in its Code of Criminal Procedure on exhumation, examination of the corpse, identification of persons, and handling of biological evidence. Exhumation can be ordered only by order of the prosecutor or by the conclusion of the criminal investigation body, and the operations must be carried out by a certified specialist, with complete forensic documentation. As a result, the treatment of human remains is predictable and highly formalised, as it is the measure authorised by the criminal investigation bodies.[57]

Moldova, on the other hand, does not have equally clear procedural norms: national legislation responds to general terms regarding the examination of the corpse, without establishing explicit procedures for exhumation, authorisation criteria, documentation standards or institutional institutions. This lack of detail creates practical uncertainty, leaving forensic work dependent on divergent interpretations by police and prosecutors.[58]

In Lithuania, legislation adopted after 1990 reflects the role of historical memory in the treatment of human remains. The contemporary cultural heritage regime combines archaeological norms with criminal requirements, establishing clear procedures for the discovery, investigation and protection of graves from the period of modern conflicts. The Lithuanian system thus recognises an interdependence between criminal investigation, heritage protection and respect for collective memory.[59] These differences reflect deep historical and institutional legacies that underscore the difficulty of creating a unified European framework.

Such divergences are not incidental but stem from deeper structural, historical and cultural determinants. Civil law systems, such as France, Germany, or Lithuania, tend to theorise personal rights as innate and continuous, a principle derived from constitutional declarations regarding human dignity and codified private law protections. In contrast, common law jurisdictions generally define reputation to be strictly individual and life-related, guided by the adversarial model and the principle that torts do not survive the person. Post-Soviet places like Ukraine and Moldova remain shaped by decades of procedural formalism and the shadow of state-controlled checks, which makes their emphasis on exhumation a matter of criminal procedure, rather than a rights-based inquiry, all the more revealing. Religious traditions are important: Orthodox, Catholic, and Islamic funerary practices still form national rules concerning exhumation, the disposal of the remains, and the conduct of commemorative ceremonies. Finally, the EU's limited competence (Article 167 TFEU)[60] underpins these conflicts, with coherence largely relying on soft-law instruments rather than hard law. In combination, these matters explain why European states provide varying and, sometimes, incompatible models of post-mortem protection.

57 Criminal Procedure Code of Ukraine No 4651-VI of 13 April 2012 (amended 1 August 2025) art 239 <https://zakon.rada.gov.ua/laws/show/4651-17#top> accessed 22 September 2025.

58 Ostavciuc and Rusnac (n 49).

59 Petrauskas, Muradian and Kurilienė (n 50).

60 Treaty on the Functioning of the European Union (TFEU) (Consolidated version) [2012] OJ C 326/47, art 167.

Digitalisation has further widened these disparities. Online profiles, biometric identifiers, and platform-stored data persist after death, raising concerns about a "post-mortem privacy" that current European law does not adequately address. GDPR explicitly excludes deceased persons from its scope (Recital 27)[61] while simultaneously allowing Member States to balance data protection with freedom of expression through dedicated derogations (Article 85 GDPR).[62] This dual structure leaves significant regulatory gaps in the protection of post-mortem digital identities.

Highlighted instances, such as In *re Ellsworth,*[63] demonstrate how service providers could deny families access to family reports of deceased relatives, placing the commercial provisions of the contract before personal dignity or family interests.[64] Researchers contend that these challenges require a new mode of regulation, comparing it to the end-of-life instrument, such as living wills, which combine technical, contractual, and moral features to ensure dignity.[65]

Despite increasing awareness of these challenges, competence within the EU remains limited. And yet, under Article 167 TFEU, any policy regarding cultural identity, burial practices, and memorialization is effectively subject to state jurisdiction. This is because hard-law harmonisation is infeasible, and EU action is more likely to be pursued through soft-law instruments: judicial cooperation, ethical guidelines, and interpretative principles based on ECHR case law. Philosophical and legal scholarship is increasingly looking askance at the notion that dignity ends at death. Notions such as "reputational afterlives" or "novel personae" describe how a person's identity and reputation continue to be reconstructed and have effects after death.[66] In the absence of binding harmonisation, these discourses reinforce the normative call for clear and consistent standards.

4.4. Digital Inheritance and Post-mortem Image Rights in the EU

Today's digital platforms and social media networks are among the most widely used tools in modern armed conflicts, increasing civilian resilience and influencing military strategies in various ways.

Microsoft, Amazon Web Services (AWS), and Starlink provide essential infrastructure, such as cloud storage, artificial intelligence, and machine learning, enabling nations to conduct

61 Regulation (EU) 2016/679 (n 12) art 17, recital 27.

62 ibid, art 85 ("Processing and freedom of expression and information").

63 *Estate of Ellsworth* (n 16).

64 Nora Hertz, 'The Right to Freedom of Thought in German' in Roger Shiner and Patrick O'Callaghan (eds), *The Cambridge Handbook of the Right to Freedom of Thought* (CUP 2025) 112. doi:10.1017/9781009539616.013.

65 Theodore Raymond Leblang, 'Death with Dignity: A Tripartite Legal Response' (1978) 2(1-2) Death Education 173. doi:10.1080/07481187808253305.

66 Céline Romainville, 'The Multidimensionality of Cultural Policies Tested by EU Law' in Céline Romainville (ed), *European Law and Cultural Policies = Droit Européen et Politiques Culturelles* (Europe of Cultures vol 12, Peter Lang 2015) 19.

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intelligence operations and deploy digital weapons. Starlink's satellite internet services were essential for communication during the conflict in Ukraine and sparked protests against corporate power when they were disrupted, even briefly.[67]

Social media has become a strong tool for propaganda and disinformation. The identities and images of the deceased, whether we are talking about combatants or other vulnerable groups among civilians, are used to manipulate public opinion.

Unfortunately, the use of the identities of those who have died goes beyond photographs and includes personal details. Different names, fabricated information, or half-truths about the deceased have been shared on messaging apps such as Telegram and VK, which operate in an almost entirely uncensored grey area.

These practices raise legal and ethical concerns about posthumous rights to privacy and dignity. Although international legal frameworks, such as the UN Guiding Principles on Business and Human Rights, emphasise the obligation of digital platforms to mitigate misuse, implementation often remains inadequate.[68]

In that context, the UN Guiding Principles on Business and Human Rights (UNGPs)[69] set forth obligations for technology companies to act in ways that do not harm people's lives, including users of their personal data and human images (including those of deceased persons). Principle 11 sets out that business has an independent duty to respect human rights, and extends to avoiding practices that degrade the dignity of the dead or expose families to secondary victimisation. Principles 13 and 17 highlight the responsibility of digital platforms to prevent, mitigate and address the human-rights impacts caused by services, such as uploading violent images to their feed, misuse of biometric data or manipulated content involving deceased persons. Principle 23 also mandates that enterprises operating in conflict-affected environments be subject to greater due diligence, and this is particularly the case in the context of the Russia-Ukraine conflict, where content involving the dead is often disseminated for propaganda or intimidation. Taken together, this set of principles provides an authoritative background and normative framework for a corporate responsibility perspective on post-mortem dignity preservation in the digital landscape.

The EU General Data Protection Regulation (GDPR) and its indirect approach to the misuse of personal data for deceased individuals remain open to interpretation.

67 Guarascio, Coveri and Cozza (n 19).

68 Buitelaar (n 14).

69 UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN 2011) principles 11, 13, 17, 23.

4.5. Post-mortem Rights in the Context of Digital Assets

Post-mortem rights refer to legal protection and rights that extend to a deceased person, protecting aspects of their identity, reputation and personal data after death. These rights cover various areas, including dignity, privacy and the right to control the commercial use of one's own image or likeness, often referred to as the right of publicity.[70]

The "right to be forgotten" is a central component of EU data protection law and is codified in Article 17 of the General Data Protection Regulation (GDPR). It allows individuals to request the deletion of their personal data when it is no longer necessary, when consent has been withdrawn, or when data has been processed unlawfully. Although the GDPR excludes deceased persons from its scope (Recital 27), the logic of Article 17 remains relevant for post-mortem digital legacies: it establishes a normative expectation that personal data should not persist indefinitely without justification. Several Member States, such as France and Spain, have introduced posthumous data-management rights through national legislation, allowing individuals to set instructions for their data after death or enabling relatives to request access to or erasure of their data under specific conditions.[71]

Informed consent, another fundamental principle of European data protection law, obliges that persons must know and willingly consent to how their personal data can be collected, used, or shared. Under the GDPR (Articles 4 and 7), consent must be specific, freely given and based on clear information. However, informed consent cannot be obtained after death, which raises ethical problems when digital platforms persist in collecting, analysing, or exploiting the data of deceased persons. This limitation is especially severe when the personal images, biometric identifiers, or behavioural data of the deceased are reused in algorithmic training, in memorialisation services, or in AI-generated content. The absence of post-mortem consent obligations at the EU level highlights a regulatory gap that exposes digital remains to potential misuse.[72]

Digital assets, such as social media profiles, emails, photo and video recordings, and cloud storage accounts, constitute sensitive personal data held by private actors with different post-mortem management policies.

Social networks, such as Facebook and Email providers, have introduced post-mortem data monitoring features, *for instance*, Facebook's Legacy Contact and Google's Inactive Account

70 Katie Townsend, 'Raising the Dead: Understanding Post-Mortem Rights of Publicity' (*Documentary*, 2 April 2022) <https://www.documentary.org/column/raising-dead-understanding-post-mortem-rights-publicity> accessed 14 March 2025.

71 Regulation (EU) 2016/679 (n 12) art 17, recital 27.

72 ibid, arts 4, 6, 7; see also art 9 on special categories of data.

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Manager. However, the informational shortcomings of these platforms are evident, with many users unaware of these options.[73]

Yahoo[74] has one of the strictest rules governing post-mortem data among large digital service providers. Its terms of service state explicitly that user accounts are non-transferable and that all rights to the content stored in an account are terminated upon death. This means families are generally unable to access emails, cloud storage, or personal files held by a deceased user, regardless of kinship or inheritance rights. This rigid contractual model has been widely criticised for disregarding both the dignity of the deceased and the legitimate interests of relatives who may require access for emotional, administrative, or legal reasons. Yahoo's policy is an example of how contractual language can effectively override broader ethical considerations about digital legacy and post-mortem privacy.

Facebook takes a more open approach to allowing users to designate a"Legacy Contact" or request that a profile be memorialised.[75] But heirs who lack prior instructions regarding access have faced significant legal challenges, especially in the context of inheritance law. A landmark judgment of the German Federal Court of Justice (Bundesgerichtshof) ruled that heirs have the right to view the complete Facebook account of a deceased minor, applying inheritance law to digital assets in the same way as to physical property.[76] The Court noted that while contractual privacy provisions cannot suppress statutory inheritance rights, it was essential to gain access to the account as the legacy of the deceased and clarification of what occurred in the case of the deceased. This decision has emerged as a focal point for European debates concerning digital inheritance and post-mortem data rights.

The risks of mismanagement are compounded by the increasing use of deceased people's data in artificial intelligence algorithms. These practices could perpetuate the misuse of sensitive information, which calls for transparency in data collection by digital platforms and the provision of safeguards to secure personal data.[77]

The European Union addresses data security through the GDPR, but limiting it almost exclusively to living personalities raises legal and ethical concerns. Some EU Member States, such as France and Spain, have taken steps to extend protection to post-mortem data as well.[78]

73 Lilian Edwards and Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Entertainment Law Journal 101. doi:10.2139/ssrn.2267388.

74 'Yahoo Terms of Service' (*Yahoo!*, 28 October 2025) <https://legal.yahoo.com/in/en/yahoo/terms/otos/index.html> accessed 23 November 2025.

75 'How to Add, Change, or Remove your "Legacy Contact" on Facebook' (*Roulet Law Firm PA*, 2025) <https://www.rouletlaw.com/blog/how-to-add-change-or-remove-your-legacy-contact-on-facebook.cfm> accessed 23 November 2025.

76 Case III ZR 183/17 (BGH, 12 July 2018) <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1> accessed 23 November 2025.

77 Erdos (n 34).

78 Harbinja (n 13).

Article 85 of the French Data Protection Act (Loi Informatique et Libertés) allows individuals to establish instructions for the management of their personal data after death, including the designation of a person empowered to execute them or the indication of general directives regarding the retention, deletion or transmission of data. These instructions are legally binding on digital service providers, who must ensure their implementation after the account holder's death.[79]

Spain's approach is set out in its national data protection law, Organic Law 3/2018 on the Protection of Personal Data and the Guarantee of Digital Rights. The law grants family members the right to request access to or erasure of the deceased's personal data, provided that this does not violate the deceased's instructions or the privacy of others.[80]

Advocates of post-mortem digital rights argue that such protection is increasingly necessary in the digital age. Individuals should be free to decide how their "digital assets" will be treated after death, including data security, privacy and the right to be forgotten online.

4.5.1. Digital Risks: Data Misuse, Disinformation and Propaganda

The misuse of biometric data, such as facial recognition from photographs of deceased people, poses risks. Advanced technologies can extract and analyse biometric identifiers from digital images, allowing unauthorised use for propaganda or disinformation campaigns.

Biometric data of deceased persons can be exploited in several unethical ways:[81]

- Data used without consent for commercial exploitation or targeted advertising;
- Misappropriation of biometric data for fraud or identity theft;
- Use of biometric profiles of deceased persons for political manipulation.

Post-mortem privacy protections depend primarily on platform terms of service, which may not align with family interests or national succession/data rules.

Those agreements, nearly always unspoken, can reveal sensitive data of dead users, especially young adults who die without a will. Major services like Facebook will continue to "memorialise" profiles, while others, such as Dropbox, require proof of death and legal

79 Law of the French Republic No 78-17 of 6 January 1978 On Information Technology, Data Files and Civil Liberties 'Relative à l'informatique, aux fichiers et aux libertés' (amended 12 December 2018) art 85 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000886460> accessed 25 September 2025.

80 Nuria Martínez Martínez, 'Reflexiones en torno a la protección post mortem de los datos personales y la gestión de la transmisión mortis causa del patrimonio digital tras la aprobación de la LOPDGDD' (2019) 39 Derecho Privado y Constitución 169. doi:10.18042/cepc/dpc.35.05.

81 Daria Bulgakova and Valentyna Bulgakova, 'The Recognition of the Deceased Biometric Data under Personal Non-Property Rights in Terms of the General Data Protection Regulation' (2023) 1 Bulletin of the Penitentiary association of Ukraine 22. doi:10.34015/2523-4552.2023.1.03.

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rights, and Google will need a court order. A lack of uniform legislation further contributes to the divergence in handling and recoverability of digital accounts following death.[82]

The rise of digital identity and post-mortem technologies, *including Delaware trustees' access* to the digital remnants of a deceased person as provided by state law, demonstrates how probate law is evolving. However, trends such as "griefbots"—AI programs designed to recreate dead loved ones from biometric and behavioural data—pose new challenges.[83]

Yet, while some legal systems cautiously recognise digital inheritance, the rapid development of AI-driven tools simultaneously exposes post-mortem data to manipulation and misuse, blurring the line between commemoration and exploitation.

Altered visual images or invented biometrics could be employed in disinformation or discreditation campaigns to manipulate public opinion or provoke a fight. Such abuse exploits the lack of regulation in spaces like Telegram or other similar platforms, and it is a disrespect to the deceased.

The Vietnam War is a historical example where the power of death representations clearly influenced public opinion. Photographs like those from the My Lai massacre became potent icons, and they were typically accompanied by specific stories as campaign fodder to confront government policy choices and persuade opposition.[84] Graphic images of the massacre sparked protests on a large scale in the U.S., including the 1969 Moratorium March to end the Vietnam War, which saw crowds estimated as high as hundreds of thousands descending on Washington, DC.[85]

Furthermore, photo/video recordings of the My Lai massacre generated military trials, including the court-martial of Lieutenant William Calley, who was found guilty and convicted for his role in the killings, although his sentence was later reduced.[86]

In Der Massenwahn, Baschwitz examines the World War I propaganda surrounding the so-called German Corpse Factory, a set of stories aimed at dehumanising enemies and mobilising public sentiment through shocking but false information, and highlights the

82 Natasha Chu, 'Protecting Privacy after Death' (2015) 13(2) Northwestern Journal of Technology and Intellectual Property 255.

83 Frédérick Bruneault, Andréane Sabourin Laflamme and Bart FW Wernaart, 'The Privacy of the Dead' in Bart Wernaart (ed), *Applied Human Rights* (Wageningen Academic 2023) 185. doi:10.3920/978-90-8686-943-5_12.

84 Tal Morse, 'Shooting the Dead: Images of Death, Inclusion and Exclusion in the Israeli Press' in Michele Aaron (ed), *Envisaging Death: Visual Culture and Dying* (Cambridge Scholars Publishing 2013) 140.

85 David Isaacs, 'Power of Visual Images' (2016) 52(9) Journal of Paediatrics and Child Health 859. doi:10.1111/jpc.13330.

86 Marcel Berni, 'Excessive Violence in a War Without Fronts: Explaining Atrocities in South Vietnam (1965-1973)' in Deborah Mayersen (ed), *Genocide and Mass Violence in Asia* (De Gruyter 2019) 117. doi:10.1515/9783110659054-007.

psychological appeal of such propaganda, rooted in the need to see one's own group as noble and the enemy as evil.[87]

These tactics persist in modern digital contexts, where visual media of deceased people are manipulated to spread misinformation, inflame emotions and deepen social divisions.

4.6. Post-mortem Justice in Contexts of Crisis: The Impact of European and International Public Law on Managing Mass Graves[88]

Mass graves are a recurrent feature of armed conflict, atrocity, pandemics, and disasters with documented legal and ethical implications. Such burials raise difficult legal, moral, and human dignity issues with far-reaching implications for the management responsible for them and the applicable law.

All these concerns should be taken up with a sophisticated understanding of the legal, cultural, and ethical ramifications associated with finding, exhuming, and managing mass graves.

In fact, mass grave management is an issue in several modern circumstances, including war crime investigations, humanitarian responses, and natural disasters. The management of these sites is a practical problem, but also an issue of worth in the larger social sphere. States are forced to balance the respect and dignity of the deceased with evidence related to judicial proceedings.[89]

4.6.1. Historical Context

Mass burial has been used throughout time as a practical means of public health rather than as a matter of dignity. From the Peloponnesian War to the Black Death, there were large-scale battles and mass burials; corpses were often buried in pits without any form of ceremony or markers.[90]

87 Jaap van Ginneken, 'First Book: On Mass Propaganda and Enemy Images' in Jaap van Ginneken, *Kurt Baschwitz: A Pioneer of Communication Studies and Social Psychology* (Routledge 2018) 93. https://doi.org/10.5117/9789462986046_CH04.

88 Ana Morari (Bayraktar) and Andreea-Nicoleta Dragomir, 'Preserving Human Dignity: The Impact of European and International Public Law on Managing Mass Graves' (International Scientific Research Congress: Congress Book, Istanbul, 20-21 December 2024) 65.

89 Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology* (Springer 2019). doi:10.1007/978-3-030-32926-6.

90 Monica H Green, 'Editor's Introduction to Pandemic Disease in the Medieval World: Rethinking the Black Death' (2014) 1(1) The Medieval Globe 3 <https://scholarworks.wmich.edu/tmg/vol1/iss1/3> accessed 24 August 2025.

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These actions stood in contrast to international humanitarian law developments, especially post-Nuremberg (1945–46), that prosecuted mass atrocity crimes and established principles of accountability, such as refuting the "they were just following orders" defence. The legal precedents that emerged formed the basis of the Geneva Conventions, which most of the world's nations signed and which set forth what we owe to war's dead and missing: an obligation to identify them, preserve evidence about who they were and how they died, and ensure their interment with dignity.[91]

Mass graves are still very relevant in modern Europe. In the wake of the conflicts in former Yugoslavia, Bosnia and Herzegovina's Missing Persons Institute has recorded almost 25,000 exhumations from over 1,600 mass graves between 1996 and 2020; findings are expected to continue up until at least 2023 in towns such as Prijedor, Srebrenica, and Foča.[92] The work, backed by international collaboration, uses state-of-the-art forensic techniques to bring answers to families and preserve their right to the truth.

Mass graves as proof of atrocity have entered the collective memory again with the war in Ukraine. Hundreds of civilians were discovered in the town of Bucha in April 2022, many with signs of execution and torture, while more than 440 bodies were found at Izium, Kharkiv oblast, in September 2022. Ukrainian and foreign forensic teams are documenting these sites using DNA tests and geospatial imagery, not just to identify victims but also to build a case for potential prosecutions before international courts.

These incidents illustrate the evidentiary and humanitarian roles of exhumations in accountability processes.

4.6.2. Technological Advancements and Cultural Sensitivities

Management and conservation of mass graves, therefore, need to achieve a balance between treating the dignity of the dead on one hand and the pursuit of justice/cultural considerations on the other. Advances in technology and changes in forensics have greatly improved the possibility of investigating mass graves and identifying individuals. These efforts will have to be considered in the light of a deep understanding of the culture and religious beliefs of the related communities, lest more suffering is imposed on them, and to ensure that their dignity after death is preserved.

Respecting the dignity of the deceased is essential not only for honouring cultural and religious customs and providing families with emotional closure, but also for

91 IM Lobo de Souza, 'Nuremberg's Enduring Legacy to International Justice' (2022) 13(2) Journal of International Humanitarian Legal Studies 222. doi:10.1163/18781527-bja10054.

92 'BIRN Publishes New Mass Graves Data from Bosnian War' (*Balkan Investigative Reporting Network*, 4 May 2023) <https://balkaninsight.com/2023/05/04/birn-publishes-new-mass-graves-data-from-bosnian-war> accessed 24 August 2025.

safeguarding public health, enabling legal and forensic processes, and supporting societal justice and healing.

Municipal cemetery systems in countries, such as the UK, are reasonably transparent and accountable to the public. Burial policies, taxation, and maintenance ultimately lie at the discretion of local councils, to whom they are responsible through the ratepayers. Comparable democratising processes may not be present where the normal provision is through Church-controlled cemeteries, which could create inequalities in both access and decision-making.[93]

It remains challenging to include ethnic and religious diversity in funeral practices globally. The Swiss decisions at the cantonal level regarding sites for Muslim burials are localised strategies that attempt to balance national secular imperatives and community needs, exemplifying the crucial role of inclusive governance in cemetery systems.[94]

In the context of mass burials, effective cemetery management techniques would provide valuable lessons for balancing justice and human dignity. Even in instances of mass graves, the systems need to be in a place that can pay respect to those buried and meet societal expectations through good governance with transparency, cultural sensitivity, and democratic accountability.

In the context of mass grave identification, it can be very challenging to refer to burial customs and respect for human dignity when attempting to reach an almost impossible "compromise" among many cultures, religions, and points of view. The employment of cutting-edge technologies in the identification and discovery of remains has alleviated these issues, but some people still believe that these techniques infringe on the right to the "rest of the soul."

For instance, the exhumation of mass graves in remote indigenous villages occasionally conflicted with Mayan beliefs concerning upsetting the dead when they were discovered in the wake of the Guatemalan civil war.[95] Before exhumations could take place, customary rites had to be performed to placate spirits and honour local traditions. The Maori people of New Zealand view graves as sacred, or "tapu" (sacred and protected). There has been resistance to scientific attempts to exhume the remains for research, including DNA analysis.[96]

93 Julie Rugg, 'Social Justice and Cemetery Systems' (2020) 46(4) Death Studies 861. doi:10.1080/07481187.2020.1776791.

94 Khadija Kadrouch Outmany, 'Religion at the Cemetery: Islamic Burials in the Netherlands and Belgium' (2016) 10(1) Contemporary Islam 87. doi:10.1007/s11562-015-0341-3.

95 Bambury Brent, 'Investigators Work to Identify Victims of Guatemala's Civil War, 21 Years After It Ended' (*CBC Radio*, 15 December 2017) <https://www.cbc.ca/radio/day6/investigators-work-to-identify-victims-of-guatemala-s-civil-war-21-years-after-it-ended-1.4444431> accessed 25 September 2025.

96 Beatrice Hudson, 'Variation and Process: The History, Current Practice and Future Potential of Mortuary Archaeology in Aotearoa New Zealand' (2020) 129(2) Journal of the Polynesian Society 125.

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However, the performance of advanced technologies in the process of safeguarding and uncovering mass graves must not be overlooked.

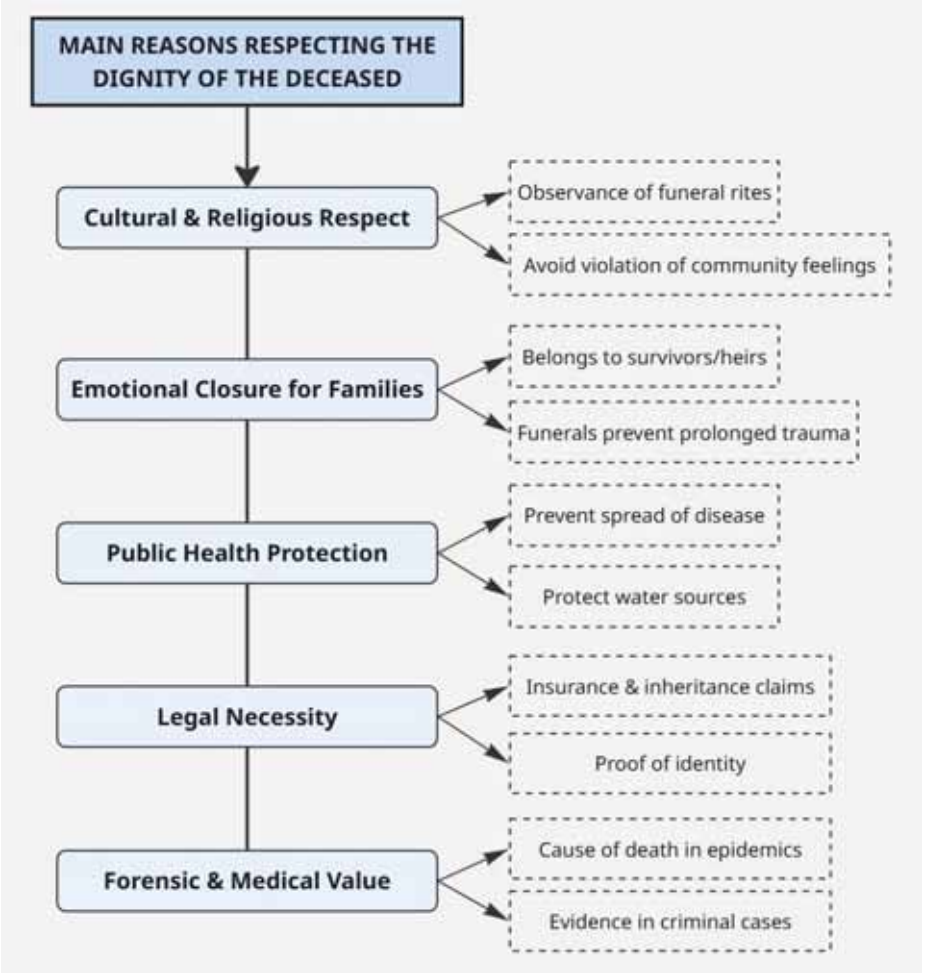

Figure 2. Main reasons for respecting the dignity of the deceased[97]

4.6.3 Forensic technologies in mass grave investigations

The application of forensic tools, including DNA testing, increases the ability to identify victims and ensure accountability. However, these approaches raise important ethical issues regarding confidentiality and consent, as genetic information about family members is particularly sensitive and should be protected from misuse. Meanwhile, cultural and religious

97 Figure 2 is the authors' own elaboration.

customs related to burial will discourage intrusive operations, such as DNA sampling, on grounds of indignity to the deceased, requiring a respectful and open approach.[98]

Ethical dilemmas arise when there is a kinship mismatch. For example, identification becomes more complex and often requires additional DNA samples when it is ascertained that a claimed family member is not biologically related. This places investigators in a challenging position where they must decide whether to reveal private information or save families from suffering.[99]

Informed consent is critical in solving this problem. Families should be informed about possible IFs and their consequences from the very start so that they can decide whether to participate. But equity does not come with consent alone. Policies must ensure fair access to the benefits of identification, such as justice and closure, and minimise risks by improving DNA techniques.

With the assistance of the Croatian government, which provided access to state-of-the-art technologies and DNA analysis, forensic investigations at Ovcara identified 184 victims.[100] In contrast, identifications at Srebrenica were complicated by scattered and altered graves; as of 2003, only 700 of the 7,500 deaths had been identified. The ICTY's[101] decisions to focus on proving patterns of genocide rather than individual identifications frustrated survivors, who again saw a conflict between legal aims and family needs.[102]

The management of mass graves is successful when governments, forensic practitioners and families of the deceased work closely together. Such cooperation will not only bring accountability and transparency to the management of systemic violence but will also support human dignity and aid in the healing process of affected communities.

DNA testing continues to be the primary method of identification and a tool for attributing responsibility for mass graves. However, it is increasingly being replaced by

98 Luciana Caenazzo, Pamela Tozzo and Daniele Rodriguez, 'Ethical Issues in DNA Identification of Human Biological Material from Mass Disasters' (2013) 28(4) Prehospital and Disaster Medicine 393. doi:10.1017/S1049023X1300040X.

99 Lisa S Parker, Alex John London and Jay D Aronson, 'Incidental Findings in the Use of DNA to Identify Human Remains: An Ethical Assessment' (2013) 7(2) Forensic Science International: Genetics 221. doi:10.1016/j.fsigen.2012.10.002.

100 Helena Ekštajn, Ivana Kružić and Željana Bašić, 'Forensic Investigation of a Mass Grave at Ovčara, Near Vukovar, of Victims Killed by the Serbian Army in 1991' (2021) 2 St Open 1. doi:10.48188/so.2.3.

101 International Criminal Tribunal for the former Yugoslavia. It operated from 1993 to 2017, established by the UN Security Council to try war crimes, crimes against humanity, and genocide committed in the territory of the former Yugoslavia. The implication is that the tribunal focused on proving patterns of genocide rather than on identifying individual victims, which created tensions with the needs of families who wanted recognition and identification of missing loved ones.

102 Kweku Vanderpuye and Christopher Mitchell, 'Lessons Learned from the Use of DNA Evidence in Srebrenica-related Trials at the ICTY' in Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (OUP 2020) 209. doi:10.1093/oso/9780198862956.003.0013.

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modern tools, such as satellite imagery and remote sensing. These techniques allow for the search for burial sites and the recording of violations, even in locations that would otherwise be inaccessible or in active conflict.

In this regard, remote sensing applications, such as hyperspectral imaging, enable researchers to identify negative changes in soil and vegetation that may result from unmarked mass graves. By detecting faint spectral fingerprints associated with disturbed soil or human remains, these technologies complement forensic investigations, providing critical assistance in the search for truth and justice. For example, experimental studies have shown discrepancies in electromagnetic radiation reflected at grave sites compared to undisrupted landscapes. These technologies provide objective evidence and may be used in situations where denying the presence of mass graves is an issue, which has happened in conflicts in Guatemala, Iraq, and Rwanda.[103]

This has very serious implications for people's right to privacy when satellite images are used to monitor private areas in conflict zones. For instance, monitoring civilian shelters, places of worship, or refugee camps without permission might violate the autonomy and dignity of the individuals being watched.

This issue has been addressed by the International Criminal Court, highlighting the need for collaboration between local authorities and forces investigating war crimes and their consequences. Practical challenges, however, include the expensive and scarce availability of adequate high-resolution photographs, often collected by for-profit companies that have limited financial incentive to collect data in atrocity-prone areas; similarly, the ICC relies heavily on external analysts such as Human Rights Watch and Amnesty International, which have limited resources and may have objectives that are inconsistent with the needs of legal evidence. Remote-sensing techniques are far from professionalised and standardised, and judges often lack the technical knowledge to evaluate geospatial evidence.[104]

These challenges involve taking measures to ensure the admissibility, reliability, and probative value of satellite evidence: developing standard forensic practices, maintaining a chain of custody, and educating the legal expert on how to understand and evaluate geospatial analysis. If satellite images are to be used appropriately in courts, judges must be knowledgeable about their technological underpinning.

103 Margaret Kalacska and others, 'The Application of Remote Sensing for Detecting Mass Graves: An Experimental Animal Case Study from Costa Rica' (2009) 54(1) Journal of Forensic Sciences 159. doi:10.1111/j.1556-4029.2008.00938.x.

104 Patrick Kroker, 'Satellite Imagery as Evidence for International Crimes' (*Coalition for the International Criminal Court*, 23 April 2015) <https://www.coalitionfortheicc.org/news/20150423/satellite-imagery-evidence-international-crimes> accessed 24 August 2025.

4.6.4 Comparative Table of Post-Mortem Rights in Selected Jurisdictions

To facilitate cross-jurisdictional comparison and ensure analytical transparency, the following table summarises key elements of post-mortem protection across the jurisdictions examined: scope and nature of post-mortem rights, duration of protection, standing to bring claims, available remedies and relevant legal practices.

Table 1 summarises the substantive scope of post-mortem protection across the selected jurisdictions, including recognised rights, duration of protection and relevant national practices. The table shows a deeply uneven European landscape in terms of the recognition and protection of post-mortem rights. Five major conclusions emerge from the comparative analysis:

i. Latin and Germanic models offer the strongest post-mortem protection. France, Germany, and Lithuania explicitly recognise dignity, image, name, or personality rights after death, thereby creating legal continuity between the rights of the living person and the protection of memory after death.

ii. Post-Soviet states retain an orientation towards the protection of reputation and the role of the family. In Moldova (and similarly in Ukraine), post-mortem rights are based on "honour, dignity and reputation," reflecting the Eastern European legal tradition and the strong role of the family as a procedural holder.

iii. Common law remains the most restrictive: the United Kingdom does not recognise any post-death personality rights, relying on indirect protections through relatives. This produces the largest normative gap in Europe regarding post-mortem dignity.

iv. The duration of protection varies significantly. From unlimited protection in Lithuania to 10 years for honour in Germany, the differences demonstrate the lack of a common European vision on post-mortem memory and identity.

v. Digital practices are the most divergent: France is the only state in the table that explicitly regulates "digital post-mortem directives" (Art. 85 LIL), whereas other states lack equivalent mechanisms.

These findings highlight the need for greater harmonisation across the EU in governing digital identity after death.

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***Table* 1. Comparative table. Substantive post-mortem rights and duration of protection**

Jurisdiction	Recognised post-mortem rights	Duration of protection	Relevant practices/notes
France	Memory, dignity, name, image[105]	Not fixed	Digital directives allowed under Art. 85 LIL[106]
Germany	General personality right (post-mortem)[107]	~10 years (honour), memory longer	Strong jurisprudence on image rights
Lithuania	Dignity, honour, image, privacy[108]	No limit	The Civil Code is explicit on the post-mortem image
Slovenia	Dignity, privacy (constitutional)[109]	Not fixed	Constitutional protection applies to the deceased
United Kingdom	No post-mortem personality rights[110]	—	Only indirect protections via relatives
Moldova	Honour, dignity, reputation[111]	Not fixed	Post-Soviet model, strong family rights

As Figure 3 shows, procedural safeguards for post-mortem rights vary considerably from country to country, particularly regarding who has standing and what remedies are available. Applicable under civil law, jurisdictions such as France, Germany, Lithuania and Moldova have the broadest standing, allowing, in most cases, spouses, children, parents and heirs to act in defence of the dignity, honour, or image of the deceased. These systems also provide for a range of remedies—such as injunctions, removal of illegal content, corrective measures and damages—which reflect a substantial recognition of

105 Scarre (n 2); Law of the French Republic No 78-17 (n 79) art 85.
106 Law of the French Republic No 78-17 (n 79) art 85.
107 *Mephisto* (n 53).
108 Petrauskas, Muradian and Kurilienė (n 50).
109 ZVOP-1 (n 33); Constitution of the Republic of Slovenia, art 34 (right to dignity) and art 38 (right to data protection).
110 Defamation Act 2013 (UK) (n 54); *Von Hannover v Germany* (n 42) - relevanță indirectă pentru absența protecției post-mortem în common law.
111 Ostavciuc and Rusnac (n 49).

post-mortem personal interests. However, Slovenia associates standing with either family ties or a 'legitimate interest', a broader principle that, in effect, adds flexibility between definitions. The United Kingdom is an exception in this regard: since post-mortem personal rights are not recognised, active standing arises only when living relatives can demonstrate that their own rights have been infringed, so that the civil remedies available are much less extensive and their channels even more restricted. Overall, the table suggests that procedural protection corresponds to substantive recognition: where post-mortem rights are recognised, remedies are more comprehensive and effective; where they are not, protection is fragmentary and indirect.

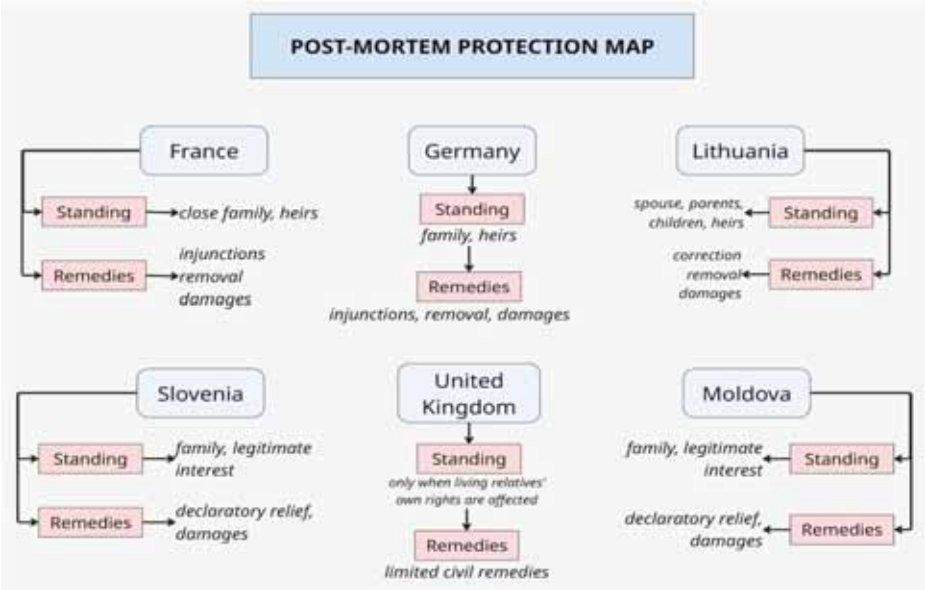

Figure 3. Comparative table. Standing and remedies in post-mortem cases

4.7. Violation of Post-mortem Rights During the Russian-Ukrainian Conflict Through Unsecured Social Media Platforms

The uncommon use of digital platforms in the documentation, distribution, and politicisation of images of the dead serves as a stark reminder of the importance of post-mortem rights in the context of the Russian-Ukrainian war. In contrast to earlier wars, the current conflict has been played out in real time on social media, with soldiers, civilians, journalists, and automated bots all sharing images of dead bodies, battlefields, and devastated communities. The treatment of the deceased has changed from a private matter

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of mourning to a public spectacle due to this digital visibility, frequently violating the rights of their families and the dignity of the departed.

Social media sites like VKontakte, Twitter (X), TikTok, and Telegram have become essential tools in contemporary information warfare. In addition to being places for propaganda and narrative control, they are also uncontrolled settings where pictures of the deceased are used as a tool for psychological manipulation, recruitment, or desensitisation.

These platforms usually host unverified graphic content that violates the principles of respect and confidentiality enshrined in international humanitarian law, because there are no strong ethical standards or legally binding international norms governing digital dissemination. The ease with which such content circulates, often without context or consent, raises serious ethical and legal questions regarding the infringement of post-mortem rights in modern conflict areas.

4.7.1. Digital Warfare and the Visibility of the Dead Content Warning: This section presents the digital circulation of wartime imagery involving the dead

The Russia-Ukraine conflict has made the dead and other victims more visible online than their fellow human beings ever have—both civilians and combatants dead, and the photos and videos of them floating constantly in every corner of the internet - have been huge ones, too. The digital visibility of this exposure—often devoid of context, consent, or moral underpinnings—has prompted scholars to view the phenomenon as a form of digital necropolitics in which bodies are reduced to instruments of propaganda, disinformation, or emotional manipulation. They violate the dignity of the dead and transgress humanitarian norms that mandate the dignified consideration of human remains.[112]

Of all the digital platforms, Telegram has been the leading one as it has relatively few controls and does not censor its uncensored wartime material much. Pro-war audiences are often shown photos of dead soldiers (which may be seen with hostile remarks intended to intimidate or back up propaganda messages) or comments used for partisan reasons. TikTok and Instagram also partake in those trivialization efforts on what is often known as wartime death, where very short videos deploy music, captions or edits to decorate or normalise the images of corpses on the battlefield. Even on more regulated platforms (e.g., Twitter/X or YouTube), wartime images continue to crop up over re-posts, comments, or algorithmic amplification.[113] Academic research, such as that conducted by Oliynyk on the

112 Anjli Parrin and others, 'The Protection of Dead Persons under International Human Rights Law: Evaluating Gaps and Developing a Principles Framework' (2025) 929 International Review of the Red Cross <https://international-review.icrc.org/articles/the-protection-of-dead-persons-under-ihl-929> accessed 24 November 2025.

113 For example, see studies on algorithmic amplification during armed conflicts and the role of platforms in the redistribution of violent content, such as: Astuti, Attaymini and Dewi (n 22); *DisinfoChronicle* (n 23).

portrayal of fallen soldiers across earlier phases of conflict, has shown that digital images can serve commemorative roles, namely, framing collective memory and narratives of sacrifice. Journalists or members of the public post on social media framing the fallen in terms of national myths of resistance, mourning and heroism. However, those same photos are also commonly weaponised by hostile parties with derogatory captions or misinformed portrayals of the deceased as criminals, enemies, or objects of derision.[114]

This duality—remembrance versus weaponisation—in which digital platforms can simultaneously venerate and degrade, depending on users' intentions. The impact on families is significant. It is typical for loved ones' deaths to be revealed only after leaked images appear online and not through official confirmation.[115] Such a loss of control over the dissemination of sensitive images undermines the family's capacity to manage commemoration, is intrusive to their privacy and results in significant and serious psychological harm. This absence of clear norms regarding the digital representation of deceased persons generates what can be described as a *digital respect vacuum*—a space in which images of the dead circulate without ethical safeguards, without institutional control, and without a protective framework that reflects post-mortem dignity.

A more extensive regulatory environment, however, has its limitations in grappling with these issues. The principles available in International humanitarian law and ICRC (International Committee of the Red Cross) guidelines for the dignified treatment of the deceased[116] are guidelines, but they do not address how they should be incorporated into platform governance. The EU Digital Services Act (DSA) imposes extensive obligations on online platforms, including notice-and-action mechanisms for removing illegal content (Article 16), systemic risk assessments concerning violent or harmful content (Article 34), and mitigation measures to reduce such risks (Article 35).[117] However, the

114 ibid

115 See, for example, Human Rights Watch reports on the documentation of war crimes and disappearances of civilians in Ukraine (2022–2024): Human Rights Watch, *World Report 2024: Ukraine* (Human Rights Watch 2024) <https://www.hrw.org/world-report/2024/country-chapters/ukraine> accessed 25 September 2025. The Amnesty International reports on civilian casualties and the treatment of prisoners of war in the context of the Russia–Ukraine conflict, see: Amnesty International, *A Deafening Silence: Ukrainians Held Incommunicado, Forcibly Disappeared and Tortured in Russian Captivity* (Amnesty International 2025) <https://www.amnesty.org/en/latest/news/2025/03/russia-ukraine-ill-treatment-of-ukrainians-in-russian-captivity-amounts-to-war-crimes-and-crimes-against-humanity/> 25 September 2025. And the analyses of *DisinfoChronicle* (n 23).

116 ICRC, *Guiding Principles for the Dignified Management of the Dead in Humanitarian Emergencies and to Prevent them Becoming Missing Persons* (ICRC 2021) <https://www.icrc.org/en/publication/4586-guiding-principles-dignified-management-dead-humanitarian-emergencies-and-prevent> accessed 25 September 2025.

117 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1, arts 16, 34, 35.

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DSA still falls short in addressing war-related imagery, post-mortem dignity, and the circulation of sensitive material involving deceased persons. In the real world, however, moderation policy loopholes and uneven enforcement of platforms' rules on such content mean that it can be widely spread and leads to desensitisation, which drives propaganda and undermines public trust. Without a legal and ethical framework, the dead are even more vulnerable in digital warfare. Their images circulate quickly, without nuance, in stories that run counter to humanitarian norms and violate basic human rights. This calls for clearer European standards that capture the interplay among digital platforms, armed conflict, and post-mortem dignity.

4.7.2. Response of the European Union to the Violation of Post-mortem Rights Through Unsecured Social Media Platforms

European institutional communication has increasingly addressed the challenges posed by hybrid threats, including the online dissemination of violent war imagery. These institutions have coordinated campaigns to expose disinformation, established dedicated task forces such as the East StratCom Task Force and the EUvsDisinfo initiative, and issued regular public statements condemning both the glorification of war crimes and the digital circulation of graphic images depicting Ukrainian soldiers (see Fig. 3).

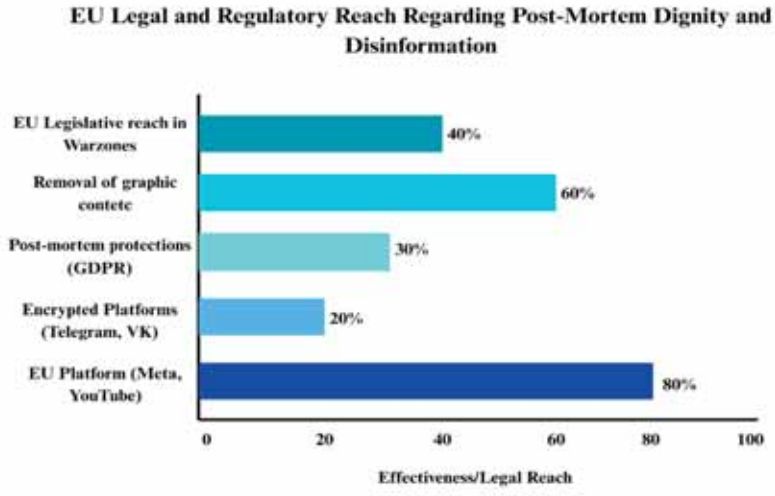

Figure 3. EU legal and regulatory reach regarding post-mortem dignity and disinformation

Figure 3 illustrates the relative visibility of EU institutional counter-measures across major platforms, based on EUvsDisinfo monitoring reports from 2022–2024. It reflects the degree of institutional response rather than formal legal compliance.

The data underlying Figure 3 were extracted from EUvsDisinfo monitoring reports (2022–2024) and coded according to the relative frequency and visibility of institutional countermeasures across major digital platforms; the percentages represent comparative visibility levels rather than legally binding compliance metrics.

Despite these initiatives, institutional communication struggles to match the speed and emotional impact of content circulating on Telegram, where anonymity, limited moderation and deliberate shock value allow harmful imagery to bypass EU standards.[118]

This challenge is compounded by the absence of a harmonised EU framework addressing post-mortem dignity in digital environments. Although Article 1 of the Charter of Fundamental Rights protects human dignity, its applicability to deceased individuals remains uncertain. The circulation of de-identified images of Ukrainian war dead on pro-Russian Telegram channels highlights a normative gap at the intersection of human rights and digital media regulation.

The European Parliament has supported regulatory instruments such as the Digital Services Act (DSA) and the strengthened 2022 Code of Practice on Disinformation, which require major platforms (Meta, X, YouTube) to remove illegal content, increase algorithmic transparency and cooperate with fact-checkers. However, as noted in Commission implementation reports and in debates within the LIBE and IMCO committees, these obligations have limited effect on decentralised or non-EU platforms such as Telegram.[119]

In practice, this regulatory gap allows conflict-related content involving deceased persons to circulate widely on Telegram, undermining EU efforts to protect human dignity and counter wartime disinformation. While documentation for purposes of accountability continues, the emotional and symbolic exploitation of the dead online is often treated as a media literacy or cybersecurity concern rather than a human rights issue.

This reflects a structural limitation of EU law, which prioritises the protection of living data subjects (e.g., under the GDPR) and lacks equivalent safeguards for post-mortem dignity. Existing ethical frameworks, such as the Bournemouth Protocol on the Protection and Investigation of Mass Graves, provide principles relevant to digital preservation and the public release of imagery. However, meaningful implementation requires enforceable digital rules capable of addressing platforms operating outside the EU's jurisdiction.

These standards align with the United Nations Minnesota Protocol (2016),[120] which establishes minimum international requirements for the investigation of potentially unlawful deaths, including the respectful treatment of the deceased and the proper

118 Raquel Ruiz-Incertis and Jorge Tuñón-Navarro, 'European Institutional Discourse Concerning the Russian Invasion of Ukraine on the Social Network X' (2024) 5(4) Journalism and Media 1646. doi:10.3390/journalmedia5040102.

119 ibid

120 OHCHR (n 21).

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handling of visual and digital documentation. Incorporating these standards into EU-level soft-law instruments would strengthen coherence between forensic, humanitarian and digital governance norms.

5 CONCLUSIONS

The analysis of the subject shows that there are significant differences in legal, digital governance, and national attitudes towards post-mortem dignity across Europe, resulting in a clearly fragmented regulatory and judicial landscape. This illustrates that the value of human dignity under Article 1 of the EU Charter is fundamental; however, its normative and institutional definitions are ambiguous, and its interpretation and consequences after death remain unclear. This ambiguity becomes particularly evident in the digital sphere, where the GDPR's exclusion of deceased persons and various national rules on digital legacy leave the posthumous presence of individuals largely at the mercy of the contractual policies of private platforms. Contemporary conflicts, notably the war in Ukraine, expose the limits of this model: mass graves, the circulation of graphic images and the algorithmic afterlife of the deceased illustrate how easily regulatory gaps can turn into harm affecting families, communities and collective memory.

These findings confirm the central questions guiding this study—whether human dignity can meaningfully be understood as a value that outlives death and whether the European legal order is capable of articulating coherent norms in this regard—questions that current doctrine is not yet equipped to resolve. The continuation of dignity after death is not presented as a formal right, but as a functional principle expressed through the rights of the living, the expectations of families and the symbolic protection of memory. At the same time, the EU regulatory architecture still cannot cope with the growing tensions associated with digitalisation and modern conflicts, thereby exposing a normative vacuum in both concept and practice.

In this context, the article argues that a coherent European approach is both necessary and achievable without changing the distribution of competences between the EU and the Member States. One promising way forward is to strengthen coordination through soft-law instruments, judicial cooperation, and principled guidelines inspired by existing humanitarian and forensic standards, such as the Bournemouth Protocol and the Minnesota Protocol. Clarifying the relationship between dignity and digital presence, including a reconsideration of Recital 27 of the GDPR, would help ensure continuity between the protection enjoyed during life and the respect due to it after death. Similarly, greater convergence in the governance of digital assets and in the ethical standards applied by online platforms would mitigate the risks posed by the unregulated dissemination of post-mortem images in conflict contexts.

Such an approach would not replace national autonomy in funeral practices, exhumation procedures, or cultural rites. Rather, it would provide a minimum common denominator, consistent with European constitutional traditions and the case law of the ECHR, ensuring that post-mortem dignity is not left entirely to domestic contingencies or the discretion of private digital actors.

Through doctrinal investigation, comparative national analyses and the concrete realities highlighted by the war in Ukraine, the article positions "post-mortem justice" as an emerging doctrinal field at the intersection of human rights, forensic practice and digital governance. The analysis demonstrates that issues traditionally treated as marginal, such as exhumation procedures, digital afterlives, and the online representation of the dead, have become central to contemporary human rights protection. This conceptual bridge between established norms and evolving technological and forensic challenges highlights the need for a more systematic and coordinated European response.

A fully coherent EU framework would ultimately require clearer obligations for digital platforms, particularly in conflict settings, to prevent the misuse of biometric data and the circulation of violent images of deceased persons, thereby ensuring that dignity remains a protected value beyond the boundaries of biological life.

REFERENCES

1. Abdurrahmani B and Abdurrahmani T, "Truth Revelation Instruments in Post-Communist Albania: Transitional Justice Non-Feasance in Investigating Communist Crimes and the Fate of Missing Persons" (2024) 7(2) Access to Justice in Eastern Europe 10. doi:10.33327/AJEE-18-7.2-a000215
2. Allen AL and Rothman JE, 'Postmortem Privacy' (2024) 123(2) Michigan Law Review 285. doi:10.36644/mlr.123.2.postmortem
3. Astuti YD, Attaymini R and Dewi MSR, 'Digital Media and War: Social Media as a Propaganda Tool for the Russia-Ukraine Conflict in the Post-truth Era' (Advances in Social Science, Education and Humanities Research, Proceedings of the Annual International Conference on Social Science and Humanities (AICOSH 2022)) 19. doi:10.2991/978-2-494069-87-9_4
4. Berni M, 'Excessive Violence in a War Without Fronts: Explaining Atrocities in South Vietnam (1965-1973)' in Mayersen D (ed), *Genocide and Mass Violence in Asia* (De Gruyter 2019) 117. doi:10.1515/9783110659054-007
5. Bruneault F, Laflamme AS and Wernaart BFW, 'The Privacy of the Dead' in Wernaart B (ed), *Applied Human Rights* (Wageningen Academic 2023) 185. doi:10.3920/978-90-8686-943-5_12

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6. Buitelaar JC, 'Post-Mortem Privacy and Informational Self-Determination' (2017) 19(2) Ethics and Information Technology 129. doi:10.1007/s10676-017-9421-9

7. Bulgakova D and Bulgakova V, 'The Recognition of the Deceased Biometric Data under Personal Non-Property Rights in Terms of the General Data Protection Regulation' (2023) 1 Bulletin of the Penitentiary association of Ukraine 22. doi:10.34015/2523-4552.2023.1.03

8. Bursell R, 'Aspects of Burial and Exhumation' (2017) 19(2) Ecclesiastical Law Journal 169. doi:10.1017/S0956618X17000059

9. Caenazzo L, Tozzo P and Rodriguez D, 'Ethical Issues in DNA Identification of Human Biological Material from Mass Disasters' (2013) 28(4) Prehospital and Disaster Medicine 393. doi:10.1017/S1049023X1300040X

10. Chu N, 'Protecting Privacy after Death: Human Dignity in Digital Afterlife: An Information Ethics Perspective' (2015) 13(2) Northwestern Journal of Technology and Intellectual Property 255.

11. Cummings RG, 'The Case Against Access to Decedents' E-mail: Password Protection as an Exercise of the Right to Destroy' (2014) 15(2) Minnesota Journal of Law, Science & Technology 897

12. De Souza IML, 'Nuremberg's Enduring Legacy to International Justice' (2022) 13(2) Journal of International Humanitarian Legal Studies 222. doi:10.1163/18781527-bja10054

13. De Tienda Palop L and Currás BX, 'The Dignity of the Dead: Ethical Reflections on the Archaeology of Human Remains' in Squires K, Errickson D and Márquez-Grant N (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology* (Springer 2019) 19. doi:10.1007/978-3-030-32926-6_2

14. Edwards L and Harbinja E, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Entertainment Law Journal 101. doi:10.2139/ssrn.2267388

15. Ekštajn H, Kružić I and Bašić Ž, 'Forensic Investigation of a Mass Grave at Ovčara, Near Vukovar, of Victims Killed by the Serbian Army in 1991' (2021) 2 St Open 1. doi:10.48188/so.2.3

16. Erdos D, 'Dead Ringers? Legal Persons and the Deceased in European Data Protection Law' (2020) 40 Computer Law & Security Review 105495. doi:10.1016/j.clsr.2020.105495

17. Finegan O and others, 'International Committee of the Red Cross (ICRC): General Guidance for the Management of the Dead Related to COVID-19 (2020) 2 Forensic Science International: Synergy 129. doi:10.1016/j.fsisyn.2020.03.007

18. Gillett M and Fan W, 'Expert Evidence and Digital Open Source Information' (2023) 21(4) Journal of International Criminal Justice 661. doi:10.1093/jicj/mqad050

19. Green MH, 'Editor's Introduction to Pandemic Disease in the Medieval World: Rethinking the Black Death' (2014) 1(1) The Medieval Globe 3 <https://scholarworks.wmich.edu/tmg/vol1/iss1/3> accessed 24 August 2025.

20. Guarascio D, Coveri A and Cozza C, 'War in the Time of Digital Platforms' (*Social Europe*, 10 January 2023) <https://www.socialeurope.eu/war-in-the-time-of-digital-platforms> accessed 14 March 2025

21. Harbinja E, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31(1) International Review of Law, Computers & Technology 26. doi:10.1080/13600869.2017.1275116

22. Harris J, *The Value of Life: An Introduction to Medical Ethics* (Routledge 1985)

23. Hertz N, 'The Right to Freedom of Thought in German' in Shiner R and O'Callaghan P (eds), *The Cambridge Handbook of the Right to Freedom of Thought* (CUP 2025) 112. doi:10.1017/9781009539616.013

24. Hudson B, 'Variation and Process: The History, Current Practice and Future Potential of Mortuary Archaeology in Aotearoa New Zealand' (2020) 129(2) Journal of the Polynesian Society 125.

25. Isaacs D, 'Power of Visual Images' (2016) 52(9) Journal of Paediatrics and Child Health 859. doi:10.1111/jpc.13330

26. Kalacska M and others, 'The Application of Remote Sensing for Detecting Mass Graves: An Experimental Animal Case Study from Costa Rica' (2009) 54(1) Journal of Forensic Sciences 159. doi:10.1111/j.1556-4029.2008.00938.x

27. Kant I, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, ed, CUP 1997)

28. Klinkner M and Smith E, *The Bournemouth Protocol on Mass Grave Protection and Investigation* (Bournemouth University 2020)

29. Kroker P, 'Satellite Imagery as Evidence for International Crimes' (*Coalition for the International Criminal Court*, 23 April 2015) <https://www.coalitionfortheicc.org/news/20150423/satellite-imagery-evidence-international-crimes> accessed 24 August 2025

30. Kvit N, 'Prospects for Regulating the Right to Posthumous Reproduction in the Context of War in Ukraine: Foreign Experience and Formation of Legal Support for the Realisation of Reproductive Rights of Military Personnel' (2023) 6(2) Access to Justice in Eastern Europe 82. doi:10.33327/AJEE-18-6.2-a000222

31. Leblang TR, 'Death with Dignity: A Tripartite Legal Response' (1978) 2(1-2) Death Education 173. doi:10.1080/07481187808253305

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32. Lefolle J, 'Identification of the Dead Under Islamic Law and International Humanitarian Law: A Mini Review' (2022) 10(2) Malaysian Journal of Syariah and Law 38. doi:10.33102/mjsl.vol10no2.394

33. Lucero Pantoja JE, 'El juez multinivel y la transversalidad de garantías: Un acercamiento a los escenarios fácticos en América y Europa' (2021) 20(41) Opinión Jurídica 71. doi:10.22395/ojum.v20n41a2

34. Makauskaite-Samuole G, 'Transparency in the Labyrinths of the EU AI Act: Smart or Disbalanced?' (2025) 8(2) Access to Justice in Eastern Europe 1. doi:10.33327/AJEE-18-8.2-a000105

35. Martínez Martínez N, 'Reflexiones en torno a la protección post mortem de los datos personales y la gestión de la transmisión mortis causa del patrimonio digital tras la aprobación de la LOPDGDD' (2019) 39 Derecho Privado y Constitución 169. doi:10.18042/cepc/dpc.35.05

36. Morari (Bayraktar) A and Dragomir AN, 'Preserving Human Dignity: The Impact of European and International Public Law on Managing Mass Graves' (International Scientific Research Congress: Congress Book, Istanbul, 20-21 December 2024) 65

37. Morse T, 'Shooting the Dead: Images of Death, Inclusion and Exclusion in the Israeli Press' in Michele Aaron (ed), *Envisaging Death: Visual Culture and Dying* (Cambridge Scholars Publishing 2013) 140

38. Nordh H and others, 'Rules, Norms and Practices: A Comparative Study Exploring Disposal Practices and Facilities in Northern Europe' (2021) 88(1) OMEGA 171. doi:10.1177/00302228211042

39. Nwabueze RN and White M, 'Privacy and Death Law – a Reappraisal' (2024) 16(2) Journal of Media Law 468. doi:10.1080/17577632.2024.2438395

40. Ostavciuc D and Rusnac C, 'Legislative, Doctrinal and Practical Challenges Regarding the Examination of the Body at the Scene in the Republic of Moldova' (2024) 18(2) AGORA International Journal of Juridical Sciences 124. doi:10.15837/aijjs.v18i2.6983

41. Outmany KK, 'Religion at the Cemetery: Islamic Burials in the Netherlands and Belgium' (2016) 10(1) Contemporary Islam 87. doi:10.1007/s11562-015-0341-3

42. Parker LS, London AJ and Aronson JD, 'Incidental Findings in the Use of DNA to Identify Human Remains: An Ethical Assessment' (2013) 7(2) Forensic Science International: Genetics 221. doi:10.1016/j.fsigen.2012.10.002

43. Parrin A and others, 'The Protection of Dead Persons under International Human Rights Law: Evaluating Gaps and Developing a Principles Framework' (2025) 929 International Review of the Red Cross <https://international-review.icrc.org/articles/the-protection-of-dead-persons-under-ihl-929> accessed 24 November 2025.

44. Petrauskas G, Muradian L and Kurilienė A, 'Archaeology of Modern Conflict and Heritage Legislation in Lithuania During Thirty Years of Restored Independence' in Hale A and Kersting T (eds), *New Challenges: Archaeological Heritage Management and the Archaeology of the 18th to 20th centuries* (Occasional Paper no 19, EAC 2024) 81. doi:10.11141/ia.66.13

45. Romainville C, 'The Multidimensionality of Cultural Policies Tested by EU Law' in Romainville C (ed), *European Law and Cultural Policies = Droit européen et politiques culturelles* (Europe of Cultures vol 12, Peter Lang 2015) 19.

46. Rugg J 'Social Justice and Cemetery Systems' (2020) 46(4) Death Studies 861. doi:10.1080/07481187.2020.1776791

47. Ruiz-Incertis R and Tuñón-Navarro J, 'European Institutional Discourse Concerning the Russian Invasion of Ukraine on the Social Network X' (2024) 5(4) Journalism and Media 1646. doi:10.3390/journalmedia5040102

48. Scarre G, 'Archaeology and Respect for the Dead' (2003) 20(3) Journal of Applied Philosophy 237. doi:10.1046/J.0264-3758.2003.00250.X

49. Smith GP, '"Dignity in Living and in Dying": The Henry H H Remak Memorial Lecture' (2018) 25(1) Indiana Journal of Global Legal Studies 413

50. Squires K, Errickson D and Márquez-Grant N (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology* (Springer 2019). doi:10.1007/978-3-030-32926-6

51. Townsend K, 'Raising the Dead: Understanding Post-Mortem Rights of Publicity' (*Documentary*, 2 April 2022) <https://www.documentary.org/column/raising-dead-understanding-post-mortem-rights-publicity> accessed 14 March 2025

52. Van Ginneken J, 'First Book: On Mass Propaganda and Enemy Images' in Van Ginneken J, *Kurt Baschwitz: A Pioneer of Communication Studies and Social Psychology* (Routledge 2018) 93. https://doi.org/10.5117/9789462986046_CH04

53. Vanderpuye K and Mitchell C, 'Lessons Learned from the Use of DNA Evidence in Srebrenica-related Trials at the ICTY' in Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (OUP 2020) 209. doi:10.1093/oso/9780198862956.003.0013

54. Vansweevelt T and Bubalo L, 'Post-mortal Protection of the Right to Reputation: A Comparative View' (2019) 10 Journal of European Tort Law 1. doi:10.1515/jetl-2019-0101

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОСУДДЯ ПІСЛЯ СМЕРТІ: ЛЮДСЬКА ГІДНІСТЬ ТА ПРАВОВИЙ ЗАХИСТ В ЄВРОПЕЙСЬКОМУ СОЮЗІ

Драгомір Андреа-Ніколета*, Весмаш Даяна-Маура та Ана Моларі (Байрактар)

АНОТАЦІЯ

Вступ. *Поводження з тілами після смерті стає дедалі суперечливішою темою в європейському правовому дискурсі, зокрема на перетині питань людської гідності, захисту даних та судово-медичної експертизи. Хоча людська гідність закріплена як один із фундаментальних принципів, що підлягають захисту згідно з законодавством ЄС, дослідження такого принципу та його поширення на інтереси після смерті є неоднорідним та має розбіжності у різних державах-членах. У статті (i) оцінюється, чи може принцип людської гідності слугувати підставою для судового захисту після смерті особи; та (ii) досліджується, як ЄС може узгодити очікування, які зростають, щодо посмертних прав у контексті цифрової війни, великої кількості даних та гібридних конфліктів. Щоб проілюструвати ці проблеми на практиці, аналіз розглядає Україну як контекстуальний випадок, де збройний конфлікт між Росією та Україною спричинив великі людські жертви, цифрове поширення зображень померлих осіб та обмеження наявних європейських механізмів захисту.*

Методи. *У статті представлено порівняльно-правовий аналіз законодавства ЄС, законодавства окремих держав-членів та обмежень міжнародних норм у сфері прав людини з наголосом на юрисдикції Європейського суду з прав людини. Автори також спираються на міждисциплінарні дослідження, що об'єднують правову доктрину, біоетику та вивчення цифрового управління. Методологія переважно доктринальна та аналітична, підкріплена справами, що ілюструють різні національні підходи до захисту гідності та прав після смерті.*

Результати та висновки. *У статті зазначено, що законодавству ЄС бракує систематизованої бази для захисту гідності після смерті, що дає державам-членам свободу регулювати її фрагментарно та іноді суперечливо. Національні рішення значно*

різняться: від фундаментального захисту особистих прав після смерті зі специфічними засобами правового захисту (Німеччина, Франція) до відсутності будь-яких наявних засобів правового захисту (Сполучене Королівство). Ця безперервна цифрова спадщина в сучасних війнах, що проілюстрована випадком України, де масові поховання та зображення померлих, поширені в Інтернеті, викликали нагальне занепокоєння, вказує на обмеження чинних механізмів, включно з GDPR та Законом про цифрові послуги. Ці тенденції свідчать про те, що ЄС міг би запровадити більш глибоку інтеграцію, впроваджуючи необов'язкові законодавчі та судові інструменти співпраці відповідно до чинних міжнародних стандартів, з метою зменшення виявленого розриву між формальним визнанням людської гідності та її ефективним захистом після смерті.

Ключові слова. *Гідність після смерті, право Європейського Союзу, права людини, захист даних, Україна.*

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Research Article

THE CHILD'S RIGHT TO BE HEARD DURING ADMINISTRATIVE AND JUDICIAL PROCEEDINGS: AN ANALYTICAL STUDY OF INTERNATIONAL AND COMPARATIVE LAW

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ABSTRACT

Background: *Early legal traditions treated children as passive and vulnerable individuals, with adults solely responsible for making decisions on their behalf. However, this attitude has gradually shifted, and children's rights are now widely recognised. This study addresses the child's right enshrined in Article 12 of the United Nations Convention on the Rights of the Child, to express opinions and to be heard in all matters affecting them, particularly in administrative and judicial proceedings. The study aims to bridge the gap between the theoretical framework and the practical application of this right by clarifying its concept and the nature of its enforcement during administrative and judicial proceedings involving the child, while also addressing the challenges of its practical implementation.*

Methods: *The researchers adopted a comparative analytical methodology, analysing the Convention on the Rights of the Child and examining and comparing the national legislation of Finland, France, and Belgium that guarantees the child's right to be heard. The study also reviews the Committee on the Rights of the Child's general comments and the practices of various courts.*

Results and conclusions*: The study finds significant disparities in the implementation of the child's right to be heard across legal systems, with some courts reluctant to hear from children. It underscores the need for clear procedural mechanisms to guarantee that children's voices are considered and that they are informed of the procedure's outcomes.*

1 INTRODUCTION

Family problems in general—and issues related to children in particular—are increasing as societies evolve, family bonds weaken, and the generational gap in thinking grows. Undoubtedly, the past neglect of children and the failure to consider their opinions and perspectives have widened the gap between them and adults, whether parents or other caregivers and decision-makers. There is no minimum age for a child to exercise their rights; even infants can express their opinions through the means available to them, which develop and evolve as they grow. The development of children's abilities to express their opinions depends on their maturity as well as on the support and responsiveness of the adults around them.[1]

The child's right to express their opinion and to be heard is a firmly established legal principle at the international level, grounded in Article 12 of the Convention on the Rights of the Child (CRC), which was pioneering in obligating states to give the child's opinion "due weight."[2] Reflecting this international obligation, many European national legislations have incorporated this right into their constitutions and laws to ensure the child's active participation in administrative and judicial proceedings that affect their interests, thereby fostering self-confidence and serving the child's best interests.[3] The United Nations Committee on the Rights of the Child (hereinafter "the Committee") works through recommendations to ensure the optimal realisation of the child's right to be heard.

At the national level, many European countries have included the child's right to express an opinion in their constitutions and legislation, implementing their obligations under the

1 Gerison Lansdown, *Can You Hear Me? The Right of Young Children to Participate in Decisions Affecting Them* (Working Paper in Early Childhood Development 36, Bernard van Leer Foundation 2005) 2.

2 Convention on the Rights of the Child (CRC) (adopted 20 November 1989 UNGA Res 44/25) 1577 UNTS 3, art 12.

3 David Archard and Suzanne Uniacke, 'The Child's Right to a Voice' (2020) 27 Res Publica 526-7. doi:10.1007/s11158-020-09491-z.

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child rights conventions. However, the effective enforcement of this right, especially in judicial and administrative proceedings, remains contingent on enacting suitable laws and training judges and administrative staff to work with children. European legislation, such as that of France, Finland, and Belgium, has sought to institutionalise this, although its mechanisms of application vary.

The exercise of this right continues to face many obstacles, chief among them the traditional societal perception that questions the child's ability to determine their own best interest, the ambiguity and complexity of procedures and their consequences, which make them difficult for children to understand properly. On the other hand, a balance must be struck between the personal freedoms of parents, such as marriage or divorce, as enshrined in constitutions, and the principle of the "best interests of the child," which must remain the paramount consideration.[4]

In view of the above, **the central research question guiding this study is:** To what extent do legal and conceptual barriers in France, Finland, and Belgium limit the effective implementation of Article 12 of the Convention on the Rights of the Child, reducing the right of the child to be heard to a procedural formality rather than a substantive right?

The study explores this question across three national contexts:

How effectively have Finland, France, and Belgium implemented Article 12 to ensure children's participation in judicial and administrative decisions through mechanisms for hearing their views?

What is the impact of using age-based criteria (as in Finland and Belgium) compared to maturity-based criteria (as in France)?

What are the practical problems in implementing Article 12 of the CRC in the countries under study?

2 METHODOLOGY

To achieve the objectives, this study adopts a comparative analytical approach to examine how the child's right to be heard, as enshrined in Article 12 of the CRC, is interpreted and applied in administrative and judicial procedures across Finland, France, and Belgium.

The study relied on a diverse set of primary and secondary sources. Primary sources included recognised legal instruments such as the Convention on the Rights of the Child,

4 Aliaa Zakaria and Alaa Abouahmed, 'Constitutional Protection of Egyptian Women's Rights in Personal Affairs' (2023) 9(1) Cogent Social Sciences 9. doi:10.1080/23311886.2023.2216997.

national legislation such as the French Civil Code[5] and the Finnish Child Welfare Act,[6] and landmark jurisprudence from domestic supreme courts and the European Court of Human Rights, most notably *C. v. Finland*.[7] These provided the formal legal framework and showed the practical application of the child's right to be heard. Secondary sources that provided the interpretive lens of critique included general Comments No. 12, No. 14, and No. 24 of the Committee on the Rights of the Child,[8] as well as Lundy's *"'Voice' Is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child"*[9] and Lansdown's seminal research on young children's participation.[10] These works provided the analytical foundation for contextualising the challenges identified in the primary legislation.

Finland, France, and Belgium were selected as comparative case studies based on substantive criteria. Though all three states share a common foundational commitment as parties to key international conventions, they reflect distinct European legal traditions. The selection is particularly instructive, given their divergent approaches to implementing the child's right to be heard, ranging from the more age-defined criteria of Finland and Belgium to the flexibility grounded in the child's discernment in France. This strategic variation allows the analysis to scrutinise the distinct challenges and solutions arising from divergent legal contexts, thus enhancing the richness of the study's findings.

The comparisons between domestic and European Court of Human Rights case law are guided by specific criteria that focus on three interrelated elements: the procedural approach to hearing the child, the substantive weight given to the child's views, and the judicial balancing of Article 12 against Article 3 of the CRC. This structured approach goes beyond a merely theoretical debate to critically evaluate how courts operationalise these rights in practice.

5 Code Civil des Français (effective 21 March 1804) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721> accessed 26 September 2025.

6 Child Welfare Act 417/2007 (Finland) (adopted 13 April 2007) <https://finlex.fi/en/legislation/translations/2007/eng/417> accessed 26 September 2025.

7 *C v Finland* App no 18249/02 (ECtHR, 9 May 2006) <https://hudoc.echr.coe.int/eng?i=001-75337> accessed 26 September 2025.

8 UN Committee on the Rights of the Child, *General Comment No 12 (2009) The Right of the Child to be Heard* (CRC/C/GC/12, UN 2009) <https://digitallibrary.un.org/record/671444?ln=en> accessed 26 September 2025; 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 Primary Consideration (art 3, para 1)* (CRC/C/GC/14, UN 2013) <https://digitallibrary.un.org/record/778523?ln=en> accessed 26 September 2025; UN Committee on the Rights of the Child, *General Comment No 24 (2019) On Children's Rights in the Child Justice System* (CRC/C/GC/24, UN 2019) <https://digitallibrary.un.org/record/3899429?ln=en> accessed 26 September 2025.

9 Laura Lundy, '"Voice" is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Education Research Journal 927. doi:10.1080/01411920701657033.

10 Lansdown (n 1).

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3 THE NATURE OF ADMINISTRATIVE AND JUDICIAL PROCEEDINGS AFFECTING THE CHILD

According to the CRC, children have the right to be heard and to participate in any judicial or administrative proceedings that affect them. These proceedings can be addressed as follows:

3.1. Administrative Proceedings

Administrative proceedings cover a broad range of cases, including immigration and asylum matters, as well as disciplinary actions in schools and other procedures. Article 22 of the CRC affirms the right of child asylum seekers to receive protection and the necessary assistance to ensure their enjoyment of rights in accordance with international law.[11] Similarly, Article 10 of the Convention emphasises the importance of family reunification.

Student participation is considered necessary in many educational matters, including the development of school policies, curriculum design,[12] teaching methods, teacher evaluations, and decisions related to disciplinary sanctions.

The Committee has emphasised the need to establish administrative procedures that reflect the obligations of Article 12 of the Convention and guarantee children's rights. This includes informing the child about the hearing session and ensuring that representation is provided by parents or other guardians.[13] In its General Comment No. 12, the Committee indicated that children are more likely to participate in administrative procedures than in judicial ones, as the former are more flexible and less formal.[14] By enumerating concrete examples, such as school disciplinary matters, denial of school certificates, applications for driver's licenses, and asylum applications filed by unaccompanied minors,[15] the Committee moves the concept of child participation beyond mere rhetoric, effectively bridging the gap between theory and practice.

Physical education provides an ideal context to honour students' right to be heard. Through targeted teaching methods, their opinions can actively shape lesson content, social organisation, and challenge levels. By co-creating games and participating in reflective

11 Maya Khater, 'Refugee Children's Right to Education: Education of Syrian Refugee Children in Jordan: Reality and Prospects' (2023) 6(3) Access to Justice in Eastern Europe 116. doi:10.33327/AJEE-18-6.3-a000302.

12 Adam Fletcher, *Meaningful Student Involvement: Guide to Students as Partners in School Change* (2nd eds, SoundOut 2024) 12.

13 UN Committee on the Rights of the Child, *General Comment No 12* (n 8) para 65.

14 ibid, para 66.

15 ibid, para 67.

discussions, students are empowered to take a direct role in shaping their own learning, thereby ensuring their feedback has a tangible impact on future practice.[16]

3.2. Judicial Proceedings

Children, like all individuals, are entitled to the guarantees of a fair trial. They have the right to be tried before an independent and impartial judicial body, the right to defend themselves and be assisted by legal counsel, the right to be informed of the charges against them in a language they understand, the right to access evidence, and the presumption of innocence until proven guilty. Respecting the child's right to express opinions and be heard in judicial proceedings affecting them is one of the fundamental principles affirmed by the CRC. Article 12 of the Convention obligates States Parties to provide children the opportunity to express their views and be heard in judicial and administrative proceedings that affect them, whether they exercise this right personally or through a representative. Guaranteeing the child's right to be heard—just as for adults—is a cornerstone of a fair trial. Participation in such proceedings must not, however, cause any additional harm to the child.

In this regard, the Committee has issued several recommendations to ensure this right is implemented optimally. In its General Comment No. 12, the Committee recommended that judicial proceedings involving minors be "accessible and child-appropriate,"[17] which requires ensuring children understand the nature of the proceedings and can participate effectively. It also recommended providing a safe environment that respects the child's dignity[18] while considering the child's individual and social circumstances.[19] The Committee explained that enabling children to express their opinions effectively requires comprehensive support, including the provision of trained staff and the adaptation of the judicial environment to suit children, from courtroom design to the attire of judges and lawyers.[20] Furthermore, in General Comment No. 5, the Committee emphasised the need to establish effective procedures that uphold children's rights, including the provision of information and counselling.[21] In General Comment No. 24, the Committee stresses that children have the right to be heard directly at all stages of the justice process, from the outset. They also have the

16 Grace Cardiff and others, 'Just Let Them Have a Say! Students' Perspective of Student Voice Pedagogies in Primary Physical Education' (2023) 42(4) Irish Educational Studies 665. doi:10.1080/03323315.2023.2255987.

17 UN Committee on the Rights of the Child, *General Comment No 12* (n 8) para 24.

18 ibid, para 23.

19 Julia Sloth-Nielsen and Michelle Oliel, *Constitutionalising Children's Rights and Domestic Courts of Member States of the Council of Europe* (Publication Series 7, Deutsches Kinderhilfswerk 2019) 14.

20 UN Committee on the Rights of the Child, *General Comment No 12* (n 8) para 34.

21 UN Committee on the Rights of the Child, *General Comment No 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child* (CRC/GC/2003/5, UN 2003) para 24 <https://digitallibrary.un.org/record/513415?ln=en> accessed 26 September 2025.

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right to remain silent, without any negative consequences if they do not speak.[22] All of these recommendations aim to empower the child and ensure that they can freely and effectively express their views, which ultimately serves their best interests.

The child should be represented in court by a competent lawyer who understands their interests and psychological characteristics. Such representation requires applying the "best interests" standard in any decision concerning the child. The role of the representative is not limited to merely conveying the child's views verbatim to the court; rather, the attorney should first discuss with the child to understand their perspectives and reasoning, clarify the legal implications, explain which requests are likely to be accepted by the judge, and ultimately work toward proposing compromises that serve the child's interest and present them to the court. This process benefits the child and reinforces the sense that their voice is being heard.[23] The child's lawyer is crucial for coordinating testimony, motivating the child, and explaining the consequences of the proceedings. Building a trust-based relationship is essential to help the child feel safe enough to cooperate effectively, even if they are uncooperative with their parents.[24]

With regard to civil judicial proceedings such as divorce, separation from parents, adoption, or kafala (care under Islamic law), the Committee clarified in General Comment No. 12 that court rulings have a significant impact on the children of divorced or separated parents, as judges determine matters such as maintenance, custody, and access. Many national laws require judicial authorities to give utmost priority to "the best interests of the child" when deciding on the dissolution of a relationship.[25] The Committee recommended that laws concerning separation ensure the child's right to be heard by the decision-making authorities and emphasised that CRC requires assessing the child's capacity to express their views on a case-by-case basis, depending on their age and level of maturity.[26]

In cases where the child is separated from their parents or requires alternative care due to neglect or abuse, the Committee has recommended that States Parties ensure the child's right to express their views, and to institutionalise this principle through appropriate legislation and guidelines governing foster care and parental visitation decisions.[27] When a child is placed for adoption or kafala under Islamic law, the child's opinion and participation must be considered. The Committee urges States Parties to ensure that the child is informed, as much as possible, about the implications of adoption or kafala, and to guarantee their right to express their views, always giving primary

22 UN Committee on the Rights of the Child, *General Comment No 24* (n 8) para 45.
23 Mark Henaghan, 'What Does a Child's Right to Be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough' (2008) 42(1) Family Law Quarterly 126.
24 ibid
25 UN Committee on the Rights of the Child, *General Comment No 12* (n 8) para 51.
26 ibid, para 52.
27 ibid, para 54.

consideration to the best interests of the child when taking such decisions, in line with the requirements of Article 12 of the Convention.[28]

Regarding the child's right to be heard in criminal judicial proceedings, every child must be entitled to freely express their views at every stage of the juvenile justice process. For a juvenile accused of violating criminal law, Article 12(2) of the CRC obliges States Parties to ensure this right throughout the trial, including the right to remain silent during the pre-trial phase. This right extends to being heard by the police, the public prosecutor, the investigating judge, and at every stage of the case up to final judgment.[29]

The child must be informed directly, and in a language they understand, about the nature of juvenile justice procedures and any measures the court may take. All procedures must be carried out in an environment that enables the child to participate freely and express their views without pressure or fear.[30] Hearings of children accused in criminal proceedings must be held behind closed doors, and any exceptions to this rule must be defined by law and remain strictly limited.[31]

As for child victims or witnesses, they must be given the full opportunity and empowerment to exercise their right to express their views and thoughts in their own way throughout the judicial process. Child victims or witnesses must be informed of the methods of interrogation, the protective measures in place, and the support mechanisms available to them when filing complaints and participating in trial proceedings.[32] The testimony of the child and their ability to provide an accurate account of the incident are extremely important, especially in cases where physical evidence is scarce, such as in sexual assault cases.[33] It is observed that international legal instruments focused on protecting children as victims tend to be less detailed than those addressing suspects or offenders.[34] However, relevant instruments include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, and the Council of Europe's Guidelines on Child-Friendly Justice (GCFJ).[35] It is worth noting that the CRC does not explicitly provide for the rights

28 ibid, para 56.

29 ibid, para 58.

30 ibid, para 60.

31 ibid, para 61.

32 ibid, para 64.

33 Council of Europe, 'Hearing of Children in Criminal Procedure According to Article 6 of the European Convention on Human Rights' *(Council of Europe: Lisbon Network,* 2008*)* <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper5_en.asp> accessed 26 September 2025.

34 Wendy De Bondt and Heleen Lauwereys, 'Children's Rights and Child Participation in Criminal Proceedings' in Ricardo Pereira, Annegret Engel and Samuli Mietinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order* (Edward Elgar 2020) 251-2. doi:10.4337/9781788977296.00019.

35 Committee of Ministers of the Council of Europe, *Guidelines on Child-Friendly Justice: adopted on 17 November 2010 and Explanatory Memorandum* (Building a Europe for and with Chidren, Council of Europe 2010) <https://rm.coe.int/16804b2cf3> accessed 26 September 2025.

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of child victims, as Article 40 focuses on the rights of children accused or suspected of crimes. Nevertheless, Article 12 is worded in a general manner and thus encompasses all children appearing before courts, whether accused, suspected, or victimised.[36]

This study emphasises the imperative of protecting children's rights in judicial proceedings, regardless of their status (victim, suspect, or accused). However, priority is given to ensuring the rise of child victims in particular, as internationally guaranteed rights -such as the right to remain silent- acquire a crucial practical dimension when applied in the context of protecting those children.

4 THE CHILD'S RIGHT TO OPINION AND EXPRESSION IN INTERNATIONAL LAW AND RELATED ISSUES

The child's right to express their views in matters that affect them is a cornerstone of international human rights law. However, its practical implementation raises several substantive challenges. Therefore, this part of the study will address the legal framework governing this right by reviewing the key legal instruments that established it, focusing on core concepts and the difficulties surrounding its interpretation and application.

4.1. The Child's Right to Express Their Views in Matters Concerning Them

The right to opinion and expression has been enshrined in both binding and non-binding international instruments. Article 19 of the 1948 Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[37] Similarly, Article 19(2) of the International Covenant on Civil and Political Rights affirms: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[38]

Article 12 of the Convention on the Rights of the Child (1989) affirms the child's right to expression and participation in proceedings that affect them.[39] At the European level, Article 3 of the European Convention on the Exercise of Children's Rights (1996) affirms the child's right to receive information and to express their views in legal proceedings.[40]

36 De Bondt and Lauwereys (n 34).

37 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 26 September 2025.

38 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200A(XXI)) 999 UNTS 171.

39 CRC (n 2) art 12.

40 European Convention on the Exercise of Children's Rights (25 January 1996) ETS 160.

Article 12 of the CRC is considered the Convention's most prominent achievement. It established the child's right to effective participation in judicial and administrative proceedings that affect them, recognising children as independent rights-holders rather than passive recipients of care or sympathy. It reinforced a culture of empowering children and instilling in them the confidence to express their views and confront their challenges. All individuals under the age of eighteen are entitled to the rights in the Convention unless the majority is attained earlier according to national law. Article 12 states:

"A. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

B. For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Article 12(1) obligates States Parties to guarantee the child's right to form and freely express their views on all matters affecting them, taking into account the child's age and maturity. This is a distinct right that differs from the broader concept of freedom of expression. In *N.T.S v. Georgia,*[41] the ECtHR affirmed that the State must presume the child's ability to express their views, without requiring the child to prove such competence.[42] Children, like adults, are not compelled to express their views; they may speak or remain silent. Article 12(2) recognises the child's right to be represented in judicial and administrative proceedings by individuals other than their parents or by appropriate bodies, provided such representation complies with national procedural law. Importantly, the child's need for representation and advocacy in these settings does not exclude the necessity for support in other contexts. For example, a child may require practical assistance to express their opinion—such as technical support or interpretation services.

From the wording of Article 12, it is clear that the exercise of these rights is conditional upon the child reaching a certain level of maturity. This distinguishes Article 12 from other rights in the CRC, which children enjoy at all times without restriction or condition.[43] According to the Committee, "even the youngest children are entitled to express their views, which should be 'given due weight in accordance with the age and maturity of the child."[44]

41 *N Ts and Others v Georgia* App no 71776/12 (ECtHR, 2 February 2016) para 20 <https://hudoc.echr.coe.int/eng?i=001-160313> accessed 26 September 2025.

42 Mariam Saneblidze, 'The Child's Right to Be Heard in Civil Proceedings' (2024) 10(29) Law and World 153. doi:10.36475/10.1.12.

43 Nawal Daim, 'Freedom of Opinion and Expression in the Convention on the Rights of the Child and its Impact on Domestic Legislation' (2018) 3(1) *Mediterranean Journal of Law and Economics* 151.

44 UN Committee on the Rights of the Child, *General Comment No 7 (2005) Implementing Child Rights in Early Childhood* (CRC/C/GC/7/Rev.1, UN 2006) para 14 <https://digitallibrary.un.org/record/584854?ln=en> accessed 26 September 2025; UN Committee on the Rights of the Child, *General Comment No 12* (n 8); UN Committee on the Rights of the Child, *General Comment No 14* (n 8) para 54.

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Lundy argues that fulfilling Article 12 demands more than just "hearing" Children; it requires adults to listen authentically—**to be listened to, not simply heard**—and to give due weight to their perspectives. She critiques "tokenistic participation," in which children's views are heard but lack influence, emphasising that due weight requires that children's perspectives genuinely impact decision-making, leading to real change rather than merely superficial consultation. [45] According to a report by leading children's rights specialists, including Lundy, effective and meaningful child participation must be transparent, voluntary, respectful, inclusive, safe, and accountable, with feedback given to demonstrate how children's input influenced outcomes. [46] The authors outline seven required building blocks to achieve this, such as embedding participation in law, strengthening children's agency, creating inclusive spaces, and undertaking robust follow-up.

Given the indivisibility of the rights set out in the CRC,[47] the provisions of Article 12 must not be interpreted in isolation. They must be read in light of the Convention as a whole and alongside other human rights instruments. For instance, implementing Articles 12 and 19 of the Universal Declaration of Human Rights may occasionally appear to be in tension with other provisions of the CRC, such as Article 3 (on the best interests of the child) and Article 5 (on the responsibilities of parents and caregivers).[48]

Articles 3 and 12 are closely interlinked. The proper implementation of Article 3 (best interests of the child) cannot be achieved without meeting the requirements of Article 12. Under Article 3, the best interests of the child must be a primary consideration in all decisions affecting the child—including decisions about their right to express views and be heard. The term "concerning" must be understood broadly. The obligation applies to all decisions and measures that affect the child, directly or indirectly, whether they are health or education policies specifically targeting children or broader environmental or housing decisions that may impact them. When a measure has significant effects on children, more detailed procedures must be adopted to safeguard their best interests.[49]

Article 12 must also be interpreted alongside Article 5 of the CRC, which affirms the right of adults to provide appropriate guidance to the child in accordance with the child's evolving capacities. Accordingly, the adult's role in guidance should gradually diminish as the child matures, and this support may cease once the child achieves a sufficient level of maturity.[50]

45 Lundy (n 9) 939.
46 Laura Forde and others, *The Right of Children to Participate in Public Decision-Making Processes* (Save the Children International 2020) 10-23.
47 UN Committee on the Rights of the Child, *General Comment No 14* (n 8).
48 Jenna Gillett-Swan and Jonathon Sargeant, 'Assuring Children's Human Right to Freedom of Opinion and Expression in Education' (2018) 20(1) International Journal of Speech-Language Pathology 121. doi:10.1080/17549507.2018.1385852.
49 UN Committee on the Rights of the Child, *General Comment No 14* (n 8).
50 Lundy (n 9) 939.

4.2. Interpretation and Application of Article 12 in Practice: Challenges and Open Questions

Article 12(1) of the CRC states that the views of the child in matters affecting them must be given due weight depending on their age and maturity, thus requiring both criteria for the right to be exercised.[51] However, the article does not specify which children are considered capable of forming and expressing views. Should all children, even those below the age of discernment, be granted the opportunity to express their opinions in matters that concern them?

As for the maturity criterion, the article does not define what constitutes maturity or identify who should assess the child's capacity to express views.[52] Maturity is commonly understood as the child's ability to understand and evaluate specific outcomes. However, international and national law lack standardised criteria for determining maturity; it is assessed on a case-by-case basis. As for age, Article 12 does not specify a particular age either, leaving that to national legislation. For instance, in Bulgaria and Romania, children's views are considered from age ten; in Spain, the legal age for expressing views in certain matters is fourteen. In France, the required age varies depending on the type of proceedings—a child may be heard in family law matters starting at age seven. In all cases, national laws should not pose an obstacle to achieving the purpose of Article 12 of the CRC.[53] By analysing both criteria separately, it can be concluded that maturity is the primary condition for applying Article 12, rather than age. For example, the views of a rational and mature ten-year-old child may be considered, while those of an older but less mature child might not. It is recommended that the National law entrust the determination of maturity standards to the discretion of competent judges, ideally those specialising in children's issues.

It is worth noting that adults possess decision-making authority over their own affairs without being required to express or justify their views, except perhaps indirectly through voting.[54] In contrast, children do not enjoy the same level of authority. They are granted the right to express their views, but whether or not those views are given weight in decisions that affect them remains conditional.[55] Not all decisions concerning a person are equally significant. Some decisions are relatively minor—such as choices about clothing, food, or entertainment—while others are more complex and may involve the child's health,

51 CRC (n 2) art 12(1).

52 Archard and Uniacke (n 3) 523.

53 FRA, *Child-Friendly Justice: Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States* (Publications Office of the EU 2015) 40; Saneblidze (n 42).

54 Lundy (n 9) 937.

55 Archard and Uniacke (n 3) 529.

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finances, or legal status. These complex decisions require greater maturity, access to relevant information, and an ability to assess potential risks.[56]

One might assume that balancing a child's views with their best interests is a straightforward task. However, it often involves other overlapping considerations, such as the child's parents' views and cooperation and the adults around them. Adults may be reluctant to give due weight to a child's views for several reasons: doubt about the child's ability to participate meaningfully in decision-making, fear of losing authority or control, and concern that fully respecting the child's rights may require significant time and effort.[57] In reality, these doubts reflect a misunderstanding of the nature of the rights enshrined in Article 12. The goal is not to give children the same rights as adults, but rather to ensure they can express their views, be heard, and progressively assume responsibility as they develop and mature.[58]

Limited awareness of children's rights presents a significant obstacle to the effective implementation of Article 12. This, in turn, constitutes a violation of Article 42 of the CRC, which obliges states to actively disseminate the Convention's principles. Full implementation of the Convention's provisions cannot be achieved unless parents and caregivers are well-informed about their content.[59] Children's capacities are often limited by parents' and caregivers' lack of awareness and the failure to create an environment that supports the exercise of children's rights. Therefore, enhancing their awareness through targeted training programs is recommended to help children exercise their rights effectively.

Another practical challenge in applying Article 12 is the complexity of weighing multiple children's views, which arises in group settings, such as schools, where giving "due weight" to children's views becomes more complex. Often, teachers categorise children according to their own perceptions or criteria rather than using objective criteria such as maturity or ability to express themselves.[60]

Although Article 12 of the CRC is one of its most commonly referenced provisions, it is frequently misunderstood due to the abbreviated language often used to refer to it, such as "the child's voice," "the right to be heard," and "the right to participate." While such phrases facilitate easier reference to the article without quoting its full text, they may dilute its legal force, as they fail to capture the full scope of its content and requirements.[61]

56 ibid 530.
57 Lundy (n 9) 929.
58 Lansdown (n 1) 8.
59 Lundy (n 9) 930.
60 Carol Robinson, 'Lost in Translation: The Reality of Implementing Children's Right to Be Heard' (2020) 8(s4) Journal of the British Academy 36. doi:10.5871/jba/008s4.029.
61 Lundy (n 9) 930.

There is also the possibility that a child's opinion may be taken into account and a decision subsequently made that negatively affects the child socially, psychologically, financially, or health-wise. In such cases, who bears responsibility? Could the child, upon reaching adulthood, initiate proceedings against the parents for decisions made based on their expressed opinion?

There is also the problem of Tokenistic Listening, which involves giving children a formal opportunity to express their opinions without taking them seriously and considering them in decision-making concerning the child. This makes children's participation merely a formality aimed at improving the public image. The Committee emphasised in its General Comment No. 12 that this type of participation does not fulfil the spirit of Article 12 of the CRC. Children's opinions must be listened to seriously, considered of intrinsic value, and properly valued, ensuring that these opinions actually influence policies and practices. Finally, feedback must be provided, explaining how their contributions were addressed, whether they were adopted or not, and explaining the reasons.[62] Another key problem is that many countries lack mechanisms to give children feedback on how their views are perceived. Influenced decisions. This undermines the purpose of participation, reducing it to a mere formality.

Moreover, if a child's opinion does not alter the final decision, the child may question whether their voice was truly taken into account. An appropriate response should make it clear that their perspective was an important part of the process, even if it was not the only determining factor.[63] Most importantly, the child should be informed how their opinion contributed to the outcome, thus validating their participation regardless of the final decision.

4.3. The Best Interests of the Child as a Limitation on the Exercise of Their Rights

The principle of the "best interests of the child" is set out in Article 3(1) of the CRC, which provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, a court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[64]

Under this principle, States Parties are required—when faced with multiple interpretations of legal provisions—to adopt the interpretation that best serves the child's interests. This requires a prior evaluation of the positive or negative consequences of any decision, and a comprehensive analysis of the child's family situation, taking into account a wide range of factors, including psychological, emotional, medical, and financial considerations. The

62 UN Committee on the Rights of the Child, *General Comment No 12* (n 8) para 45.

63 Archard and Uniacke (n 3) 533-4.

64 CRC (n 2) art 3(1).

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ECtHR affirmed this in *Neulinger and Shuruk v. Switzerland*,[65] where the court set out two criteria for assessing whether the best interests of the child were properly considered:

1. Ensuring the child's development in a healthy environment, free from harmful actions by either parent; and

2. Preserving the child's relationship with their family, unless it can be demonstrated that the family environment is unsuitable.[66]

In *Maumousseau and Washington v. France*, the Court was satisfied that the local French court had conducted a thorough examination of the child's family situation and assessed the interests of all parties fairly and reasonably, with a focus on the child's best interests.[67]

This principle imposes a dual obligation on the State: to justify every child-related decision[68] and to broaden its application to all proceedings affecting the child. The "best interests of the child" is a flexible principle that must be adapted to each case. When making decisions involving the child, factors such as the child's opinion, maturity, vulnerabilities, and rights to health, education, and family ties must be taken into account.[69] However, a major challenge lies in the selective consideration of the child's views. For instance, they may be heard in custody cases, but disregarded in medical decisions deemed contrary to their best interests.

The Committee, in its General Comment No. 14 (2013), stated that determining a child's best interest requires respect for the child's right to express their views and giving due weight to such views[70]—the best interests of the child and the right to be heard—are fundamental to the CRC and must be applied together to ensure neither is limited at the expense of the other.[71] Accordingly, the child's right to express their opinion may be limited when necessary to protect their best interests, for example, if exercising that right poses a threat to the child's "open future," contradicts developmental needs, or irreparably limits future choices.[72]

65 *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECtHR, 6 July 2010) para 139 <https://hudoc.echr.coe.int/eng?i=001-99817> accessed 26 September 2025.

66 Charlotte Mol and Thalia Kruger, 'International Child Abduction and the Best Interests of the Child: An Analysis of Judicial Reasoning in Two Jurisdictions' (2018) 14(3) Journal of Private International Law 434. doi:10.1080/17441048.2018.1525074.

67 *Maumousseau and Washington v France* App no 39388/05 (ECtHR, 6 December 2007) para 74 <https://hudoc.echr.coe.int/eng?i=001-83823> accessed 26 September 2025.

68 UN Committee on the Rights of the Child, *General Comment No 14* (n 8) para 20.

69 Alexander Weihrauch, 'The Principle of the Best Interest of the Child' (*Humanium*, 2 March 2021) <https://www.humanium.org/en/the-principle-of-the-best-interest-of-the-child/> accessed 26 September 2025.

70 UN Committee on the Rights of the Child, *General Comment No 14* (n 8) para 43.

71 Saneblidze (n 42).

72 Lundy (n 9) 938.

5 THE NATIONAL IMPLEMENTATION OF THE CHILD'S RIGHT TO BE HEARD: A COMPARATIVE LEGISLATIVE AND JUDICIAL PERSPECTIVE

National legislation plays a pivotal role in enshrining Article 12 of the CRC and ensuring the child's right to express opinions in judicial and administrative proceedings concerning them. Among the most notable legislative examples are those of Finland, France, and Belgium, which will be discussed in turn.

Finland ratified the CRC on 20 June 1991. According to Article 95(1) of the Finnish Constitution,[73] international treaties become legally binding and enforceable through parliamentary legislation once ratified. Section 12 of the Constitution guarantees everyone the right to freedom of expression and the right to impart and receive information. The details of this right are regulated by law, including restrictions intended to protect children from harmful visual content. Section 21 of the Constitution guarantees the components of a fair trial, ensuring that everyone has the right to have their case handled appropriately by a legally competent, independent court without undue delay. It also emphasises that provisions related to public hearings and the right to be heard are to be regulated by law.[74]

Article 20 of the Child Welfare Act affirms that children aged 12 and above must be given an opportunity to express their views on matters concerning their care. Their views and wishes must be taken into account in a manner appropriate to their age and level of development, provided it does not cause them harm.[75] Article 21 further affirms the child's right, from the age of 12, to be heard independently in matters related to their care, reinforcing their participation in decisions that concern them.[76] Article 15 of the Child Custody and Right of Access Act states that the child's right to be heard in custody matters is conditional, not absolute. It requires the child's explicit consent and applies only when necessary to resolve the dispute and where the hearing would not cause the child harm.[77] Article 39 of the same law stipulates that the Court of Appeal must ascertain the child's opinion before deciding on the enforcement of a foreign custody decision, provided it is assumed that the child has reached an adequate level of maturity.[78] The legislation establishes a nuanced approach to the child's right to be heard, transitioning from a mandatory right in welfare matters to a conditional one in custody disputes. This hierarchy particularly applies the "best interest" principle by tailoring the child's level of participation to the specific case.

73 Constitution of Republic of Finland 731/1999 (effective 1 March 2000) <https://www.finlex.fi/en/legislation/translations/1999/eng/731> accessed 26 September 2025.

74 Council of Europe, 'Hearing of Children (n 33).

75 Child Welfare Act 417/2007 (n 6) s 20.

76 ibid, s 21.

77 Act on Child Custody and Right of Access 361/1983 (Finland) (effective 1 January 1984) s 15 <https://finlex.fi/en/legislation/translations/1983/eng/361> accessed 26 September 2025.

78 ibid, s 39.

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The Finnish Criminal Investigations Act allows a child complainant or witness to provide testimony via video recording, without setting a minimum age to benefit from this procedure.[79] The Act also permits interrogation by a qualified expert trained in interviewing children and allows such interviews to be conducted in alternative locations, such as the child's home or any safe and supportive environment.[80] Additionally, the law grants the accused the right to question the child indirectly, either by being present in a separate room during the interview or by viewing the recorded video afterwards. According to the Code of Judicial Procedure, video recordings made in accordance with the Criminal Investigations Act may be admitted as evidence at trial, provided that the accused has been granted the opportunity to ask questions.[81] This demonstrates that Finnish law seeks to maintain a delicate balance—it aims to protect vulnerable witnesses, such as children, from the trauma of in-court testimony, while simultaneously safeguarding the defendant's right to a fair trial by granting them the opportunity to cross-examine witnesses during the recorded interview.

Chapter 2, Section 1 (107/1998) of the Criminal Procedure Act (No. 689/1997) provides that a defence counsel must be appointed for a suspect under 18 years of age, unless it is clearly unnecessary.[82] This means that, while it is finished, Low acknowledges the need for legal assistance for minors in criminal cases, it does not grant an absolute right to counsel for all children in every judicial proceeding.

The amended Code of Judicial Procedure also outlines the conditions under which children can be heard as parties to a case. Interrogation of children under the age of fifteen is left to the court's discretion, while children under ten are generally not heard. Any interrogation must be conducted in a manner that avoids causing suffering or harm to the child's development. This may include questioning without the accused present or without visual contact, and the court may involve experts such as child psychologists. Minors aged fifteen have the right to be heard independently in matters concerning their person, in addition to their legal guardian or custodian.[83]

In short, age 12 is the threshold for "the right to participate and be heard" in social and welfare matters. In contrast, age 15 is the threshold for "competence and independence" in more serious judicial and procedural matters. It is worth noting that the presence of psychiatrists in court proceedings is crucial, as their reports determine

79 Criminal Investigation Act 805/2011 (Finland) (effective 1 January 2014) ch 6, s 11 <https://finlex.fi/en/legislation/translations/2011/eng/805 > accessed 26 September 2025.

80 ibid, ch 4, s 7.

81 Code of Judicial Procedure 4/1734 (Finland) (amended up to Act 812/2019) ch 17, s 24 <https://finlex.fi/en/legislation/translations/1734/eng/4-000> accessed 26 September 2025.

82 Criminal Procedure Act 689/1997 (Finland) (effective 1 October 1997) ch 2, s 1 <https://www.finlex.fi/en/legislation/translations/1997/eng/689> accessed 26 September 2025.

83 Code of Judicial Procedure 4/1734 (n 81) s ch 12 s 1.

the feasibility of a child's testimony and help ensure a balance between the plaintiff's rights and the child's best interests.

In its 2023 concluding observations on Finland, the Committee welcomed the integration of the best interests of the child into various laws but expressed concern about the inconsistent application of this principle.[84] Regarding respect for children's opinions, the Committee noted that children's views are not always taken into account and that the law allows formal hearings only for those over 12 years old. The Committee, therefore, recommended guaranteeing the right of all children to express their views in matters affecting them and amending the laws to ensure children are heard regardless of age.[85]

The ECtHR addressed these issues in *C. v. Finland*.[86] The plaintiff filed a complaint against the Finnish Supreme Court's decision to award custody of his children to the deceased mother's partner, surnamed "L." The plaintiff argued that the Supreme Court gave unreasonable weight to the children's opinions and age, relying on their desire to live with "L" and overturning two lower court decisions granting custody to the father. He claimed that the court applied the age criterion automatically without considering maturity, and that experts should have examined the children to assess the reliability of their wishes before their opinions could be relied upon in the decision. The ECtHR has held that courts must listen to children's wishes and opinions, and that it is detrimental to the child's interests to force them to submit to a position they resist. Although the Court did not explicitly mention Article 12 of the CRC, it referred to the same principle contained in Article.

However, the Court noted that the Supreme Court gave exclusive weight to the children's views, without taking into account the children's rights, thus giving the children an unconditional right of veto, and that this decision was made without an oral conference session or sufficient analysis of the effects of the decision on the children's well-being and their relationship with their father.[87]

The court recognised that the child's best interests are paramount, but the children's views should not be considered decisive in custody proceedings. A broader assessment of the child's best interests, including emotional stability and continuity of care, must be made.[88] Accordingly, the Court found that Finland had violated Article 8 of the ECHR by failing to ensure the father's right to contact his children and by failing to balance the father's interests against those of the children, and awarded compensation to the plaintiff father.

84 UN Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Reports of Finland* (CRC/C/FIN/CO/5-6, 2 June 2023) para 17 <https://www.ohchr.org/en/documents/concluding-observations/crccfinco5-6-concluding-observations-combined-fifth-and-sixth> accessed 26 September 2025.

85 ibid, para 19.

86 *C v Finland* (n 7) para 57.

87 ibid, para 58.

88 ibid

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In its ruling of 16 June 2017, the Supreme Administrative Court of Finland affirmed that listening to children during asylum procedures is a fundamental right.[89] The verdict was based on Section 6(2) of the Finnish Aliens Act and the CRC. The case concerned an Iraqi man and his son who had applied for asylum in Finland on the grounds of religious persecution. The Court overturned the decisions of the lower administrative court and the Immigration Service and remanded the case for reassessment. The two cases reveal a consistent trend in Finnish jurisprudence affirming the child's right to express his opinion to the court, without granting it decisive authority.

On a practical level, to strengthen safeguards for children in Finland, the project "Barnahus in Finland – Ensuring child-friendly justice through the effective operation of the Barnahus-units in Finland" was launched in 2019.[90] This project presents a multidisciplinary, child-friendly model aimed at strengthening child safeguards in judicial proceedings and stopping child abuse through a coordinated and effective response that reduces psychological trauma during investigations and judicial proceedings.

In France, the amended Constitution (2008) enshrines the right to freedom of opinion and expression under Article 11, recognising it as one of the most valuable human rights, which may only be restricted in exceptional circumstances defined by law. According to Article 55 of the Constitution, once ratified (as with the CRC in 1990), international treaties take precedence over domestic law and are automatically integrated into the legal system. However, the direct enforceability of these provisions before French courts depends on the judiciary's recognition of their "self-executing" nature.[91] The highest French courts—including the Council of State and the Court of Cassation—have affirmed the direct applicability of certain CRC provisions, such as Article 3(1) and Article 12, enabling individuals to invoke them directly in legal proceedings.[92]

In the context of family law, the French Civil Code allows for hearing the views of a legally capable minor when it serves their best interests. The minor may be heard alone, with a lawyer, or with a person of their choosing—unless this choice is not in the child's best interest, in which case the judge may appoint another person.[93] The law also permits

89 Decision KHO:2017:81 (Supreme Administrative Court of Finland, 16 June 2017) <https://www.asylumlawdatabase.eu/en/content/finland-supreme-administrative-court-rules-children%E2%80%99s-right-be-heard-during-asylum-procedure> accessed 26 September 2025.

90 European Commission, 'Ensure Child-Friendly Justice Through Effective Operation of the Barnahus Units in Finland' (*European Commission: Reform Support*, 9 January 2025) <https://reform-support.ec.europa.eu/what-we-do/public-administration-and-governance/ensure-child-friendly-justice-through-effective-operation-barnahus-units-finland_en> accessed 10 November 2025.

91 Constitution of the French Republic (4 October 1958, amended 2008) <https://www.constituteproject.org/constitution/France_2008 > accessed 26 September 2025.

92 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: France* (CRC/C/FRA/4, 21 February 2008) para 35 <https://docs.un.org/CRC/C/FRA/CO/4> accessed 26 September 2025.

93 Code civil des Français (n 5) art 388-1.

children to be represented by a dedicated legal representative in civil, criminal, and administrative proceedings. Moreover, Article 388-2 of the Civil Code allows for the appointment of a special representative in family law matters when there is a conflict of interest between the child and their parents.[94]

Pursuant to Article 388 of the French Civil Code, authorities must presume the child's capacity to form personal views, which necessitates listening to the child to assess their maturity. If the child is found capable of discernment, a child's attorney or an ad hoc legal representative is appointed to represent and protect their interests during judicial proceedings.

Articles 338-1 to 338-12 of the French Code of Civil Procedure (CPC) establish the procedural mechanism for hearing a minor in court. The child must be informed—by the holder of parental authority or their guardian—of their right to be heard in proceedings that concern them, as well as their right to legal counsel.[95] The child may request a hearing at any stage of the proceedings, including for the first time on appeal.[96] Article 338-4 requires that any refusal to hear the child must be substantiated by a reasoned decision, and the child and parties must be notified of this refusal. It is worth noting that a child is not considered a party to the proceedings; therefore, this process should not be confused with criminal proceedings involving a minor in which the minor is alleged to have committed unlawful acts.

Under the French Code of Criminal Procedure, when a minor is heard freely under Article 61-1, or when procedures under Article 61-3 are carried out, the judicial police officer must inform the child's legal representative or appointed guardian by any available means.[97] Article L11-1 of the Code of Juvenile Criminal Justice stipulates that a minor may be held criminally responsible if they are capable of discernment, which is presumed for those aged 13 or older, provided they understand their actions and intend to commit them.[98]

In a case of first impression, the Court of Appeal of Aix-en-Provence refused to hear the testimony of two minor children in a custody dispute without stating reasons. The court assigned permanent residence to the father, in contravention of Article 388-1 of the Civil Code and Article 338-4 of the Civil Procedure Code. The first provision grants the child the right to be heard; the second mandates that any refusal be explained. The Court of

94 ibid, arts 388-1-2, 388-2.

95 Code de procédure civile (France) (amended 2025) art 338-1 <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000020664476> accessed 26 September 2025.

96 ibid, art 338-2.

97 Code de procédure pénale (France) (effective 2 March 1959 (France métropolitaine), 1 March 1962 (DOM-TOM)) arts 61-1, 61-3 <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042915707> accessed 26 September 2025.

98 Code de la justice pénale des mineurs (France) (effective 30 September 2021) art L11-1 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000039086952> accessed 26 September 2025.

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Cassation overturned the decision, affirming a key principle:[99] when a minor capable of discernment requests to be heard in a matter concerning them, the judge is obligated to do so, and any refusal must be justified.

In a similar context, the Court of Cassation ruled that a judge's refusal to hear a child cannot be based solely on age; it must rely on an objective assessment of the child's capacity for discernment, and any denial must be supported by a detailed legal justification—especially when the request originates from the child.[100]

The Court of Cassation also overturned an appellate court decision due to a breach of the principle of adversarial proceedings, as the mother had not been notified of the child's hearing transcript referenced in the ruling.[101] The decision relied on Articles 16(1) and 338-12 of the Code of Civil Procedure, which require drafting a hearing report and notifying all parties. The court emphasised the importance of respecting procedural safeguards to ensure the rights of all parties, particularly in matters involving children.[102] Despite French courts' recognition of the CRC and its direct applicability to certain provisions,[103] judicial application remains inconsistent. Court decisions have varied and sometimes contradicted the Convention, often lacking clear reasoning when applying—or overlooking—certain provisions.[104]

French courts have shown greater attention to Article 3 of the CRC. The Constitutional Council, Court of Cassation, and Council of State have all applied the best interests of the child principle, and the Committee has commended France for this in its annual report.[105] The Council of State has also affirmed the direct effect of Article 3(1), annulling decisions that contravened it.[106] Furthermore, the Conseil d'État (France's Supreme Administrative Court) ruled that a child may appear before a judge in emergencies to protect their fundamental rights—even if they lack full legal capacity to initiate proceedings.[107]

99 Appeal No 21-24.296 (Court of Cassation, First Civil Chamber (France), 17 January 2024) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000049052988> accessed 26 September 2025.

100 Appeal No 18-26.707 (Court of Cassation, First Civil Chamber (France), 14 April 2021) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000043473530> accessed 26 September 2025.

101 Appeal No 21-19.362 (Court of Cassation, First Civil Chamber (France), 12 July 2023) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000047852569> accessed 26 September 2025.

102 Laurence Gareil-Sutter, 'Audition de l'enfant: le juge doit s'assurer du respect du contradictoire!' (*Dalloz Actualité*, 12 September 2023) <https://www.dalloz-actualite.fr/flash/audition-de-l-enfant-juge-doit-s-assurer-du-respect-du-contradictoire> accessed 26 September 2025.

103 Sloth-Nielsen and Oliel (n 19) 28.

104 ibid

105 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of France* (CRC/C/FRA/CO/5, 23 February 2016) <https://digitallibrary.un.org/record/834948> accessed 26 September 2025.

106 Sloth-Nielsen and Oliel (n 19) 34.

107 App No 375956 (Council of State, Judge of Interim Relief (France), 12 March 2014) <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000028721828> accessed 26 September 2025.

In *Maumousseau and Washington v. France*, the ECtHR held that the French authorities had complied with the standards of the CRC regarding the child's right to express views in matters affecting them. The court emphasised that the child's right to be heard is a fundamental element in assessing compliance with Article 8 of the ECHR. However, it didn't find a violation in this case, noting that the child, being only three years old, had not yet reached the age of discernment necessary to express an independent and reliable opinion.[108]

To enhance the process of hearing children practically, "Melani rooms" have been set up in police stations and hospitals. Designed like friendly playrooms with toys and child-sized furniture. These spaces are meant to create a safe, supportive environment for children to express themselves freely. Interviews are audio- and video-recorded in the room, and the presence of the camera is explained to the child in a simplified manner. Interviews are conducted by plainclothes officers using simple language, while the session is monitored from behind one-way glass. Interviews in these rooms are audio- and video-recorded, and the camera's presence is explained to the child in simple terms. Plainclothes officers conduct their sessions using simple language, while others monitor from behind one-way glass. These rooms, established in several French provinces, play a crucial role in the judicial system by ensuring that children's testimonies are collected in a manner that preserves their dignity and protects them from psychological harm.[109]

Belgium ratified the CRC on 16 December 1991, granting it a higher legal status than domestic legislation and initiating several legislative reforms to align with its provisions. Thus, the protection of children's rights in Belgium is grounded in the CRC, the Belgian Constitution, the Judicial Code, and the 1965 Youth Protection Act, as amended.

Article 19 of the Belgian Constitution guarantees fundamental freedoms, including the right of individuals—regardless of age—to freely express their opinions in all matters, unless such expression constitutes a criminal offence. Article 22bis, introduced in 2000, focuses specifically on the child's right to have their opinion considered in all matters that affect them, following their age and maturity. It also emphasises that the child's best interests must be the primary consideration in all decisions affecting them.[110] This Constitutional provision is groundbreaking as it elevates the principles of Articles 12 and 3 of the CRC to the highest level of national law. However, the child's right, as specified in Article 12, is not absolute; the court balances it against other constitutional principles such as legal certainty and the right to a fair trial.

108 *Maumousseau and Washington v France* (n 67).

109 Ministère de l'Intérieur, 'Salle Mélanie à Montauban: un lieu bienveillant pour l'écoute des très jeunes victimes' (*Ministère de l'Intérieur: Ma Sécurité*, 26 May 2025) <https://www.masecurite.interieur.gouv.fr/fr/actualites/salle-melanie-montauban-lieu-bienveillant-ecoute-tres-jeunes-victimes> accessed 26 September 2025.

110 Constitution of Belgium (effective 21 February 1831) <https://mjp.univ-perp.fr/constit/be1831.htm> accessed 26 September 2025.

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Article 56B of the 1965 Youth Protection Act establishes the specific right of the child to be heard before the juvenile court.[111] The court is obliged to summon the child if the child is at least 12 years old when making decisions concerning parental responsibilities, residence, or the management of the child's property. It is imperative that the juvenile judge personally hear the child before rendering any decision, unless the child refuses to appear or is prevented from doing so by health conditions.[112]

In the same context, Article 1004 §1 of the Belgian Judicial Code states that every minor has the right to be heard by a judge in matters that concern them, such as custody and adoption.[113] However, certain financial matters—like maintenance obligations that do not directly affect the child's assets—are exceptions, and the judge may refuse to hear the child. The purpose of this provision is to allow minors to share their concerns with the court to ensure that decisions serve their best interests. Article 1004 §2 allows minors under the age of twelve to be heard upon request by the child, a party, the public prosecutor, or the judge, provided it serves the child's interests. Article 1004 §6 requires the judge to consider the child's views in light of their age, maturity, and any external influence exerted on them. However, children under fifteen may not testify under oath and may only be heard for informational purposes.[114]

Children have the right to legal representation during hearings or before the juvenile court. Moreover, the child is heard alone unless the judge determines that their best interests require the presence of an accompanying adult.[115] This trusted adult cannot be a member of the immediate family, except for siblings.[116]

Moreover, being heard in proceedings that affect a child's rights does not automatically confer party status.[117] In exceptional cases where the child becomes a party to the proceedings, a lawyer may be appointed to represent them. In the event of a conflict of interest with the parents, a temporary guardian can be appointed to protect the child's rights.[118]

111 Law of Belgium 'On the Protection of Young People' (adopted 8 April 1965) art 56B <https://www.uppl.be/wp-content/uploads/2019/01/Loi-Protection-de-la-jeunesse-08-AVRIL-1965.pdf> accessed 26 September 2025.

112 ibid, art 52ter.

113 Belgian Judicial Code (adopted 10 October 1967) art 1004 §1 <https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1967101002> accessed 26 September 2025.

114 ibid, art 931.

115 Nathalie Meurens, *Study on Children's Involvement in Judicial Proceedings – Contextual Overview for the Criminal Justice Phase – Belgium* (European Union 2013) 15.

116 'Legislation Regarding the Right of Minors to be Heard: An Overview' (*Keyser Advocaten*, 18 April 2024) <https://www.keyseradvocaten.be/en/legislation-regarding-the-right-of-minors-to-be-heard-an-overview/> accessed 27 September 2025.

117 Belgian Judicial Code (n 113) art 1004 §6.

118 Larissa De Wulf and Carolyn Vanthienen, *Family Laws and Regulations: Belgium* (3rd edn, ICLG 2025) <https://iclg.com/practice-areas/family-laws-and-regulations/belgium> accessed 26 September 2025.

Belgium has established some mechanisms to protect child victims and witnesses, such as audiovisual recordings. However, these measures are limited and rely heavily on expert evaluations. In its 2010 Concluding Observations, the Committee noted that Belgium[119] had not implemented previous recommendations regarding this right. Children reported that their views were not given sufficient attention, and the Committee found that juvenile judges did not effectively apply the child's right to be heard in residence and visitation cases following parental divorce.[120] The Committee also noted that although the best interests of the child principle had been incorporated into Belgian law, it was not consistently reflected across all child-related legislation.[121]

In terms of case law, it is generally left to the discretion of domestic judges to determine whether a provision of the CRC has direct effect, leading to inconsistent application. The Council of State (Belgium's highest administrative court) tends to reject the direct effect of the convention's provisions, while lower courts are more flexible. The Court of Cassation has recognised the direct effect of certain CRC articles.[122] Regarding children's voluntary involvement in parental proceedings, the Court of Cassation ruled that the CRC does not grant children the right to participate in proceedings that do not directly affect their interests.[123] However, it did affirm their right—under Article 9 of the CRC—to express their views in matters concerning them, even though this right does not extend to financial claims, such as requests to limit a parent's right to personal contact.[124]

Among the complaints filed against Belgium before the CRC Committee regarding enforcement of Article 12, a prominent case is *Y.B. and N.S. v. Belgium*, submitted on behalf of the Moroccan child C.E., who had been left by her mother at birth.[125] The Committee found that the Belgian courts had violated Articles 3 and 12 of the Convention by failing to provide the child an opportunity to express her views in humanitarian visa proceedings. The Committee emphasised that her young age (five years) was not a valid justification for

119 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Belgium* (CRC/C/BEL/CO/3-4, 18 June 2010) para 37 <https://digitallibrary.un.org/record/684938> accessed 26 September 2025.

120 ibid

121 ibid, para 33.

122 Wouter Vandenhole, 'Belgium: The Convention of the Rights of the Child in Belgian Case Law' in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014) 108. doi:10.1007/978-94-017-9445-9_7.

123 Court of Cassation (Belgium), 15 September 2010 (2011-2012) 75 *Rechtskundig Weekblad*.

124 Vandenhole (n 122) 110.

125 Gamze Erdem Türkelli and Wouter Vandenhole, 'The Refusal of a Humanitarian Visa to a Child Who Was Entrusted to a Belgian-Moroccan Couple in the Context of a Kafala: Communication 12/2017 CE v Belgium' (*Leiden Children's Rights Observatory*, 27 September 2018) <https://www.childrensrightsobservatory.org/case-notes/casenote2018-3> accessed 26 September 2025.

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ignoring her voice in a matter that clearly affected her familial and educational future.[126] The case shows Belgian courts' reluctance to hear children due to welfare concerns, underscoring the need for case-by-case assessments to protect their interests. In fact, hearing children under 12 raises questions about its efficacy: Is it reasonable to consider the opinion of a child who may not grasp the complexity of crucial matters? Do they truly possess the capacity to determine their own interests? These enquiries challenge the logic of involving this age group in the decision-making process.

At the practical level, a comprehensive assessment of child-friendly justice was launched as part of a joint EU-Council of Europe project to align the judicial system with child-friendly justice standards. Belgium actively participated in this project by using the Council of Europe's Child-Friendly Justice Assessment Tool. Belgium reviewed progress made in ensuring that children's voices are heard in judicial proceedings at a panel discussion held in Strasbourg in November 2024, bringing together representatives from countries, experts, and policymakers. Reaffirming its commitment to a fairer and more humane judicial system for children.[127]

As observed from the above analysis of national laws, the legislation of France, Finland, and Belgium shares the same international legal framework for the child's right to be heard. Still, the legislative mechanisms, as well as judicial applications and guarantees of legal representation, differ among them, although they all originated from the same basic principles.

With regard to the right of the child to be heard, the above overview of the legislative frameworks in France, Finland, and Belgium shows that each has distinct mechanisms for implementing this right. Since all three countries ratified the CRC within a very short period and enshrined this right into their constitutions, Finnish and Belgian law place the age limit condition (commonly twelve years of age) on the exercise of the right, whereas French law has adopted the criterion of "capacity of discernment," a more flexible rule, whereby this capacity is assumed from the age of thirteen years onward.

These legislative differences are clearly reflected in judicial practice. French courts, particularly the Supreme Court, emphasise the mandatory nature of hearing the child and overturn decisions that disregard this right. Finnish courts are criticised for failing to

126 UN Committee on the Rights of the Child, *Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No 12/2017* (CRC/C/79/D/12/2017, 5 November 2018) paras 8.8, 8.9 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2FC%2F79%2FD%2F12%2F2017&Lang=en> accessed 26 September 2025.

127 Council of Europe, 'Promoting Child-Friendly Justice in Belgium, Poland and Slovenia: Round Table Discussion with the Participation of Children and Youths' (*Council of Europe: Children's Rights*, 26 November 2024) <https://www.coe.int/en/web/children/-/promoting-child-friendly-justice-in-belgium-poland-and-slovenia-roundtable-discussion-at-the-council-of-europe> accessed 26 September 2025.

properly balance child protection with fair trial guarantees. Meanwhile, in Belgium, practices vary considerably from case to case, raising serious concerns for the Committee regarding the inconsistent application of this right.

A similarly clear divergence is evident regarding the child's right to legal representation; the three systems differ. French and Belgian law explicitly guarantee this right through legal provisions that obligate the judge to inform the child of their right or appoint a lawyer for them, especially in protection cases. Finnish law, on the contrary, regulates this right more restrictively, as the appointment of a lawyer for a defendant under the age of eighteen is conditional on it not being "clearly unnecessary." Consequently, it is a discretionary right, rather than a general legal obligation, as in France and Belgium.

6 CHILD PARTICIPATION IN EUROPE: GAPS IN PRACTICE BETWEEN LEGAL PROMISES AND EVERYDAY REALITIES

The 2017 report by the European Union Agency for Fundamental Rights was based on a field study involving 392 children and 570 judicial and social professionals across ten EU Member States. The report focused on the right to be heard and to participate effectively and clearly showed the gap between the legal framework and real practice. For example, the report also revealed that hearings of children in France were conducted without standardised rules. In contrast, it highlighted a positive action: the creation of contact points in a number of French cities where children can access specialised lawyers.[128] In Finland, the report indicated that standards and guidelines were more developed, making the hearing procedures more child-friendly.[129] Overall, the report's findings, gathered through field interviews, showed that judicial practices with children relied heavily on professionals' individual skills rather than on standardised institutional procedures.

The 2023 UNICEF report, informed by empirical data from UNICEF U-Report polls and partner surveys, has provided insight into adolescent participation across Europe and Central Asia, defining the core adolescent population as those aged 10 to 19. Such findings indicate a chasm exists in this right between its recognition and actual practice. For instance, a U-Report poll of 7,685 adolescents aged 15-19 in six countries found that 61% had experienced or witnessed discrimination in schools, while their opinions are often systematically disregarded due to social norms and legal obstacles.[130] The report highlighted the U-Report initiative as a positive digital tool developed to support youth consultation, yet concluded that meaningful participation for adolescents is achieved

128 FRA, *Child-Friendly Justice – Perspectives and Experiences of Children and Professionals: Summary* (Publications Office of the EU 2017) 7.

129 ibid 5.

130 UNICEF, *Situation of Children in Europe and Central Asia* (UNICEF Regional Office for Europe and Central Asia 2023) 56.

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when the possibility of providing opportunities can be institutionalised rather than merely an ad hoc arrangement.[131]

7 CONCLUSION

The right of the child to freely express their views is enshrined in both international and national instruments. Article 12 of the CRC explicitly outlines the child's right to be heard in judicial and administrative proceedings affecting them. This right has been adopted in the legal frameworks of France, Belgium, and Finland. Each of these countries has enacted legislation and made amendments to give domestic effect to the CRC. The comparative analysis reveals a shared legislative intent to uphold this right, yet significant variation persists in its actual implementation.

This study concluded that a complete implementation of Article 12 required the provision of a legal and procedural framework to facilitate the child's efficient participation in proceedings affecting them. The study identified a gap between the age and maturity criteria, resulting in unequal enforcement across countries. In some countries, the courts either systematically ignored the children's opinions or didn't clearly explain the reasons for refusing them. Such practices undermined public confidence in the judiciary as a whole and ran contrary to the standards adopted by the ECtHR.

Based on these findings, the study recommends moving beyond rigid age thresholds and instead adopting individualised assessments of the child's maturity and capacity for discernment. It further advocates the development of specialised, mandatory training programs for lawyers, police officers, social workers, and educators, aimed at fostering trust and enhancing communication with children, to safeguard their best interests.

The study also recommends establishing clear procedural safeguards requiring judges to inform the child how their views were considered, and to provide clear justification when refusing to hear them. This approach enhances transparency and ensures the continuous protection of the child's best interests within judicial and administrative proceedings. Furthermore, the study recommends that the European Union guide Member States toward legal harmonisation to address disparities in European national laws regarding Article 12 of the CRC, through the adoption of common guidelines, targeted training, best-practice exchanges, and enhanced monitoring mechanisms to ensure consistent adherence to international child rights standards.

131 ibid 45.

REFERENCES

1. Archard D and Uniacke S, 'The Child's Right to a Voice' (2020) 27 *Res Publica* 521. doi:10.1007/s11158-020-09491-z
2. Cardiff G and others, '"Just Let them Have a Say!" Students' Perspective of Student Voice Pedagogies in Primary Physical Education' (2023) 42(4) Irish Educational Studies 659. doi:10.1080/03323315.2023.2255987
3. Daim N, 'Freedom of Opinion and Expression in the Convention on the Rights of the Child and its Impact on Domestic Legislation' (2018) 3(1) *Mediterranean Journal of Law and Economics* 146
4. De Bondt W and Lauwereys H, 'Children's Rights and Child Participation in Criminal Proceedings' in Pereira R, Engel A and Mietinen S (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order* (Edward Elgar 2020) 232. doi:10.4337/9781788977296.00019
5. De Wulf L and Vanthienen C, *Family Laws and Regulations: Belgium (3rd edn, ICLG 2025)*
6. Fletcher A, *Meaningful Student Involvement: Guide to Students as Partners in School Change* (2nd eds, SoundOut 2024)
7. Forde L and others, *The Right of Children to Participate in Public Decision-Making Processes* (Save the Children International 2020)
8. Gareil-Sutter L, 'Audition de l'enfant: le juge doit s'assurer du respect du contradictoire!' (*Dalloz Actualité*, 12 September 2023) <https://www.dalloz-actualite.fr/flash/audition-de-l-enfant-juge-doit-s-assurer-du-respect-du-contradictoire> accessed 26 September 2025
9. Gillett-Swan J and Sargeant J, 'Assuring Children's Human Right to Freedom of Opinion and Expression in Education' (2018) 20(1) *International Journal of Speech-Language Pathology* 121. doi:10.1080/17549507.2018.1385852
10. Henaghan M, 'What Does a Child's Right to Be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough' (2008) 42(1) *Family Law Quarterly* 117.
11. Khater M, 'Refugee Children's Right to Education: Education of Syrian Refugee Children in Jordan: Reality and Prospects' (2023) 6(3) *Access to Justice in Eastern Europe* 108. doi:10.33327/AJEE-18-6.3-a000302
12. Lansdown G, *Can You Hear Me? The Right of Young Children to Participate in Decisions Affecting Them* (Working Paper in Early Childhood Development 36, Bernard van Leer Foundation 2005)

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13. Lundy L, '"Voice" is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Education Research Journal 927. doi:10.1080/01411920701657033

14. Meurens N, *Study on Children's Involvement in Judicial Proceedings – Contextual Overview for the Criminal Justice Phase – Belgium* (European Union 2013)

15. Mol C and Kruger T, 'International Child Abduction and the Best Interests of the Child: An Analysis of Judicial Reasoning in Two Jurisdictions' (2018) 14(3) *Journal of Private International Law* 421. doi:10.1080/17441048.2018.1525074

16. Robinson C, 'Lost in Translation: The Reality of Implementing Children's Right to Be Heard' (2020) 8(s4) Journal of the British Academy 29. doi:10.5871/jba/008s4.029

17. Saneblidze M, 'The Child's Right to Be Heard in Civil Proceedings' (2024) 10(29) *Law and World* 153. doi:10.36475/10.1.12

18. Sloth-Nielsen J and Oliel M, *Constitutionalising Children's Rights and Domestic Courts of Member States of the Council of Europe* (Publication Series no 7, Deutsches Kinderhilfswerk 2019)

19. Türkelli GE and Vandenhole W, 'The Refusal of a Humanitarian Visa to a Child Who Was Entrusted to a Belgian-Moroccan Couple in the Context of a Kafala: Communication 12/2017 CE v Belgium' (*Leiden Children's Rights Observatory*, 27 September 2018) <https://www.childrensrightsobservatory.org/case-notes/casenote2018-3> accessed 26 September 2025

20. Vandenhole W, 'Belgium: The Convention of the Rights of the Child in Belgian Case Law' in Liefaard T and Doek J (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014) 105. doi:10.1007/978-94-017-9445-9_7

21. Weihrauch A, 'The Principle of the Best Interest of the Child' (*Humanium*, 2 March 2021) <https://www.humanium.org/en/the-principle-of-the-best-interest-of-the-child/> accessed 26 September 2025

22. Zakaria A and Abouahmed A, 'Constitutional Protection of Egyptian Women's Rights in Personal Affairs' (2023) 9(1) *Cogent Social Sciences* 2216997. doi:10.1080/23311886.2023.2216997

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО ДИТИНИ БУТИ ПОЧУТОЮ ПІД ЧАС АДМІНІСТРАТИВНОГО ТА СУДОВОГО ПРОВАДЖЕННЯ: АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ МІЖНАРОДНОГО ТА ПОРІВНЯЛЬНОГО ПРАВА

Джамал Барафі*, Алія Закарія, Ахмед Фекрі Мусса та Абдулла Абдуллатіф

АНОТАЦІЯ

Вступ. *Раніше в правових традиціях розглядали дітей як пасивних та вразливих осіб, а дорослі несли повну відповідальність за ухвалення рішень від їхнього імені. Однак ця позиція поступово змінилася, і зараз права дітей широко визнані. Це дослідження розглядає право дитини, закріплене у статті 12 Конвенції Організації Об'єднаних Націй про права дитини, висловлювати думку та бути почутою з усіх питань, що її стосуються, зокрема в адміністративних та судових провадженнях. Дослідження має на меті подолати розрив між теоретичною базою та практичним застосуванням цього права шляхом уточнення його змісту та характеру його забезпечення під час адміністративних та судових проваджень, що стосуються дитини, а також вирішення проблем практичної реалізації цього права.*

Методи. *Дослідники застосували порівняльно-аналітичну методологію, проаналізувавши Конвенцію про права дитини та вивчивши й порівнявши національне законодавство Фінляндії, Франції та Бельгії, яке гарантує право дитини бути почутою. У статті також розглядаються загальні коментарі Комітету з прав дитини та практика різних судів.*

Результати та висновки. *Дослідження виявляє значні розбіжності у реалізації права дитини бути почутою в різних правових системах, причому деякі суди неохоче заслуховують дітей. Воно підкреслює необхідність чітких процесуальних механізмів, які гарантують, що думки дітей будуть враховані та що вони будуть поінформовані про результати процедури.*

Ключові слова. *Конвенція ООН про права дитини; Загальна декларація прав людини; Комітет з прав дитини; Найкращі інтереси дитини; Стаття 12 Конвенції про права дитини; Свобода вираження поглядів.*

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AN ANALYSIS OF CONSUMER COMPLAINT STATISTICS IN KOSOVO: TRENDS AND CHALLENGES (2019-2025)

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ABSTRACT

Background: *This study aims to research, analyse and present the presence and consequences of consumer fraud in Kosovar society. It also focuses on the legal protection of consumers and on the treatment of their reactions through legal remedies, thereby clarifying their awareness of the rights defined by law. This study presents the most frequent violations of consumer rights, consumer fraud, the justifications for not resolving consumer complaints, the challenges Kosovo institutions face in handling consumer complaints, and the challenges Kosovo institutions face in respecting key EU directives.*

Methods: *To successfully achieve the study's purpose and objectives, a specialised scientific research methodology will be applied. In this study, the following will be applicable: focus groups, historical-legal method, normative-legal method, statistical method and analysis method. The choice of a scientific research methodology like this was made to address consumer rights violations accurately and, in certain situations, consumer fraud. Although the fundamental discussion of the*

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topic began with spontaneous focus groups, which represent social reality, the study goes beyond this. It is oriented towards treating the topic through the historical-legal method to examine the situation and the reactions in the past to the highlighted problem. Furthermore, the application of the normative-legal method is necessary to present the violation of consumer rights in a legal context, including cases of consumer fraud, with a view to incriminating such actions under the law. Meanwhile, the statistical method is extremely important because it presents the existing situation of violation of consumer rights, including cases of their fraud in society, while to analyse the problem highlighted in its entirety and throughout the study, the analysis method was used.

Results and Conclusions: *The findings of this study make it clear that violations of consumer rights, including consumer fraud, are widespread in Kosovar society. The results also show that the legal framework for consumer protection and the relevant mechanisms exist; however, there are delays in achieving adequate consumer protection. The results obtained make it clear that the level of consumer reaction to violations of their rights is increasing, and that the high prevalence of these violations in society is also worrying. Furthermore, the existence of an obscure number of consumer fraud cases makes the situation even more worrying.*

1 INTRODUCTION

One of the problems that Kosovar society is currently facing is the existence of violations of consumer rights, including consumer fraud. Although a consumer is defined as any natural person who purchases and uses goods or services to meet personal needs that are not related to commercial, business, craft or professional activity[1], there are still situations in which purchased goods or services fail to meet the consumers' expectations. The research results further show that it is not uncommon for consumers to be subjected to fraudulent actions, unfair commercial practices, deceptive advertising messages, and other harmful actions. Even more concerning is the fact that today in Kosovo the paradigm of abuse of power for clan interests remains prevalent.[2] This perception contributes to public uncertainty, including doubts about the inadequacy of institutional response when violations occur, although it should be noted that important steps have been taken towards improving and addressing this situation.

Taking into account the consequences caused, the high number of cases involving violations of basic consumer rights, and the daily uncertainty consumers face regarding the goods or services they receive, this study approaches the issue of consumer rights, including consumer fraud, from a broader and more comprehensive perspective than previous analyses.

1 Law of the Republic of Kosovo No 06/L-034 'On Consumer Protection' [2018] Official Gazette 11, art 3, para 1.1.

2 Fatmire Krasniqi and Gezim Jusufi, 'Tax Evasion as a Criminal Offense in Developing Countries: Some Perception from Business Organizations' (2022) 6(4) Corporate Governance and Organizational Behavior Review 314. doi:10.22495/cgobrv6i4sip12.

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To be as objective as possible, the study and the data provided will include a numerical representation of consumers' reactions through the submission of complaints alleging violations of their rights during the period 1 January 2019 to 9 September 2025. This situation does not include the unknown number of illegal cases, which would likely increase the total number of violations identified during the research period. Nevertheless, both reported and unreported dimensions indicate a troubling situation.

Furthermore, this study also presents the challenges encountered in addressing consumer complaints, as well as the challenges faced by state institutions in terms of their legal and institutional functioning when consumer protection is at the centre.

2 STUDY OBJECTIVES

Given that this study will include theoretical and practical aspects of the concerning situation regarding violations of consumer rights, including consumer fraud in Kosovo, the ***objectives*** of this study are as follows:

1) To review literature on the basic concepts of violation of consumer rights, including consumer fraud.
2) To assess the reasons for consumer dissatisfaction.
3) To provide a statistical presentation of the number of consumer complaints regarding violations of their rights.
4) To conduct a concrete analysis of the degree of admissibility of consumer complaints, which reflects consumer awareness of seeking justice, but also confirms that in certain cases there is consumer fraud.

The structural aspect of the study includes: the introductory part, study objectives, the literature review, research methodology, results and discussion, conclusions and finally, the sources on which this study is based.

3 LITERATURE REVIEW

The concept of being a consumer dates back to ancient times, when humans lived in caves. People exchanged commodity goods to satisfy their needs for food or other necessities. In its origins, trade often consisted of bartering items with others.[3] However, in terms of protecting consumer rights, consumer protection only began to develop in the second half

3 Adnan Jashar and Krenare Vokshi, 'Legal Analysis on the Legal Mechanisms for Consumer Protection in the Comparative Right, the Role and Importance of these Legal Mechanisms in Kosovo' (2018) 1(1) European Journal of Marketing and Economics 117. doi:10.26417/ejme.v1i1.p117-121.

of the 20th century. The historical record suggests that the concept of the "consumer" emerged as the market economy expanded rapidly. Trade became very harsh, and merchants' pressure on consumers was significant.

The *European Union* was created as a structure that initially meant a geographical space without barriers, where the free movement of goods, services, capital, and people would take place. Such a common market needed discipline, where all actors had well-defined rights and obligations.[4] In this context, consumer protection emerged as a fundamental right within this framework.

Although the right to consumer protection has ancient roots, in Kosovo it began to gain institutional recognition only after 2000. Since then, laws relevant to consumer protection have been enacted, amended, and continue to evolve.[5] In 2012, the *Ministry of Trade and Industry of Kosovo* established the *Consumer Protection Department* as a separate unit to further strengthen consumer protection.[6] Kosovo continues to improve its structures and legislation to align with *European Union* standards.[7]

However, Kosovo's economy has faced significant fluctuations between 2020 and 2025, largely due to the COVID-19 crisis and the subsequent rise in global inflation. As a small country with an open economy that uses the Euro without an independent monetary policy, Kosovo has limited tools to control inflation. This vulnerability directly affects consumers' purchasing decisions and the operation of goods and services.[8].

A key challenge remains the alignment of Kosovo legislation on consumer protection with the so-called EU *acquis communautaire.* Research shows that Kosovo still faces challenges in implementing the main *EU* directives. However, with regard to the *Directive on unfair contract terms (93/13/EEC)*,[9] the *Kosovo Law on Consumer Protection* has been harmonised with the *EU Directive on Unfair Contract Terms*; inconsistencies persist in other legislation, which diminishes the effectiveness of consumer protection.[10] Furthermore, the *Unfair Terms Directive* applies to all consumer contracts, including insurance contracts, except those

4 Adnan Jashar and Krenare Vokshi, 'Analysis on the Legal Mechanisms for Consumer Protection in the Comparative Right: Kosovo Case' (2022) 5(2) European Journal of Marketing and Economics 65.

5 Behrije Ramaj, 'Consumer Protection Legislation in Kosovo, Albania and Montenegro' (2020) 42(5) Knowledge 1021.

6 ibid 1020.

7 Xhenete Isufi and Danijela Miloshoska, 'Insurance Sector State Policy and Legal Regulation Improvement in Kosovo' (2024) 7(4) Social and Legal Studios 111. doi:10.32518/sals4.2024.111.

8 Donart Bislimi, Donjet Bislimi and Besmir Salihu, 'Impact of Inflation on Consumers Goods Pricing in Kosovo Retail Sector (2020-2025)' [2025] Social Sciences and Humanities Open. doi:10.2139/ssrn.5279393.

9 Council Directive 93/13/EEC of 5 April 1993 On Unfair Terms in Consumer Contracts [1993] OJ L 95/29.

10 Luljeta Plakolli-Kasumi, 'Some Preliminary Findings regarding the Kosovo Legislation in the Field of Consumer Protection with Special Emphasis in Arbitration Clauses in Consumer Contracts' (2020) 57(3) Zbornik radova Pravnog fakulteta u Splitu 875. doi:10.31141/zrpfs.2020.57.137.875.

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related to employment, succession rights, family law, company incorporation or partnership agreements. *Chapter IX of the Law on Consumer Protection* is in full compliance with the *Unfair Terms Directive,* and it applies to all consumer contracts except those which are excluded from the scope of the *Unfair Terms Directive*.[11]

Similarly, compliance with the *Unfair Commercial Practices Directive 2005/29/EC* remains a focus,[12] although significant achievements have been made in this regard. The law stipulates misleading commercial practices and lays down the conditions under which comparative advertising is permitted. If these conditions are contravened, interested parties can file a complaint with the *Ministry of Trade and Industry Inspectorate* or other inspection bodies. The competent authority may prohibit comparative and misleading advertising through an ordinance, and the advertising sponsor will bear the costs of the broadcaster. The publisher of the advertisement is required to submit evidence confirming the accuracy of the factual claims contained in the contested advertisement within seven days of receiving the ordinance. Failure to do so will be taken to indicate that the advertising is misleading, questionable and inaccurate.[13] The main challenge in complying with this directive lies in the inability to supervise unfair commercial activities adequately.

Challenges also arise in complying with *Directive 2011/83/EU on consumer rights*.[14] The *Customer Rights Directive* provides consumers with the same strong rights across the *EU*. It aligns and harmonises national customer rules, including the information consumers must receive before making a purchase and their right to cancel online purchases wherever they shop in the *EU*.[15] However, these rights are often not respected in Kosovo, as evidenced by the large number of customer complaints, particularly regarding online purchases.

The Digital Content Directive, 2019/770[16] is applicable because its elements are reflected in the *Consumer Protection Law*. However, the relevant provisions are often considered

11 ibid

12 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-To-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L 149/22.

13 'New Kosovo Law on Consumer Protection Introduces Provisions on Comparative and Misleading Advertising' (*Petosevic*, 30 May 2013) <https://www.petosevic.com/resources/news/2013/05/1742> accessed 10 September 2025.

14 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304/64.

15 Institute for Development Policy, *Consumer Protection in Kosovo: Standards, Regulations and Policies* (EU in Kosovo 2020) 4.

16 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 On Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services [2019] OJ L 136/1.

incomprehensible, making their practical application challenging. Consequently, even when compliance is attempted, functional flaws remain in the legal and institutional framework.

Regarding the *Consumer Credit Directive 2008/48/EC*,[17] government documents note that the *Law on Consumer Protection* foresees this directive and aligns with it, though full harmonisation is not explicitly stated. The draft law is generally in line with *EU* legal acts, including:

- Unfair terms in the contract (Directive 93/13);
- Indication of the prices of products offered to consumers (Directive 96/6);
- Sale of consumer goods and related warranties (Directive 1999/44);
- Trading financial services remotely (Directive 2002/65);
- Unfair trading practices (Directive 2005/29);
- Consumer loan agreements (Directive 2008/48);
- Duration of use of timeshare, long-term holiday product, resale and exchange contracts (Directive 2008/122);
- Interim legal measures to protect the interests of the consumer (Directive 2009/22);
- Consumer rights in relation to contracts (Directive 2011/83),

This clearly demonstrates Kosovo's efforts to align with EU consumer protection standards.[18]

However, consumer protection remains an important issue not only economically, but also legally. While economic, legal, and institutional measures have already been taken to protect consumers, studies in the field show that consumer fraud victims often suffer numerous negative consequences.[19] Although certain businesses are aware of their legal obligations regarding customer care, the results remain largely invisible.[20] Consequently, in many cases, businesses not only commit legal violations by failing to comply with the legal framework, but also directly harm, endanger, and violate consumers' lives and basic rights. This is

17 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 On Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC [2008] OJ L 133/66.

18 Ministry of Trade and Industry of the Republic of Kosovo, *Consumer Protection Programme 2021–2025* (Consumer Protection Department 2020) 27 <https://mint.rks-gov.net/page.aspx?id=2,39> accessed 10 September 2025.

19 Lukas Brenner and others, 'Consumer Fraud Victimization and Financial Well-Being' (2020) 76 Journal of Economic Psychology 102243. doi:10.1016/j.joep.2019.102243.

20 Bajram Hasani, 'The Role of Consumer Care in Kosovo' (2021) 49(1) Knowledge 85.

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particularly concerning given that food safety remains a major concern for consumers in the Western Balkans, including Kosovo.[21]

Thus, the violations, damage, and endangerment of consumers in the current situation arise from uncertainty surrounding even basic food products on Kosovo's markets. Meanwhile, as a "dirty little secret", marketing professionals have increasingly accepted the idea that they must present false information in their advertisements and marketing strategies to gain a larger market share and higher profits. Since some businesses are willing to risk misleading their customers, deceptive advertising has long existed. It continues to be a problem worldwide,[22] and is especially prevalent in Kosovo.

Consumer dissatisfaction with goods and services, the fragile legal framework, the lack of responsibility of businesses towards consumers, as well as consumers' desire for higher-quality products and better services, often create pressures for different decisions within the Kosovo market. These circumstances push consumers to make choices that differ from their previous choices and may lead them to fall prey to deception. Beyond this, several theories explain how and why consumer behaviour changes.

According to variety-seeking theory, consumers become bored with a product or service when it no longer provides new or different experiences. They often shift to other brands or platforms that offer attractive alternatives—such as regularly introducing new products and services, offering promotions or discounts, or creating unique and engaging experiences for consumers.

Dissatisfaction theory refers to the discomfort that consumers feel when using products or services that do not meet their needs or desires. They may believe they have made a poor choice, and thus switch to another brand or platform to remedy the situation. This dissatisfaction may arise from a variety of factors, such as poor product quality, overpriced or unsatisfactory customer service.

Social influence theory explains how consumers are influenced by the people around them when making purchasing decisions. Consumers are more likely to purchase products recommended by friends, family, or influencers.[23] Emotional factors such as perception, impulse, faiths and beliefs, knowledge and trust also have a significant effect on consumer behaviour.[24]

21 Iliriana Miftari and others, 'Factors influencing consumer attitudes towards organic food products in a transition economy - Insights from Kosovo' (2022) 14(10) Sustainability 5873. doi:10.3390/su14105873.

22 Noor un Nisa, Angelico Acha and Nazia Dharejo, 'The Consequences of Upholding Deceptive Marketing Practices and Its Effect on Consumers' Related Attitudes Including Consumer Loyalty and Consumer Trust: Evidence from the Fashion Industry in the UAE' (2022) 7(2) Journal of Advanced Research in Social Sciences and Humanities 71. doi:10.26500/JARSSH-07-2022-0203.

23 Yoesoep Edhie Rachmad, 'Social Media Marketing Mediated Changes In Consumer Behavior from E-Commerce to Social Commerce' (2022) 1(3) International Journal of Economics and Management Research 227. doi:10.55606/ijemr.v1i3.152.

24 Priyabrata Roy and Dhananjoy Datta, 'Theory and Models of Consumer Buying Behaviour: A Descriptive Study' (2022) 11(8) Parishodh Journal 206. doi:10.2139/ssrn.4205489.

In this regard, although each of the theories mentioned above is present in Kosovar society in one form or another—highlighting the fragile and suspicious position in consumer decision-making—false advertising often places consumers in a state of deception, leaving them unable to return to their previous state (i.e. before making a selective decision in relation to a certain product or service).

However, an important fact is that today the situation is very different from the early stages of starting a business and creating a functional mutual relationship between consumers. Today, unlike previous periods, Artificial Intelligence (AI) plays an increasingly important role in our economy. AI has the potential to become the engine of productivity and economic growth. It can increase the efficiency and quality of decision-making processes and spawn the creation of new products, services, markets, and industries.[25]

However, AI technologies are transforming industries worldwide, and their integration also raises significant challenges related to data protection.[26] In this era of globalisation, many community activities—including economic transactions—can be carried out freely across communities. One of these activities is buying and selling goods or services.[27]

The rapid development of internet technology and society's increasing reliance on online platforms have impacted various sectors, especially the economy and business.[28] However, this has also brought another possibility of violating consumer rights. A major cyber threat in digital finance is data breaches, where unauthorised parties gain access to sensitive information held by financial institutions.[29] Consumer vulnerability becomes even more pronounced when dealing with online providers who store users' payment details and allow "single click" purchases.[30]

Thus, despite being closer to product and service information—and therefore potentially better informed—consumers remain at risk due to the handling of their personal data, the inability to identify the source of the information, and uncertainty about its accuracy. These

25 Laura Abrardi, Carlo Cambini and Laura Rondi, 'Artificial Intelligence, Firms and Consumer Behavior: A Survey' (2022) 36(4) Journal of Economic Surveys 969. doi:10.1111/joes.12455.

26 Anil Kumar Yadav Yanamala and Srikanth Suryadevara, 'Navigating Data Protection Challenges in the Era of Artificial Intelligence: A Comprehensive Review' (2024) 15(1) Revista de Inteligencia Artificial en Medicina 113.

27 Udi Juswanto, Suryanto Suryanto and Yusuf Gunawan, 'Juridical Review of Legal Protection Against E-Commerce Consumers on the Marketplace' (2022) 11(4) Legal Brief 2534.

28 Ainul Millah Al-Mumtaza Al-Mumtaza and Muhammad Rustamaji, 'Consumer Legal Protection on the Implementation of E-Commerce Using Instagram with a Pre-Order System During the Covid-19 Pandemic' (2022) 3(1) International Journal of Environmental, Sustainability, and Social Science 59. doi:10.38142/ijesss.v3i1.158.

29 Fnu Jimmy, 'Enhancing Data Security in Financial Institutions with Blockchain Technology' (2024) 5(1) Journal of Artificial Intelligence General Science 424. doi:10.60087/jaigs.v5i1.217.

30 Amit Zac and others, 'Dark Patterns and Consumer Vulnerability' [2025] Behavioural Public Policy 1. doi:10.1017/bpp.2024.49.

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ongoing concerns regarding possible violations, damage or even endangerment of consumers in various dimensions.

In essence, the consumer, even under these concrete circumstances, remains an insecure subject when confronted with information about a service or product and remains at risk of having their personal data misused. Simply put, while one is aware of the positive social changes and the extraordinary social and economic emancipation of societies, including Kosovar society, it must be highlighted that, in the face of such developments, new forms of consumer rights violations and fraud are emerging. Therefore, promotion is an activity that focuses on creating conditions for the regular circulation of information, delivering useful messages, and facilitating the purchase of various products,[31] precisely because consumers often lack information about the products they buy.[32]

Another worrying form of violation of consumer rights and fraud, increasingly prevalent in Kosovar society, is the reliance on reviews for product information. The usefulness of such reviews is undermined by fake reviews that distort the picture of product quality.[33] Furthermore, potential consumers often forget that the relevant comments may be fake, ordered from fake addresses, or deliberately selected. Fraud also extends beyond fake reviews to inaccurate information about the product or service offered. This includes: outright lies; disproportionate promises; the use of vague terminology; visuals that are too suggestive compared to the real product; fake eco-labels that correspond to no recognised standards; claims of sustainability unrelated to the product; claims without proof; and false exclusivity where a company merely complies with legal standards.[34] All of these forms of misleading information have a direct impact on the potential consumer.

Considering the situations highlighted above, *EU* consumer law has long focused on improving consumers' substantive rights; the *Union* has more recently taken significant steps to strengthen the practical enforcement of those rights, too. This ties in with the well-known aversion of consumers to enforcing their rights through traditional court procedures, which are often complicated, expensive, and lengthy.[35] While it must be accepted that, in a free-market economy, the ideal is to minimise state intervention—and

31 Hasani (n 20).

32 Guli-Sanam Karimova and others, 'Global Standards and the Philosophy of Consumption: Toward a Consumer-Driven Governance of Global Value Chains' (2025) 34(1) Business Ethics, the Environment and Responsibility 280. doi:10.1111/beer.12648.

33 Joni Salminen and others, 'Creating and Detecting Fake Reviews of Online Products' (2022) 64 Journal of Retailing and Consumer Services 102771. doi:10.1016/j.jretconser.2021.102771.

34 Izabela Kowalik, Marine Leyge and Tomasz Sikora, 'Green Marketing and Greenwashing in Poland and France, a Comparison of Consumer Reactions' (2024) 60(1) International Journal of Contemporary Management 60. doi:10.2478/ijcm-2024-0002.

35 Felix Maultzsch, 'Paradigms of EU Consumer Law in the Digital Age' in Matthias C Kettemann, Alexander Peukert and Indra Spiecker gen Döhmann (eds), *The Law of Global Digitality* (Routledge 2022) 144. doi:10.2139/ssrn.3759858.

while consumer protection measures risk becoming overly protective or interfering with the consumer's right to free choice[36]— such initiatives should serve the best interests of consumers. This is especially important in light of the increased production, marketing and use of nutritional supplements, in a predominantly self-regulatory environment[37], where violations of basic consumer rights may occur.

Consumers represent diverse groups: elderly people, adults, youth and children. Some live in urban areas while others come from rural areas. Their financial and economic backgrounds differ—rich, middle and poor. Their educational backgrounds also vary, ranging from well-educated to illiterate.[38] Therefore, in an environment like this, intervention should be in the form of regulation and supervision aimed at consistently protecting consumer rights.

When it comes to electronic commerce, it is particularly useful to strengthen oversight authorities by introducing the power for inspectors to conduct secret purchases. This would provide an effective tool for collecting evidence, which is decisive in determining the factual situation and imposing the administrative measure. If used consistently and correctly, this mechanism would greatly improve[39] the countless situations of consumer fraud through e-commerce, including false product presentations, online payment risks, and the inability of consumers to touch or see the product up close.

However, even in this situation, technology can provide traceable, tamper-proof, and transparent information about a product's sustainable performance.[40] Therefore, improvement in consumer education is necessary to equip consumers with the working knowledge to effectively protect themselves and utilise the many formal rights they enjoy.[41] This would direct consumers towards even more responsible behaviour by taking a step further in respecting the environment and towards a more sustainable society.[42]

36 Tanya Woker, 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31(2) Obiter 217. doi:10.17159/obiter.v31i2.12356.

37 Gary Gabriels and others, 'Will the New Consumer Protection Act Prevent Harm to Nutritional Supplement Users?' (2011) 101(8) South African Medical Journal 543.

38 Norhasliza Ghapa and Nor Aida Ab Kadir, 'Information Regulation: A Measure of Consumer Protection' (2021) 29 Pertanika Journal of Social Sciences and Humanities 59. doi:10.47836/pjssh.29.s2.05.

39 Burim Dermaku and Minerva Dermaku, 'Functioning of Market and Trade in the Republic of Kosovo' (2022) 6(S8) International Journal of Health Sciences 4728. doi:10.53730/ijhs.v6nS8.13282.

40 Arne Nygaard and Ragnhild Silkoset, 'Sustainable Development and greenwashing: How Blockchain Technology Information Can Empower Green Consumers' (2023) 32(6) Business Strategy and the Environment 3801. doi:10.1002/bse.3338.

41 Spencer Weber Waller and others, 'Consumer Protection in the United States: An Overview' (*SSRN*, 12 January 2011) <https://ssrn.com/abstract=1000226> accessed 10 September 2025.

42 Cristina Chueca Vergara and Luis Ferruz Agudo, 'Fintech and Sustainability: Do they Affect Each Other?' (2021) 13(13) Sustainability 7012. doi:10.3390/su13137012.

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It is clear that a free market is an economy in which individuals and private companies make decisions about production and consumption. Price, quantity and production methods are determined by the market. To fulfil this function, the market must have competition rules, and such rules must be implemented. There shall not be a free market economy where the production opportunities are kept away from companies with a dominant position in the market, whether they are private or public.[43] However, we must protect and care for consumers because, above all, without consumers there can be no development of the market or of companies.

4 RESEARCH METHODOLOGY

To achieve the highest quality of study, a special scientific research methodology was applied. The research initiative began with several *focus groups* to examine the social situation, participants' ideas, and their perspectives on the issues discussed. In fact, the initial idea for addressing the chosen topic emerged from these group discussions. The participants were all students, most aged 20 - 21. They were not informed that the discussion would be used for a study; however, their attitudes, experiences as consumers, and ideas were largely in agreement that their consumer rights are being violated in the country, as illustrated by personal negative experiences.

Such a study, conducted among students representing families from *urban* and *rural* areas, was repeated from time to time, and it was observed that the state of consumer protection leaves much to be desired. These focus groups were spontaneous, without any prior planning regarding participant selection beyond the fact that they were students (because discussions were held during lectures) and the intention to address the topic through open, interactive discussions aligned with the course curriculum.

Furthermore, in conducting this study, the *historical-legal method* proved applicable, enabling the basic notions of consumer rights to be examined from the early stages of human development to the present day.

In addition, to address the legal-criminal component of consumer rights violations, including fraud, the *normative-legal method* was applied to convey fundamental notions from the legal context. Through this method, not only was the domestic legal framework on consumer protection examined, but data from the European legal context were analysed, including Kosovo's efforts to harmonise its legal framework with the so-called ***acquis communautaire***.

43 Gani Asllani, Bedri Statovci and Gentiana Gega, 'Development and Protection of Economic Competition in Kosovo: Case Study Gjilan Region' (2018) 2(1) International Journal on Responsibility 5. doi:10.62365/2576-0955.1014.

Statistical methods were also essential in this study. Concrete data obtained directly from the *Department of Consumer Protection* within the *Ministry of Industry, Entrepreneurship and Trade of Kosovo* were studied, processed and monitored.

Finally, to complete the research-scientific aspect in all its dimensions, an *analysis method* was applied, through which the statistical data presented were gradually analysed in detail, yielding concrete data and accurate figures on the violation of consumer rights, including cases of consumer fraud in Kosovar society. Through this analysis and its compatibility with other research methods, it has been established that the negative phenomenon of consumer fraud in Kosovo can be researched over a relatively long period, namely from 1 January 2019 to 9 September 2025. Although specific figures cannot always be obtained—due to the scarcity of concrete data and the significant "dark number" of criminal cases—the identification of consumer rights violations provides clear evidence of consumer fraud.

Such research reflects the current state of the theme under study and may serve as an important basis for state institutions in drafting policies and decision-making strategies to prevent and combat this worrying situation in society.

5 RESULT AND DISCUSSION

From research and analysis of detailed data on violations of consumer rights, including cases of consumer fraud in Kosovo, the results clearly demonstrate the extent of this phenomenon at a worrying level. In fact, the prevalence of such violations—combined with consumers' attempts to assert their rights through complaints—is very high. These reactions reveal that consumers continue to be subjects who are violated, damaged or endangered in many cases.

Discussions held in spontaneous focus groups support these findings. Participants were asked various questions about their experiences with purchasing products, product quality, instances of fraud related to product weight, their quality, and failure to provide fiscal coupons. Most participants reported that they or their families had encountered these problems in their daily lives. In fact, several of them stated they had never reported these issues to the competent authorities.

For a more objective presentation of research, the following data will be introduced gradually, depending on the areas in which consumers filed complaints and alleged legal violations. In this study, the ***independent variables*** represent the years examined, which remain constant across all statistical data since they cover the period 1 January 2019 to 9 September 2025. The choice of this period was made to present the studied situation over the longest possible period. The ***dependent variables*** will be introduced gradually throughout the statistical presentation.

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In this regard, the data show that consumer complaints in the *Trade category* are particularly frequent. In 2019, a total of 169 cases were filed, of which 86 were substantiated, while 39 cases remain under review.

In 2020, the number of complaints more than doubled from the previous year, reaching 445. Of these, 148 were well-founded, and 185 remain under review. This situation speaks to consumers' awareness of the need for justice, but also to violations of their rights.

A trend of numerical increase continues in the following years. In 2021, a total of 886 complaints were recorded, of which 569 were based, and 165 remained under review. In 2022, complaints reached an even higher figure: 1,094, of which 644 were substantiated, and 248 remained under review.

2023 saw a slight numerical decrease, though the number of complaints remains high at 1,015. Of these, 566 were based, and 278 complaints remained in the review process.

In 2024, however, the recorded number of complaints decreased substantially, with only 20 complaints received, 19 of which remain under review. In 2025, i.e. up to 9 September 2025, no complaints were received.

The tabular data appear as follows:

Table 1. Complaints addressed to the Trade category[44]

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	130	86	44	0	39	76.92%	169
01.01.2020-31.12.2020	260	148	96	16	185	58.43%	445
01.01.2021-31.12.2021	721	569	148	4	165	81.38%	886
01.01.2022-31.12.2022	846	644	177	25	248	77.33%	1094
01.01.2023-31.12.2023	737	566	162	9	278	72.61%	1015
01.01.2024-31.12.2024	778	540	227	11	289	72.91%	1067
01.01.2025-09.09.2025	380	246	133	1	147	72.11%	527

44 The numerical data on which tables no. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 have been compiled are official data received from the *Department of Consumer Protection, Ministry of Industry, Entrepreneurship and Trade*, sent electronically on: 09.09.2025. This data was then processed and presented in tabular form and in specific graphs/figures next to each table.

The data presented in graphs looks like this:

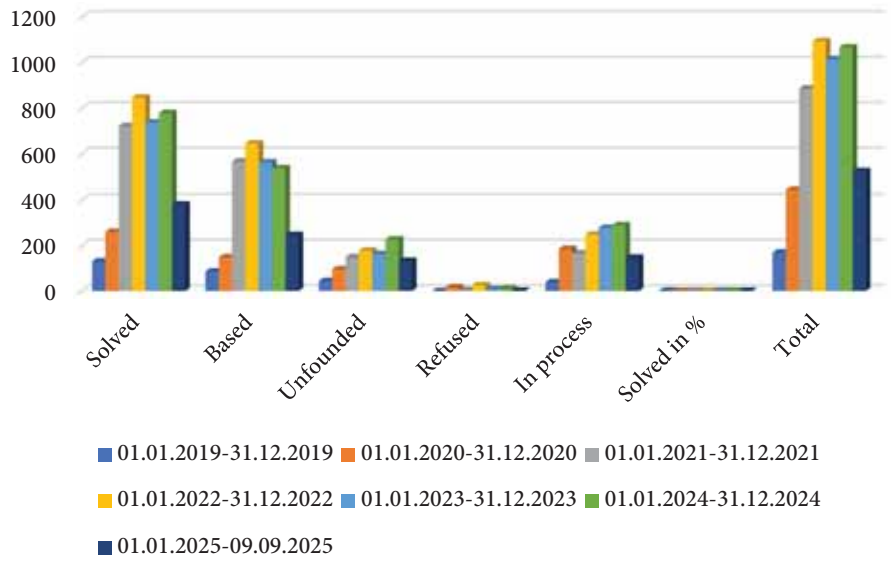

Figure 1. Complaints addressed to the Trade category

The *dependent variable* in this case clearly shows that in 2019, there were a total of 169 cases. Over the following years, this variable recorded a significant increase, reaching 445 cases in 2020, 886 cases in 2021, and 1,094 cases in 2022. A slight decrease is seen in 2023, with a total of 1,015 cases. Meanwhile, in 2024, a total of 1,067 cases were recorded, and in 2025, the number reached 527.

According to the *Department of Consumer Protection*, the most common complaints related to: *disregard of warranty*, *consumer fraud*, *price discrepancies*, *price increases*, *misleading advertising*, *disregard of the contract*, *failure to return the goods*, *failure to return change*, *lack of official language on the packaging*, etc.[45]

From both the *dependent variables* and the types of complaints, it can be concluded that the periods with the highest number of complaints were those following the pandemic, along with its accompanying consequences, including high inflation. Meanwhile, the decreasing

45 Data received from the *Department of Consumer Protection*, *Ministry of Industry, Entrepreneurship and Trade*, on date: 09.09.2025. After each table, data on the type of complaint is from this source.

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variables show a significantly improved situation, resulting from increased efficiency of state bodies and greater citizen awareness.

Complaints directed by consumers to the *RAEPC—Telecommunications category*—also remain high. *RAEPC,* the *Regulatory Authority for Electronic and Postal Communications*, is the regulatory body in the field of electronic communications and postal services, overseeing the regulatory frameworks defined by the law on electronic communications, the law on postal services, and development policies.[46]

The data shows that in 2019, 135 complaints were filed, of which 29 were found to be justified. However, the number of complaints remaining in process in this category is high almost every year. This is clearly evident in 2019, where 101 complaints were still in process. In 2020, 115 complaints were filed, of which 37 were found well-founded and 43 remained under review. In 2021, 174 complaints were filed, of which 24 were found to be well-founded, while 143 remained under review. In 2022, 256 complaints were received, of which 119 were found to be well-founded, while 83 remained under review. In 2023, 264 complaints were filed, of which 110 were found well-founded and 111 remained under review. The highest number of complaints for the study period occurred in 2024, with a total of 389 complaints—217 of which were based and 62 still in process. Meanwhile, in the study period for 2025, a total of 127 complaints were recorded, of which 53 were based, and 44 remained in process. The tabular data is as follows:

Table 2. Complaints addressed to the RAEPC category – Telecommunications

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	34	29	5	0	101	25.19%	135
01.01.2020-31.12.2020	72	37	30	5	43	62.61%	115
01.01.2021-31.12.2021	31	24	7	0	143	17.82%	174
01.01.2022-31.12.2022	173	119	54	0	83	67.58%	256
01.01.2023-31.12.2023	153	110	43	0	111	57.95%	264
01.01.2024-31.12.2024	327	217	109	1	62	84.06%	389
01.01.2025-09.09.2025	83	53	30	0	44	65.35%	127

46 *Autoriteti Rregullativ i Komunikimeve Elektronike dhe Postare* <https://www.arkep-rks.org/AboutUs/25> accessed 10 September 2025.

The data presented in the graphs appears as follows:

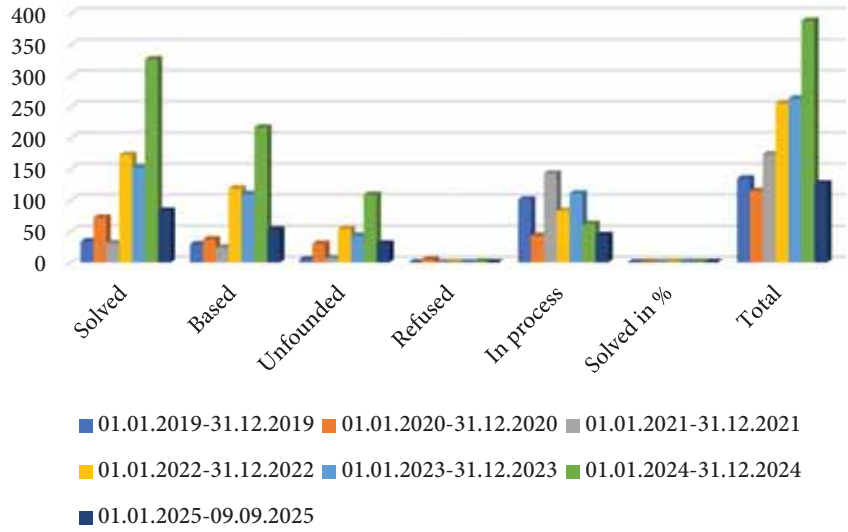

Figure 2. Complaints addressed to the RAEPC category - Telecommunications

From the data, the *dependent variables* show that in 2019, there were a total of 135 cases. In the following year, 2020, the variable shows a slight decrease with 115 cases. In the following years, the variables increase again: 174 cases in 2021, 256 cases in 2022, and 264 cases in 2023. The variable showed an even greater increase in 2023, with a total of 389 cases, while in 2025, 127 cases were recorded.

Complaints were most often filed for *poor-quality services*, *unfair billing*, *fraudulent practices,* and *breach of contract*.

The data highlighted by the independent variables and the types of complaints clearly show a trend of gradual increase in consumer complaints. This situation is primarily attributed to the rise in internet use and online communications, as well as increased consumer awareness of their rights.

In the following category—*WSRA (Water Supply)*—a few elements must first be emphasised. The *Water Services Regulatory Authority (WSRA)* is an independent authority responsible for regulating the activities of water service providers in Kosovo. The *WSRA* role is to ensure the provision of quality, efficient and secure services on a non-discriminatory basis for all consumers in Kosovo, taking into account the protection of the environment and public health.[47]

47 *Water Services Regulatory Authority (WSRA)* <https://www.arru-rks.org/en/per_arru/279/roli-dhe-pergjegjsite/279> accessed 10 September 2025.

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The data shows that the number of complaints in this category is much smaller compared to other categories. In 2019, only two complaints were filed, both of which were found to be well-founded. In 2020, six complaints were filed, and two remained in the process. In 2021, six complaints were filed, of which one was found to be well-founded, while four remained in the process. In 2022, only three complaints were received, of which 1 was found to be justified, while two remained in the process. In 2023, nine complaints were submitted, of which nine remained in the process. The largest number of complaints received for the study period resulted in 2024, with a total of 20 complaints, of which 19 remained in the process. Meanwhile, during the 2025 study period, seven complaints were received, of which were justified and remained in process.

The tabular data looks as follows:

Table 3. Complaints addressed to the WSRA – Waterworks

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	2	2	0	0	0	100.00%	2
01.01.2020-31.12.2020	4	0	4	0	2	66.67%	6
01.01.2021-31.12.2021	2	1	1	0	4	33.33%	6
01.01.2022-31.12.2022	1	1	0	0	2	33.33%	3
01.01.2023-31.12.2023	0	0	0	0	9	0.00%	9
01.01.2024-31.12.2024	1	0	1	0	19	5.00%	20
01.01.2025-09.09.2025	4	2	2	0	3	57.14%	7

The data presented in graphs is as follows:

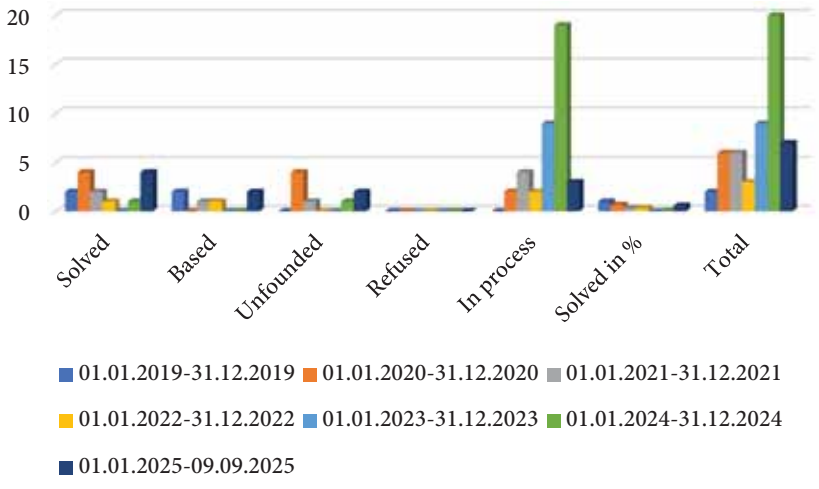

Figure 3. Complaints addressed to the WSRA - Waterworks category

From the data, the *dependent variables* show an almost stable situation in terms of complaints in this category. In 2019, there were only two complaints. In the following year, the variable increased slightly to six cases, a number identical to that of 2021, when only six cases. A decrease is evident in 2022 with only three cases, followed by an increase to nine cases in 2023. The largest increase occurred in 2024, with 20 cases. The dependent variable then moves towards a decrease in 2025, with only seven cases.

The most common complaints concern *unfair billing*, *breach of contract,* and *poor-quality services*.

From the data presented in the variables, the types of complaints, and the overall situation in society, it is clear that increases in complaints occurred primarily due to consumer dissatisfaction with services, including poor quality, insufficient water supply, water loss, and poor infrastructure.

Complaints in the *Electricity* category are also present. From the data provided, it appears that in 2019, eight complaints were filed, of which three were substantiated, and three remained in the process. In 2020, 15 complaints were filed, of which three were substantiated, while nine remained in process. In 2021, 25 complaints were filed, of which 10 were substantiated, while 15 remained in process. In 2022, 31 complaints were received, of which three were based, and 28 were in process. In 2023, 32 complaints were submitted, of which three were based, and 26 were in process. The largest number of complaints received during the study period occurred in 2024, with a total of 65 complaints, of which nine were based, and 49 were in process. Meanwhile, during the 2025 study period, there were 37 complaints, of which 34 remained in process. The tabular data is as follows:

Table 4. Complaints addressed to the category - Electricity

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	5	3	2	0	3	62.50%	8
01.01.2020-31.12.2020	6	3	2	1	9	40.00%	15
01.01.2021-31.12.2021	10	10	0	0	15	40.00%	25
01.01.2022-31.12.2022	3	3	0	0	28	9.68%	31
01.01.2023-31.12.2023	6	3	3	0	26	18.75%	32
01.01.2024-31.12.2024	16	9	6	1	49	24.62%	65
01.01.2025-09.09.2025	3	0	3	0	34	8.11%	37

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The data presented in the graphs appears as follows:

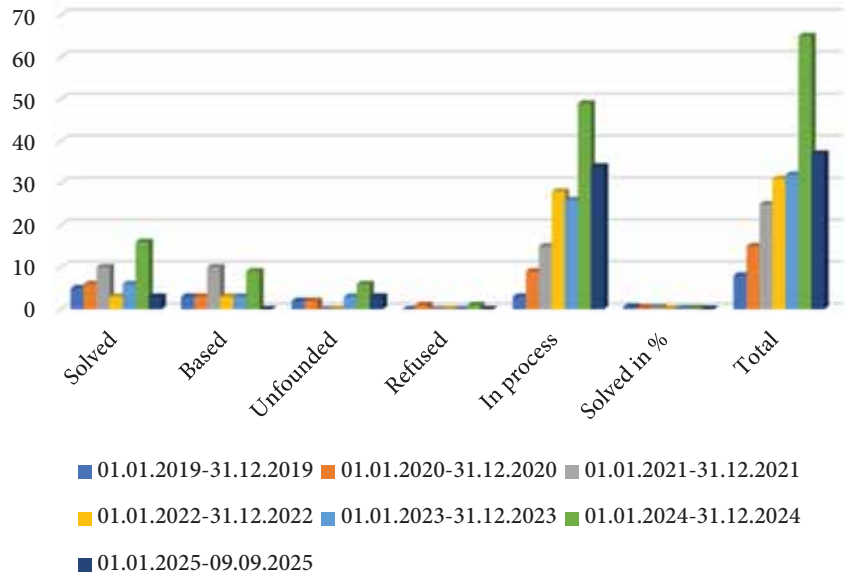

Figure 4. Complaints addressed to the category – Electricity

The data show a slight increase in complaints in this category over the years. In 2019, 8 cases were filed, almost double the number in the following year, 2020, which registered 15 cases. The upward trend continued in 2021 (25 cases), 2022 (31 cases), and 2023 (32 cases). The highest variable, respectively doubled compared to the previous year in 2024, with a total of 65 cases. However, a decrease is evident in 2025, with 37 cases.

The most common complaints relate to *unfair billing*, *breach of contract,* and *poor-quality services*.

Based on the data presented, the types of complaints and the broader social context, it is evident that the notable increase in complaints in 2024 is strongly linked to the rise in electricity prices and, consequently, to consumer concerns, especially about unfair billing.

Complaints directed towards the *category Metrology* are also present. According to the tabular data, in 2019, only two complaints were filed, both of which are still in process. In 2020, five complaints were filed, and all were found to be unfounded. In 2021, 14 complaints were filed, of which two were substantiated, and two were still in process. In 2022, three complaints were received, of which one was still in process. In 2023, 11 complaints were filed, of which two were substantiated, and two were still in process. In 2024, nine

complaints were received, of which one was substantiated, and four were in process. For the study period of 2025, no complaints were received.

The tabular data is as follows:

Table 5. Complaints addressed to the category - Metrology

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	0	0	0	0	2	0.00%	2
01.01.2020-31.12.2020	5	0	5	0	0	100.00%	5
01.01.2021-31.12.2021	12	2	10	0	2	85.71%	14
01.01.2022-31.12.2022	2	0	2	0	1	66.67%	3
01.01.2023-31.12.2023	9	2	6	1	2	81.82%	11
01.01.2024-31.12.2024	5	1	3	1	4	55.56%	9
01.01.2025-09.09.2025	0	0	0	0	0	0.00%	0

The data presented in the graphs appears as follows:

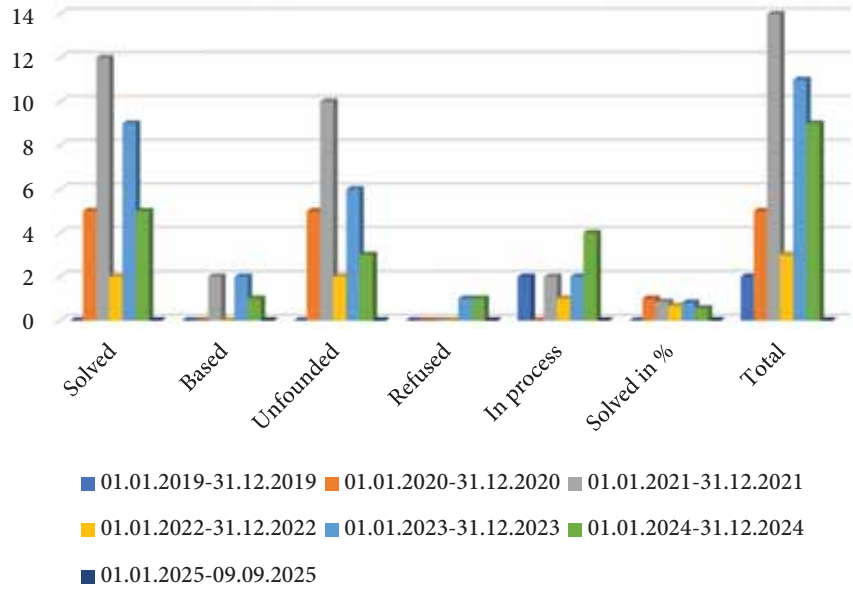

Figure 5. Complaints addressed to the category - Metrology

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The data shows that in this category there are relatively few consumer complaints. However, the data is clear that in 2019 there were only two complaints, a decrease compared to the previous year in 2020, when five complaints were submitted. The variable increased again—more than doubling the last year—in 2021 with 14 complaints. A decrease followed in 2022 with three cases, before rising again in 2023 with 11 cases. This was followed by a decrease in 2024 with 9 cases, and no cases were recorded in 2025.

The most common complaints concerned *quantity discrepancies* and *questionable measurements*.

The presented data and *dependent variables* clearly show that there were more complaints in 2021 and 2023. This may be explained by institutions having conducted more inspections and identified irregularities they addressed, as well as by a more pronounced consumer awareness of their rights.

Complaints directed towards the *Health category* are also present. From the tabular data presented, in 2019, only five complaints were filed, of which two were substantiated, and three were in process. In 2020, 20 complaints were filed, of which one was based, while 18 remained in process. In 2021, 33 complaints were filed, of which one was based, and 31 were in process. In 2022, 40 complaints were received, of which one was based, and 39 were in process. In 2023, 32 complaints were filed, of which all remained in process. In 2024, 25 were received, of which 24 remained in process. Meanwhile, during the 2025 study period, 33 complaints were received, of which five were based and 28 were in process. The tabular data looks as follows:

Table 6. Complaints addressed to the category – Health

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	2	2	0	0	3	40.00%	5
01.01.2020-31.12.2020	2	1	1	0	18	10.00%	20
01.01.2021-31.12.2021	2	1	1	0	31	6.06%	33
01.01.2022-31.12.2022	1	1	0	0	39	2.50%	40
01.01.2023-31.12.2023	0	0	0	0	32	0.00%	32
01.01.2024-31.12.2024	1	0	1	0	24	4.00%	25
01.01.2025-09.09.2025	5	5	0	0	28	15.15%	33

This data, presented in the graphs, appears as follows:

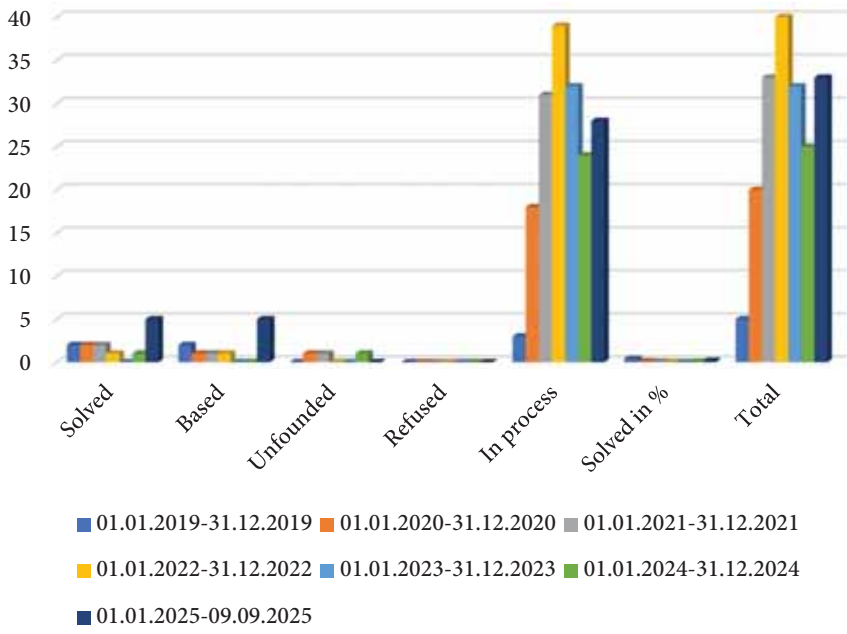

Figure 6. Complaints addressed to the category – Health

From the data, the *dependent variable* shows a numerical increase starting in 2019, when only nine complaints were filed. In 2020, the number of complaints increased manifold, reaching 20. In the following years, the trend increased, with 33 cases in 2021 and 40 cases in 2022. A slight decrease is observed in 2023 with 32 cases, followed by another decline in 2024 with 25 cases. The increasing variable is marked in 2025 with 33 cases. Overall, the trend is relatively stable, with no abrupt or extreme fluctuations over the years.

Complaints are mostly filed for *suspicious products*, *products without labels*, *poor quality services*, *suspicions of fraud*, etc. From the data presented and the nature of the complaints, it is clear that the number of complaints has remained stable and reflects consumers' increasing awareness of their rights.

Complaints against the *CBK - Financial Services category* are also present. The tabular data shows that in 2019, 17 complaints were filed, of which two were substantiated and 14 remained in process. In 2020, 26 complaints were filed, of which 11 were substantiated, and nine remained in process. In 2021, 35 complaints were filed, of which eight were substantiated, and 21 remained in process. In 2022, 51 complaints were received, of which

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seven were substantiated, and 27 remained in process. In 2023, 69 complaints were filed, of which all remained in process. In 2024, 42 were received, of which 39 remained in process. Meanwhile, during the 2025 study period, 17 complaints were received, of which 15 remained in process. The tabular data is as follows:

Table 7. Complaints addressed to the CBK category - Financial Services

Time period	Solved	Based	Unfounded	Refused	In process	Solved in %	Total
01.01.2019-31.12.2019	3	2	1	0	14	17.65%	17
01.01.2020-31.12.2020	17	11	4	2	9	65.38%	26
01.01.2021-31.12.2021	14	8	6	0	21	40.00%	35
01.01.2022-31.12.2022	24	7	16	1	27	47.06%	51
01.01.2023-31.12.2023	0	0	0	0	69	0.00%	69
01.01.2024-31.12.2024	3	0	2	1	39	7.14%	42
01.01.2025-09.09.2025	2	0	1	1	15	11.76%	17

This data, presented in the graphs, appears as follows:

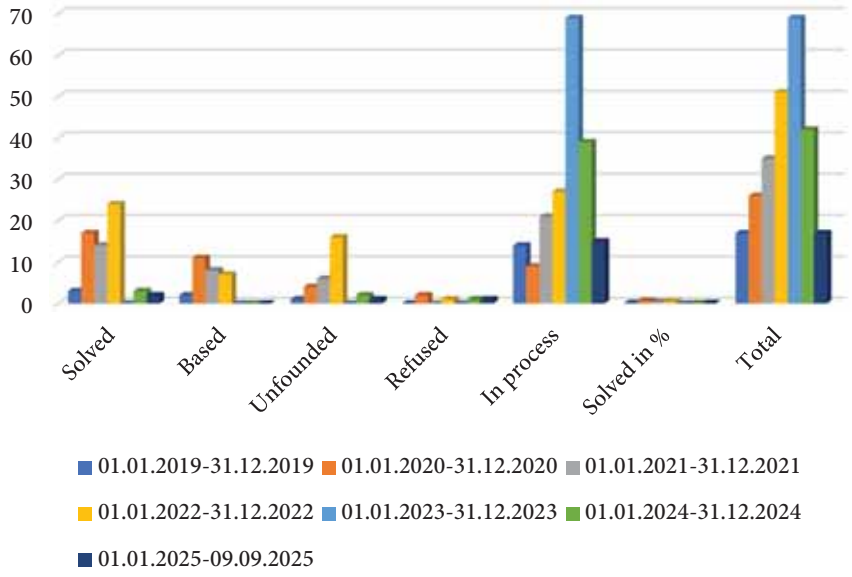

Figure 7. Complaints addressed to the CBK category - Financial Services

Based on the presentation of the data, the *dependent variables* show an upward trend in the number of complaints received over the years. The variable shows that in 2019, 17 complaints were received, in 2020, 26 were received, 35 in 2021, 51 in 2022, and 69 in 2023. A decrease is observed in 2024, with 42 complaints, and in 2025, with only 17 complaints. The increasing variable is present especially in 2022 and 2023.

Complaints mainly concern *poor quality services*, *consumer fraud*, *misleading advertising*, etc.

From the data, the variables presented, and the nature of the complaints, it can be concluded that increased consumer awareness and the more active role of the inspectorate have influenced the presentation of these complaints highlighted above.

It should be noted that the *Kosovo Food and Veterinary Agency (KFVA)* is the highest food and veterinary authority responsible for protecting human life and health by ensuring a high level of food safety, including animal feed, animal health, plant health, animal welfare, and the quality of food of plant and animal origin.[48] However, the data shows that there have been a considerable number of complaints against this agency. In 2019, 89 complaints were filed, of which 16 were based, and 51 were in process. In 2020, 129 complaints were filed, of which 10 were based, and 101 were in process. In 2021, 154 complaints were filed, of which 18 were based, and 96 remained in process. In 2022, 212 complaints were received, of which 19 were based, and 133 remained in process. In 2023, 266 complaints were filed, of which 24 were based, and 214 remained in process. In 2024, 290 complaints were received, of which 70 were based, and 175 were in process. Meanwhile, during the 2025 study period, 156 complaints were received, of which 20 were substantiated and 104 were in process. The tabular data is as follows:

Table 8. Complaints addressed to the KFVA - Food

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	38	16	22	0	51	42.70%	89
01.01.2020-31.12.2020	28	10	18	0	101	21.71%	129
01.01.2021-31.12.2021	58	18	40	0	96	37.66%	154
01.01.2022-31.12.2022	79	19	59	1	133	37.26%	212
01.01.2023-31.12.2023	52	24	28	0	214	19.55%	266
01.01.2024-31.12.2024	115	70	44	1	175	39.66%	290
01.01.2025-09.09.2025	52	20	32	0	104	33.33%	156

48 *Food and Veterinary Agency (FVA)* <https://auvk.rks-gov.net/en/about-fva/> accessed 10 September 2025.

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This data, presented in the graphs, appears as follows:

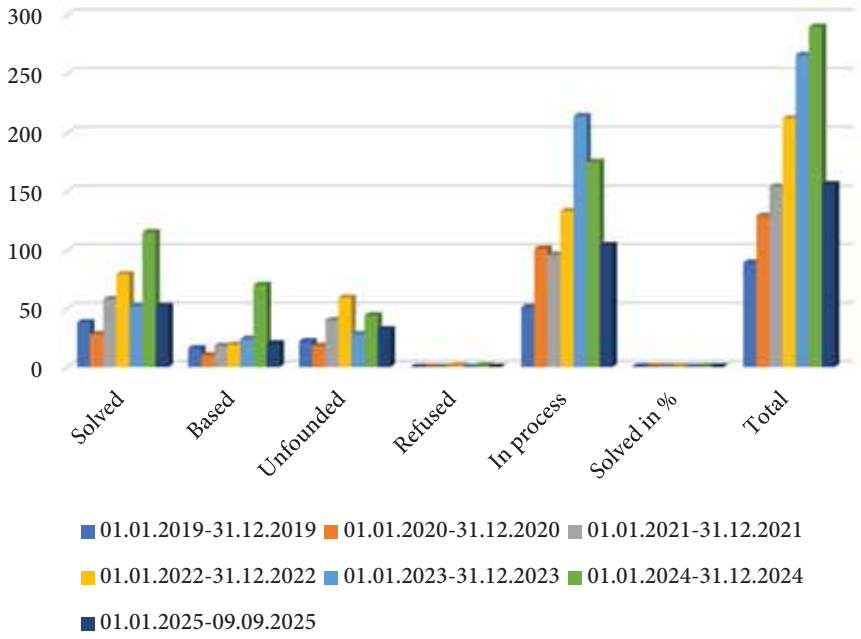

Figure 8. Complaints addressed to the KFVA - Food

The data show a continuous increase in the number of complaints in this category. While there were 89 complaints in 2019, the number increased to 129 in 2020, 154 in 2021, 212 in 2022, 266 in 2023, and 290 in 2024. A decrease is noted in 2025, with 156 cases.

The most common complaints are related to *expired products*, *suspicious products*, *poor hygiene*, *tobacco consumption*, and the *lack of official language on the packaging*.

From the data, the variables presented, and the type of complaints, it becomes clear that the increase reflects both growing consumer awareness and more active institutional efforts to protect consumer rights.

Complaints directed towards the *online shopping category* are also highly prevalent. Developments in the economic and commercial sectors, as well as in technology, have contributed to the increase in online purchases. In this context, consumer dissatisfaction has also increased.

Consequently, in 2019, 22 complaints were filed, of which five were based, while 14 remained in process. In 2020, 91 complaints were filed, of which 36 were based, while

50 were in process. In 2021, 120 complaints were filed, of which 85 were based, while 16 were in process. In 2022, 97 complaints were received, of which 66 were based, while nine were in process. In 2023, 114 were filed, of which 67 were based, while 42 remained in process. In 2024, 280 were received, of which 197 were based, while 67 were in process. Meanwhile, in 2025, 261 were received, of which 192 were based, while 63 were in process. The tabular data is as follows:

Table 9. Complaints addressed to the category - Online Shopping

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	8	5	3	0	14	36.36%	22
01.01.2020-31.12.2020	41	36	3	2	50	45.05%	91
01.01.2021-31.12.2021	104	85	9	10	16	86.67%	120
01.01.2022-31.12.2022	88	66	21	1	9	90.72%	97
01.01.2023-31.12.2023	72	67	4	1	42	63.16%	114
01.01.2024-31.12.2024	213	197	13	3	67	76.07%	280
01.01.2025-09.09.2025	198	192	6	0	63	75.86%	261

The data presented in the graphs appears as follows:

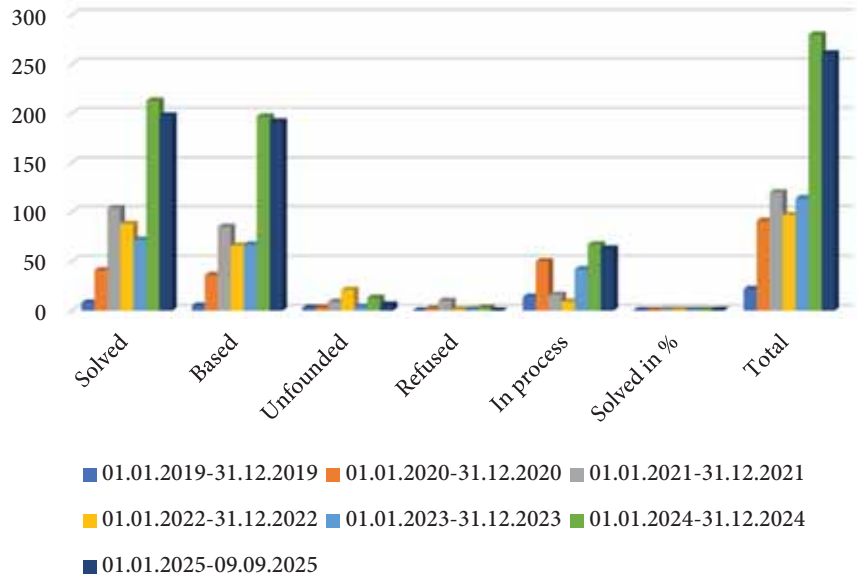

Figure 9. Complaints addressed to the category - Online Shopping

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From the data presented, the variables show a clear numerical increase in consumer dissatisfaction over the years. In 2019, the presence of cases with complaints was not high, with only 22 cases. This was followed by a sharp upward trend in 2020 with 91 cases and in 2021 with 120 cases. A slight decrease is observed in 2022 with 97 cases, followed by an increasing variable in 2023 with 114 cases, 2024 with 280 cases and with a slight decrease in 2025 with 261 cases.

The most common complaints related to *consumer fraud*, *questionable products*, *non-return of goods*, and *aggressive, deceptive practices*.

From the data and variables presented, it is evident that the years 2024 and 2025 record the highest number of complaints. This is particularly due to the increase in online purchases, the lack of education about this form of purchase, and a growing awareness of the right to respond as a consumer.

Complaints directed towards the *Kosovo Tax Administration category* are also present. The data shows that in 2019, eight complaints were filed, all of which remain in process. In 2020, 44 complaints were filed, of which three were based, and 41 were in process. In 2021, 94 complaints were filed, of which five were based, and 87 were in process. In 2022, 172 complaints were received, of which 48 were based, and 114 were in process. In 2023, 135 complaints were filed, of which 26 were based, and 89 were in process. In 2024, 127 complaints were received, of which 61 were based, and 24 were in process. In 2025, 58 complaints were received, of which 10 were based, and 35 were in process. The tabular data is as follows:

Table 10. Complaints addressed to the category - Kosovo Tax Administration

Time period	*Solved*	*Based*	*Unfounded*	*Refused*	*In process*	*Solved in %*	*Total*
01.01.2019-31.12.2019	0	0	0	0	8	0.00%	8
01.01.2020-31.12.2020	3	3	0	0	41	6.82%	44
01.01.2021-31.12.2021	7	5	2	0	87	7.45%	94
01.01.2022-31.12.2022	58	48	10	0	114	33.72%	172
01.01.2023-31.12.2023	46	26	20	0	89	34.07%	135
01.01.2024-31.12.2024	103	61	42	0	24	81.10%	127
01.01.2025-09.09.2025	23	10	12	1	35	39.66%	58

This data presented in the graphs appear as follows:

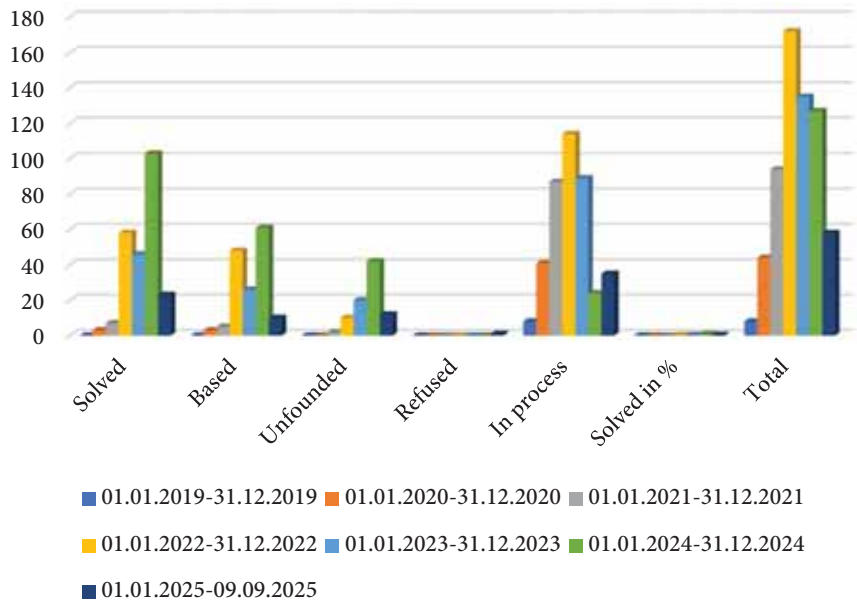

Figure 10. Complaints addressed to the category - Kosovo Tax Administration

From the data presented, there are numerous complaints in this category, with a generally increasing trend over the years. In 2019, only eight complaints were registered, followed by an increase in 2020 with 44 cases, in 2021 with 94 cases, and in 2022 with 172 cases. A slight decrease is observed in 2023 with 135 cases, followed by another decrease in 2024 with 127 cases, and then a more pronounced decrease in 2025 with 58 cases.

Complaints were filed only for issues related to *fiscal vouchers*.

From the data, variables presented and the type of complaint, it becomes clear that consumers are increasingly aware of the need for a fiscal voucher as proof of payment and of the existence of the legal violations committed by businesses when such vouchers are not issued.

However, to achieve a more accurate correlative representation and interpretation, additional numerical variables were derived from the data presented in the table above. These variables reflect the type and specific number of consumer complaints across all categories. In this framework, the alleged cases of consumer fraud—representing the complaints submitted by consumers—are also presented.

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Table 11. Types of complaints filed by consumers include consumer fraud complaints

Types of complaints filed by consumers include consumer fraud complaints								
Time period: 01.01.2019-09.09.2025	*2019*	*2020*	*2021*	*2022*	*2023*	*2024*	*2025*	*Total:*
Complaints addressed to the Trade								
Disregard of warranty	51	93	140	174	181	265	110	1014
Consumer fraud	50	37	71	110	102	196	96	662
Price mismatch	38	102	251	388	288	284	145	1496
Misleading Advertising	17	27	64	59	57	43	47	314
Non-return of goods	13	24	45	117	161	208	101	669
Rising prices	0	154	1	5	0	4	5	169
Non-refund of cents	0	5	12	22	3	10	7	59
Lack of flag on the shelf	0	3	13	19	67	5	3	110
Lack of official language on packaging	0	0	26	0	0	4	2	32
Neglect of contract	0	0	262	193	8	12	0	475
SMS	0	0	1	6	5	1	0	13
Refund of funds	0	0	0	1	104	3	1	109
Currency	0	0	0	0	34	3	0	37
Chile and derivatives	0	0	0	0	5	10	4	19
Termination of the contract	0	0	0	0	0	19	0	19
Price of derivatives	0	0	0	0	0	0	6	6
Complaints addressed to the ARKEP category - Telecommunications								
Unfair billing	17	26	48	47	22	22	13	195
Neglect of contract	12	14	19	78	87	36	5	251
Deceptive practices	16	14	9	17	23	16	14	109
Subpar service	90	61	98	114	132	315	95	905
Complaints addressed to the ARRU - Waterworks								
Poor quality services	1	2	4	3	7	8	3	28
Unfair billing	1	4	2	0	2	8	3	20
Neglect of contract	0	0	0	0	0	4	1	5

Complaints addressed to the category - Electricity								
Poor quality services	8	11	19	15	13	40	14	120
Unfair billing	0	4	6	12	12	19	21	74
Incompatibility of the contract	0	0	0	4	7	6	2	19
Complaints addressed to the category - Metrology								
Suspicious measurement	2	2	12	2	1	3	0	22
Quantity discrepancy	0	3	2	1	10	6	0	22
Complaints addressed to the category - Health								
Suspicious product	4	7	12	3	4	9	3	42
Product without banderole	1	2	2	2	1	1	0	9
Subpar service	0	6	14	34	15	11	6	86
Suspicion of fraud	0	5	5	1	1	3	5	20
Water	0	0	0	0	11	1	19	31
Complaints addressed to the CBK category - Financial Services								
Consumer fraud	4	5	7	20	22	21	3	82
Subpar service	13	21	28	29	14	20	12	137
Misleading Advertising	0	0	0	2	0	0	1	3
Currency	0	0	0	0	33	1	1	35
Complaints addressed to the AVUK - Food								
Tobacco consumption	7	2	6	2	70	68	29	184
Lack of hygiene	11	33	29	26	20	17	12	148
Suspicious product	49	38	63	63	59	83	36	391
Expired Term	22	56	54	121	117	121	79	570
Lack of official language on packaging	0	0	2	0	0	1	0	3
Complaints addressed to the category - Online Shopping								
Suspicious product	7	17	6	4	1	7	3	45
Consumer fraud	15	74	113	93	9	30	21	355
Aggressive deceptive practices	0	0	1	0	0	0	0	1
Non-return of goods	0	0	0	0	104	243	237	584

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Complaints addressed to the category - Kosovo Tax Administration								
Fiscal coupons	8	44	94	172	135	127	58	638

From the data presented above, we can conclude that the violation of consumer rights also exists in our society (taking into account the situations where complaints are considered justified), while consumer fraud as a form of violation of these rights is present in almost all categories presented above and where the consumer has filed his complaints alleging violation of his rights and a such a fact can also be clearly observed through the numerical data presented above.

However, it must be emphasised that the total number of complaints received during the study period is very high in numerical terms. This can be seen in the following tabular data:

Table 12. Complaints received by the Department of Consumer Protection - Time period: 1 January 2019-9 September 2025

Category:	*Solved*	*Total in %*	*Based*	*Unfounded*	*Refused*	*In process*	*Total in %*	*Total*
1. Complaints addressed to the Trade category	3852	74.0	2799	987	66	1351	25.9	5203
2. Complaints addressed to the RAEPC category - Telecommunications	873	59.7	589	278	6	587	40.2	1460
3. Complaints addressed to the WSRA - Waterworks category	14	26.4	6	8	0	39	73.5	53
4. Complaints addressed to the category - Electricity	49	23.0	31	16	2	164	76.9	213
5. Complaints addressed to the category - Metrology	33	75.0	5	26	2	11	25.0	44
6. Complaints addressed to the category - Health	13	6.91	10	3	0	175	93.0	188

Category:	*Solved*	*Total in %*	*Based*	*Unfounded*	*Refused*	*In process*	*Total in %*	*Total*
7. Complaints addressed to the CBK category - Financial Services	63	24.5	28	30	5	194	75.4	257
8. Complaints addressed to the AVUK - Food category	422	32.5	177	243	2	874	67.4	1296
9. Complaints addressed to the category - Online shopping	724	73.5	648	59	17	261	26.4	985
10. Complaints addressed to the category - Kosovo Tax Administration	240	37.6	153	86	1	398	62.3	638
Total:	6283	60.7	4446	1736	101	4054	39.2	10337

From the data presented, it is clear that during the research period, a total of 10,337 complaints were filed, of which 6,283 or 60.7% were resolved. However, a relatively high number of unresolved complaints remained in the process: 4,054 (39.2%).

The research shows that the high number of complaints remaining in the process is due, in some cases, to a lack of professional staff to handle complaints, bureaucracy, a lack of evidence, the passing of the presented case through several instances, the existence of many complaints, and poor coordination between departments or even institutions.

It is also important to emphasise that of the 6,283 complaints resolved, 4,446 were considered well-founded, indicating clear evidence of a consumer rights violation.

However, to achieve comparability with neighbouring countries, it must be emphasised that, although in Kosovo the largest number of consumer complaints clearly appears to be addressed to the *Trade* category, from the available data, which may not be conclusive, in Albania, user complaints to the *Electronic and Postal Communications Authority (AKEP)* increased fivefold during 2023. According to information from AKEP, last year, 2123 complaints were filed with this institution by subscribers of public electronic communications services, compared to 415 complaints filed in 2022,[49] while the *Consumers'*

49 'Data: Citizen Complaints to AKEP Increased Fivefold Last Year' (*Dosja*, 28 Maj 2024) <https://dosja.al/newsmobile//373899/> accessed 10 September 2025.

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Organisation of Macedonia conducted 1,523 consultations with consumers regarding their rights in sales and service contracts, addressing disputes with traders concerning these rights. Over 50% of the complaints (822) pertained to the purchase of goods, with the highest number related to home appliances and IT equipment[50]. This fact makes it clear that consumers not only in Kosovo but also in countries in the region continue to react to alleged violations of their rights. Meanwhile, based on the available data, in Albania there were more complaints in the *Electronic and Postal Communications* category, while in Kosovo and Macedonia there were more complaints in the *Trade* category.

6 CONCLUSIONS

As emphasised earlier, the primary purpose of this study was to present violations of consumers' rights, including consumer fraud, in Kosovo. Although consumer fraud[51] is a criminal offence—highlighted for its dangerous nature—the intention was to clarify the existing situation regarding violations of consumer rights, including fraud, and to illustrate this through an analysis of legal remedies and consumer actions to seek justice.

The findings of this study indicate that:

- Violations of consumer rights, including consumer fraud, are present in Kosovo at a worrying level. When considering the *dark figure* of unreported cases, the situation becomes even more worrying.
- Educating consumers about their legally protected rights should be an institutional priority. Although consumer awareness has recently increased—evidenced by the growing number of complaints—this is still significant work to be done.
- Discussions with spontaneous focus groups and an analysis of statistical data confirm high levels of consumer dissatisfaction, especially in the fields of trade, food, telecommunications and increasingly, online shopping.
- The large number of unresolved complaints that remain without definitive resolution over the years is worrying.
- The significant number of cases that remain in the process is due to a lack of professionalised staff, insufficient coordination between departments and institutions, bureaucratic obstacles, lack of evidence, and the transfer of cases from one instance to another—together representing a serious problem.

50 Neda Zdraveva, 'ADR for Consumer Disputes in the Consumer Protection Legislation of North Macedonia' in Marc Bungenberg and others (eds), *Alternative Dispute Resolution in the Western Balkans: Trends and Challenges* (Springer 2023) 265. doi:10.1007/978-3-031-76345-8_16.

51 Criminal Code of the Republic of Kosovo No 06/L-074 [2019] Official Gazette 2, ch 25.

- The lack of accurate, concrete and publicly available data on criminal offences in the form of consumer fraud from 2019 to date remains worrying. Such non-publication by institutions is harmful because it causes a lack of accuracy in the current state of this phenomenon, which subsequently causes obstacles in institutional planning for its prevention and combating.
- Strengthening law enforcement in this area must be prioritised. While the legal framework for consumer protection in Kosovo is comprehensive—including the *Law No. 06/L -034 on Consumer Protection* (2018), published in the *Official Gazette* in 2025—there remains significant work to be done, especially in harmonising Kosovo's legislation with the so-called *acquis communautaire*, including in the field of consumer rights protection.
- Although institutions exist in Kosovo to receive and address consumer complaints, there are evident shortcomings in their effective handling. This highlights the need for improved coordination, clarified institutional competencies, and enhanced operational efficiency.
- Another current challenge for Kosovo is the full approximation of its legal framework with EU law. Despite important steps towards compliance with *EU directives*, it is still in the harmonisation phase, meaning it has not yet reached full alignment of its legal framework with that of the *EU*.
- It is necessary to organise forums and conferences where topics of the nature we have addressed would be professionally discussed. Such an organisation would not only contribute to scientific debates but would also directly help in improving more effective policies in terms of preventing violations of consumer rights and
- Future research on this topic is necessary—and should be even more detailed—given that analysis of consumer fraud, in the form presented here, is largely lacking in Kosovar society. This gap results in a lack of access to important data in an important field, not only social but also economic and legal.

REFERENCES

1. Abrardi L, Cambini C and Rondi L, 'Artificial Intelligence, Firms and Consumer Behavior: A Survey' (2022) 36(4) Journal of Economic Surveys 969. doi:10.1111/joes.12455
2. Al-Mumtaza AMA and Rustamaji M, 'Consumer Legal Protection on the Implementation of E-Commerce Using Instagram with a Pre-Order System During the Covid-19 Pandemic' (2022) 3(1) International Journal of Environmental, Sustainability, and Social Science 59. doi:10.38142/ijesss.v3i1.158

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3. Asllani G, Statovci B and Gega G, 'Development and Protection of Economic Competition in Kosovo: Case Study Gjilan Region' (2018) 2(1) International Journal on Responsibility 5. doi:10.62365/2576-0955.1014
4. Bislimi D, Bislimi D and Salihu B, 'Impact of Inflation on Consumers Goods Pricing in Kosovo Retail Sector (2020-2025)' [2025] Social Sciences and Humanities Open. doi:10.2139/ssrn.5279393
5. Brenner L and others, 'Consumer Fraud Victimization and Financial Well-Being' (2020) 76 Journal of Economic Psychology 102243. doi:10.1016/j.joep.2019.102243
6. Chueca Vergara C and Ferruz Agudo L, 'Fintech and Sustainability: Do they Affect Each Other?' (2021) 13(13) Sustainability 7012. doi:10.3390/su13137012
7. Dermaku B and Dermaku M, 'Functioning of Market and Trade in the Republic of Kosovo' (2022) 6(S8) International Journal of Health Sciences 4728. doi:10.53730/ijhs.v6nS8.13282
8. Gabriels G and others, 'Will the New Consumer Protection Act Prevent Harm to Nutritional Supplement Users?' (2011) 101(8) South African Medical Journal 543
9. Ghapa N and Kadir NAA, 'Information Regulation: A Measure of Consumer Protection' (2021) 29 Pertanika Journal of Social Sciences and Humanities 59. doi:10.47836/pjssh.29.s2.05
10. Hasani B, 'The Role of Consumer Care in Kosovo' (2021) 49(1) Knowledge 85
11. Isufi X and Miloshoska D, 'Insurance Sector State Policy and Legal Regulation Improvement in Kosovo' (2024) 7(4) Social and Legal Studios 111. doi:10.32518/sals4.2024.111
12. Jashar A and Vokshi K, 'Analysis on the Legal Mechanisms for Consumer Protection in the Comparative Right: Kosovo Case' (2022) 5(2) European Journal of Marketing and Economics 65
13. Jashar A and Vokshi K, 'Legal Analysis on the Legal Mechanisms for Consumer Protection in the Comparative Right, the Role and Importance of these Legal Mechanisms in Kosovo' (2018) 1(1) European Journal of Marketing and Economics 117. doi:10.26417/ejme.v1i1.p117-121
14. Jimmy F, 'Enhancing Data Security in Financial Institutions with Blockchain Technology' (2024) 5(1) Journal of Artificial Intelligence General Science 424. doi:10.60087/jaigs.v5i1.217
15. Juswanto U, Suryanto S and Gunawan Y, 'Juridical Review of Legal Protection Against E-Commerce Consumers on the Marketplace' (2022) 11(4) Legal Brief 2534

16. Karimova GS and others, 'Global Standards and the Philosophy of Consumption: Toward a Consumer-Driven Governance of Global Value Chains' (2025) 34(1) Business Ethics, the Environment and Responsibility 280. doi:10.1111/beer.12648

17. Kowalik I, Leyge M and Sikora T, 'Green Marketing and Greenwashing in Poland and France, a Comparison of Consumer Reactions' (2024) 60(1) International Journal of Contemporary Management 60. doi:10.2478/ijcm-2024-0002

18. Krasniqi F and Jusufi G, 'Tax Evasion as a Criminal Offense in Developing Countries: Some Perception from Business Organizations' (2022) 6(4) Corporate Governance and Organizational Behavior Review 314. doi:10.22495/cgobrv6i4sip12

19. Maultzsch F, 'Paradigms of EU Consumer Law in the Digital Age' in Kettemann MC, Peukert A and Döhmann IS (eds), *The Law of Global Digitality* (Routledge 2022) 144. doi:10.2139/ssrn.3759858

20. Miftari I and others, 'Factors influencing consumer attitudes towards organic food products in a transition economy - Insights from Kosovo' (2022) 14(10) Sustainability 5873. doi:10.3390/su14105873

21. Nisa N, Acha A and Dharejo N, 'The Consequences of Upholding Deceptive Marketing Practices and Its Effect on Consumers' Related Attitudes Including Consumer Loyalty and Consumer Trust: Evidence from the Fashion Industry in the UAE' (2022) 7(2) Journal of Advanced Research in Social Sciences and Humanities 71. doi:10.26500/JARSSH-07-2022-0203

22. Nygaard A and Silkoset R, 'Sustainable Development and greenwashing: How Blockchain Technology Information Can Empower Green Consumers' (2023) 32(6) Business Strategy and the Environment 3801. doi:10.1002/bse.3338

23. Plakolli-Kasumi L, 'Some Preliminary Findings regarding the Kosovo Legislation in the Field of Consumer Protection with Special Emphasis in Arbitration Clauses in Consumer Contracts' (2020) 57(3) Zbornik radova Pravnog fakulteta u Splitu 875. doi:10.31141/zrpfs.2020.57.137.875

24. Rachmad YE, 'Social Media Marketing Mediated Changes In Consumer Behavior from E-Commerce to Social Commerce' (2022) 1(3) International Journal of Economics and Management Research 227. doi:10.55606/ijemr.v1i3.152

25. Ramaj B, 'Consumer Protection Legislation in Kosovo, Albania and Montenegro' (2020) 42(5) Knowledge 1019

26. Roy P and Datta D, 'Theory and Models of Consumer Buying Behaviour: A Descriptive Study' (2022) 11(8) Parishodh Journal 206. doi:10.2139/ssrn.4205489

27. Salminen J and others, 'Creating and Detecting Fake Reviews of Online Products' (2022) 64 Journal of Retailing and Consumer Services 102771. doi:10.1016/j.jretconser.2021.102771

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28. Waller SW and others, 'Consumer Protection in the United States: An Overview' (*SSRN*, 12 January 2011) <https://ssrn.com/abstract=1000226> accessed 10 September 2025

29. Woker T, 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31(2) Obiter 217. doi:10.17159/obiter.v31i2.12356

30. Yanamala AKY and Suryadevara S, 'Navigating Data Protection Challenges in the Era of Artificial Intelligence: A Comprehensive Review' (2024) 15(1) Revista de Inteligencia Artificial en Medicina 113

31. Zac A and others, 'Dark Patterns and Consumer Vulnerability' [2025] Behavioural Public Policy 1. doi:10.1017/bpp.2024.49

32. Zdraveva N, 'ADR for Consumer Disputes in the Consumer Protection Legislation of North Macedonia' in Bungenberg M and others (eds), *Alternative Dispute Resolution in the Western Balkans: Trends and Challenges* (Springer 2023) 257. doi:10.1007/978-3-031-76345-8_16

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АНАЛІЗ СТАТИСТИКИ СКАРГ СПОЖИВАЧІВ У КОСОВО: ТЕНДЕНЦІЇ ТА ВИКЛИКИ (2019-2025)

Фатміре Краснічі

АНОТАЦІЯ

***Вступ**: У цій статті авторка має на меті дослідити, проаналізувати та представити наявність та наслідки порушень прав споживачів у косовському суспільстві. Основна увага також буде приділена аспекту правового захисту споживачів, а також обробці їхньої реакції за допомогою засобів правового захисту, що уточнює їхню обізнаність про права, визначені законом. За результатами цього дослідження будуть представлені найчастіші порушення прав, які оскаржуються споживачами, шахрайство споживачів, обґрунтування невирішених скарг споживачів, проблеми інституцій Косово у розгляді скарг споживачів, а також проблеми інституцій Косово у дотриманні ключових директив ЄС.*

***Методи**: Для досягнення мети дослідження та його цілей буде застосовано спеціальну наукову методологію дослідження. У цій статті застосовані такі методи: фокус-групи, історико-правовий метод, нормативно-правовий метод, статистичний метод та метод аналізу. Вибір такої науково-дослідницької методології був зроблений з метою якомога точніше розглянути порушення прав споживачів та, в певних ситуаціях, виникнення випадків шахрайства з боку споживачів. Хоча фундаментальне обговорення теми розпочалося зі спонтанних фокус-груп, які представляють соціальну реальність, дослідження виходить за ці межі та орієнтоване на розгляд теми через історико-правовий метод, щоб побачити ситуацію та реакцію на досліджувану проблему в минулому. Крім того, застосування нормативно-правового методу необхідне для того, щоб представити порушення прав споживачів у юридичному аспекті, зокрема випадки шахрайства споживачів з погляду інкримінації таких дій законом. Тим часом*

статистичний метод є надзвичайно важливим, оскільки він відображає наявну ситуацію порушення прав споживачів, включно з випадками їхнього шахрайства в суспільстві, тоді як для аналізу висвітленої ситуації в цілому та протягом усього дослідження було використано метод аналізу.

***Результати та висновки**: Результати цього дослідження чітко показують, що порушення прав споживачів, зокрема шахрайство з боку споживачів, є досить поширеними в косовському суспільстві. Результати також показують, що правова база для захисту прав споживачів та відповідні механізми існують, проте є затримки у досягненні належного захисту споживачів. Отримані результати чітко показують, що рівень реакції споживачів на порушення їхніх прав зростає, а також те, що факт високої поширеності цих порушень у суспільстві також викликає занепокоєння. Крім того, якщо додати до цього існування невеликої кількості випадків шахрайства з боку споживачів, ситуація дає ще більше причин для стурбованості.*

***Ключові слова:** права споживачів, обман споживачів, правове регулювання, електронна комерція, інституційне правозастосування.*

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Research Article

DIGITALLY TRACKED VICTIMS AND ABUSERS: LITHUANIAN CASE LAW ON TECHNOLOGY-FACILITATED PARTNER STALKING

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ABSTRACT

Background. *Though technology-facilitated partner stalking is a prevalent form of abuse, prosecutorial research in this field is underdeveloped. Online and offline violence reinforce each other, but this interaction could be leveraged as technology-enabled resistance and evidence.*

Method. *This study employs a doctrinal legal research design, combined with qualitative content analysis, focused on Lithuania's national-level case law. Fifty-seven court and pre-trial decisions were compiled into a dataset for the study. The main objective of this paper is to identify typical tech stalking behaviors and the criminal law's response to them.*

Results and Conclusions. *The national case law analysis supports previous empirical findings regarding motivation, typical tactics, and effects of technology-facilitated partner stalking. Deficiencies of national anti-stalking legislation reinforce the difficulties of prosecuting tech abuse. Charging decisions are not consistent and get even more complicated in cases of polyvictimization and non-physical violence. The*

success of criminal proceedings largely depends on the active involvement of victims, thereby potentially leading to repeat, extended, and secondary victimization. The practice of lenient sanctioning and technical challenges adds constraints on effective prosecution. However, even within the existing national legal framework, there is potential to improve the criminal law's response by developing digital literacy of the population, building specialized professional capacities (both legal and technical) within law agencies, and expanding the responsibilities of tech developers.

1 INTRODUCTION

Feminist research conceptualizes the utilization of technologies as a shift from traditional cybercrime to structural, gendered coercive control dynamics.[1] Technology-facilitated gender-based violence (TFGBV) has grown increasingly prevalent in recent years, particularly during the COVID-19 pandemic. Beyond intensifying abusive behaviors like stalking, bullying, sexual harassment, coercion, or terrorizing, information and communication technologies have accelerated new manifestations of harm.[2] Technology-facilitated partner stalking is the misuse of digital tools and services by a current or ex-intimate partner aimed at controlling. The most prevalent patterns and tactics employed by abusers are surveillance and tracking (both passive location tracking and active use of spyware/stalkerware); account compromise and impersonation (account takeovers, fake profiles, doxxing); social-media and communication abuse (repeated unwanted contact, threat messages, public shaming); image-based sexual abuse (sharing private intimate material without consent), etc.[3]. EU Directive 2024/1385 defines cyber stalking as the intentional conduct of repeatedly or continuously placing a person under surveillance, without that person's consent or a legal authorization to do so, by means of information and communication technology, to track or monitor that person's movements and activities, where such conduct is likely to cause serious harm to that person (Art. 6).[4] Due to the diversity of victim-survivor characteristics and relationship

1 Molly Dragiewicz and others, 'Technology Facilitated Coercive Control: Domestic Violence and the Competing Roles of Digital Media Platforms' (2018) 18(4) Feminist Media Studies 609, doi:10.1080/14680777.2018.1447341.

2 Vaiddehi Bansal and others, 'Help-Seeking Behaviours of Those Experiencing Technology-Facilitated GBV in Asia: Implications for Policy and Programming' (2023) 7(2) Journal of Gender-Based Violence 352, doi:10.1332/239868021X16697232129517.

3 Afroditi Pina and others, *Technology-Facilitated Intimate Partner Violence: A Multidisciplinary Examination of Prevalence, Methods Used by Perpetrators and the Impact of COVID-19* (Home Office Report, University of Kent ICSS 2021) <https://kar.kent.ac.uk/95001/> accessed 14 November 2025; Michaela M Rogers and others, 'Technology-Facilitated Abuse in Intimate Relationships: A Scoping Review' (2023) 24(4) Trauma, Violence & Abuse 2210, doi:10.1177/15248380221090218.

4 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 'On Combating Violence against Women and Domestic Violence' [2024] OJ L 1385.

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contexts, findings reveal variation in manifestation and impact.[5] Despite the absence of widely accepted definitions and measurements, research worldwide finds digital abuse significantly prevalent.[6] While gender is a key determinant, intersectional vulnerabilities also shape the risk of victimization.[7]

The use of electronic devices and the Internet is usually combined with offline abuse and extends to post-separation, which enables perpetrators to amplify the scale of stalking and its adverse cumulative effect on victims.[8] It impairs health, safety, and wellbeing, e.g., mental health (elevated anxiety, depression, PTSD symptoms, chronic fear) and social impacts (disruption of work, social isolation, restriction of movements/choices.[9] Specific effects of cyberstalking are a sense of the perpetrator's omnipresence, isolation, and humiliation.[10]

Coping strategies vary from individual to policy, from technical to legal, e.g., digital safety, seeking service and support, and reporting to police.[11] Survivors face barriers to accessing support due to patriarchal gender norms and the nuances of TFGBV that make understanding, responding to, and preventing violence difficult.[12] Digital literacy is the key factor in combating cyber-violence. That is why the EU Directive 2024/1385 also requires

5 Hayley Boxall, Siobhan Lawler and Anthony Morgan, 'Unpacking Variation in Technology-Facilitated Intimate Partner Violence: A Conceptual and Empirical Analysis' [2025] Journal of Family Violence, doi:10.1007/s10896-025-00928-8.

6 Rogers and others (n 3); Sharon Hoi Lam Pak and others, 'Measuring Technology-Facilitated Sexual Violence and Abuse: A Scoping Review Protocol of Existing Measurements' (2024) 14 BMJ Open e089296, doi:10.1136/bmjopen-2024-089296; Chanell Wilson, Lorraine Sheridan and David Garratt-Reed, 'What Is Cyberstalking? A Review of Measurements' (2021) 37(11-12) Journal of Interpersonal Violence NP9763, doi:10.1177/0886260520985489.

7 Boxall, Lawler and Morgan (n 5)

8 ibid; Rogers and others (n 3).

9 Chuka Emezue, 'Digital or Digitally Delivered Responses to Domestic and Intimate Partner Violence during COVID-19' (2020) 6(3) JMIR Public Health Surveill e19831, doi:10.2196/19831; TK Logan and Jennifer Cole, '"I Felt as If My Body Wasn't Mine Anymore": Ex-Partner Stalking Victims' Overlapping Experiences of Sexual Harassment and Sexual Assault' (2023) 38(7) Journal of Family Violence 1341, doi:10.1007/s10896-022-00455-w; Jennifer Gatewood Owens, 'Why Definitions Matter: Stalking Victimization in the United States' (2016) 31(12) Journal of Interpersonal Violence 2196. doi:10.1177/0886260515573577; Pina and others (n 3); Rogers and others (n 3).

10 Rogers and others (n 3); Delanie Woodlock, 'The Abuse of Technology in Domestic Violence and Stalking' (2017) 23(5) Violence Against Women 584, doi:10.1177/1077801216646277.

11 Emezue (n 9); Martyna Bendlin and Lorraine Sheridan, 'Risk Factors for Severe Violence in Intimate Partner Stalking Situations: An Analysis of Police Records' (2021) 36(17-18) Journal of Interpersonal Violence 7895, doi:10.1177/0886260519847776; Alison Gregory and Emma Williamson, '"I Think It Just Made Everything Very Much More Intense": A Qualitative Secondary Analysis Exploring the Role of Friends and Family Providing Support to Survivors of Domestic Abuse during the COVID-19 Pandemic' (2022) 37 Journal of Family Violence 991, doi:10.1007/s10896-021-00292-3; TK Logan and Robert Walker, 'Stalking: A Multidimensional Framework for Assessment and Safety Planning' (2017) 18(2) Trauma, Violence & Abuse 200, doi:10.1177/1524838015603210.

12 Bansal and others (n 2).

measures to develop skills that enable users to identify and address cyber abuse, seek support, and prevent its perpetration.

The legal response to TFGBV is evolving across many jurisdictions, but enforcement and forensic technical capacity vary. Research advocates for improved legislation and cooperation from tech developers.[13] Legislative changes do not necessarily increase the rates of prosecution,[14] therefore, a full spectrum of efforts must be operationalized: better understanding, enhanced multi-sectoral capacities, and victim support.[15] The EU Directive 2024/1385 criminalizes physical violence, as well as psychological, economic, and sexual violence against women across the EU, both offline and online. Due to the spread and serious impact, criminalization covers the most widespread forms of cyber-violence, including the non-consensual sharing of intimate images (including deepfakes), cyber-stalking, cyber-harassment, misogynous hate speech, and "cyber-flashing". Cyber abuse was already addressed in the jurisprudence of the European Court of Human Rights as a form of partner violence. The state's failure to protect against it may constitute a violation of the right to privacy or non-discrimination.[16] Research report challenges for national law-enforcement systems in prosecuting digital stalking, including the failure to recognize this form of abuse as a tactic of coercive control; inadequate training; constraints on time, personnel, and technical resources; and difficulties in evidence collection.[17]

13 Kathryn Brookfield, Rachel Fyson and Murray Goulden, 'Technology-Facilitated Domestic Abuse: An Under-Recognised Safeguarding Issue?' (2024) 54(1) British Journal of Social Work 419, doi:10.1093/bjsw/bcad206; Brett Eterovic-Soric and others, 'Stalking the Stalkers – Detecting and Deterring Stalking Behaviours Using Technology: A Review' (2017) 70 Computers & Security 278, doi:10.1016/j.cose.2017.06.008.

14 Leana A Bouffard and others, 'Still in the Shadows: The Unresponsiveness of Stalking Prosecution Rates to Increased Legislative Attention' (2021) 73 Journal of Criminal Justice 101794, doi:10.1016/j.jcrimjus.2021.101794.

15 Stavros Chatzisymeonidis and Afroditi Pina, 'Exploring Police Attitudes on Victims' Delayed Reporting and Victim Blame in Technology-Facilitated IPV' (2024) 13(12) Crime Science 12, doi:10.1186/s40163-024-00213-x; Wendy O'Brien and Marie-Helen Maras, 'Technology-Facilitated Coercive Control: Response, Redress, Risk, and Reform' (2024) 38(2) International Review of Law, Computers & Technology 174, doi:10.1080/13600869.2023.2295097.

16 *Buturugă v Romania* App No 56867/15 (ECtHR, 11 February 2020) <https://hudoc.echr.coe.int/fre?i=001-201342> accessed 14 November 2025; *Volodina v Russia* App No 41261/17 (ECtHR, 9 July 2019) <https://hudoc.echr.coe.int/eng?i=001-194321> accessed 14 November 2025; *Volodina v Russia (No 2)* App No 40419/19 (ECtHR, 14 September 2021) <https://hudoc.echr.coe.int/eng?i=001-211794> accessed 14 November 2025.

17 Heather Douglas and others, 'Policing Technology-Facilitated Domestic Abuse (TFDA): Views of Service Providers in Australia and the United Kingdom' (2025) 40 Journal of Family Violence 341, doi:10.1007/s10896-023-00619-2; Brianna O'Shea, Nicole L Asquith and Jeremy Prichard, 'Mapping Cyber-Enabled Crime: Understanding Police Responses' (2022) 11(4) Crime, Justice & Social Democracy 25, doi: 10.5204/ijcjsd.2096; Carlotta Rigotti, Clare McGlynn and Franziska Benning, 'Image-Based Sexual Abuse and EU Law: A Critical Analysis' (2024) 25(9) German Law Journal 1472, doi:10.1017/glj.2024.49.

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Online and offline abuse can reinforce each other but this interaction could be leveraged as technology facilitated resistance and a tool that leads to perpetrators' liability,[18] e.g., to establish persistent communication (screenshots, exported messages, recordings, IPs, login times); surveillance (photos/videos, hidden cameras, shared devices, cloud backups); monitoring and tracking (GPS logs, location sharing, account credentials, stalkerware); impersonation/online harassment (fake accounts, coordinated messaging, platform records, IP/metadata). Images of devices preserving metadata and timestamps; provider records/metadata (telco logs, platform message headers, IPs, login times); app/spyware artifacts (installation traces, persistence mechanisms, server communications); correlation of timelines; witness statements – all of these are forensic evidence found most useful in court.[19] With the potential of new evidence, the utilization of technologies has greatly complicated prosecution. Due to rapid technological developments and emerging issues (e.g., the Internet of things), the legal system often offers a delayed response, leading to underreporting and legal uncertainty about definitions, admissibility, property access, and search powers.[20] However, prosecutorial research on tech abuse is underdeveloped. Most empirical studies focus on prevalence, typology, victim experience, and police or social work responses. Studies in Lithuania tackle tech abuse in the more general discourse on partner violence or stalking (prevalence, tactics) or focus on legislation.[21]

2 METHODOLOGY

This study employs a doctrinal legal research design combined with qualitative content analysis. The doctrinal component examines the interpretation of national and international legislation related to stalking. The qualitative component identifies patterns in judicial reasoning, evidentiary approaches, and legal qualification of technology-facilitated behaviors. The research focuses on Lithuania's national-level case law.

Open-access online databases of national legislation and case law, "Infolex" and "Liteko", were employed as a source and a tool to gather sample cases. "Art. 148-1", "in the motivational part" [of the court decision], "Criminal Code", and "criminal case" were used as keywords for a search strategy. The number of cases was relatively small, so to increase the study's representativeness, decisions of courts of all instances were used, although the

18 Eterovic-Soric and others (n 13); Rogers and others (n 3).

19 Woodlock (n 10).

20 Rogers and others (n 3); Lisa Sugiura and others, 'The Technification of Domestic Abuse: Methods, Tools and Criminal Justice Responses' [2024] Criminology & Criminal Justice, doi:10.1177/17488958241266760.

21 Ilona Laurinaitytė, Ilona Michailovič and Liubovė Jarutienė, 'Dealing with Stalking Cases in Lithuania: The Role of Public Perceptions and Legal Response' (2022) 40(5) Behavioral Sciences & the Law 660, doi:10.1002/bsl.2597; Ramunė Jakštienė, 'A New Norm on Stalking: Is This the New Normal in Lithuania?' (2022) 15(2) Baltic Journal of Law & Politics 29, doi:10.2478/bjlp-2022-0009.

Supreme Court shapes judicial practice in Lithuania. To reach data saturation and follow the progress of the cases (i.e., pretrial investigation, court proceedings, probation), final decisions in pre-trial investigations were requested from the Kaunas Regional Prosecution Office (the largest territorial unit of a state) under the established procedure, depersonalized, and under the duty of confidentiality. These documents (i.e., applications for termination of criminal proceedings by court order, indictments, decisions to discontinue criminal proceedings; n=28) covered the period November 2021 – September 2023. During the initial screening, irrelevant cases were removed. The pool of potential samples was filtered to ensure that different decisions related to the same criminal proceeding (e.g., the same case at different stages of the criminal procedure). Cases that did not meet the eligibility criteria (i.e., technology-facilitated partner stalking) were eliminated. Accordingly, n=35 court cases and n=22 decisions from pre-trial investigation (n=57 samples in total) covering the period of November 2021 – July 2025 were compiled into a dataset for the analysis (Annex). When referring to a court case, its number is specified. There was limited access to documents from pre-trial investigations; therefore, they are randomly assigned numbers.

Several thematic fields for the analysis emerged from the data: types of technology used (e.g., internet, devices), behavioral patterns (e.g., monitoring, impersonation, repeat contacts), judicial interpretation of technology facilitated partner stalking (e.g., elements of offense), legal qualification (crime category, protection orders), and emerging legal gaps and challenges.

To respond to the diversity of stalking types,[22] for this article, the concept of partner violence is interpreted more broadly than the definition provided in the Criminal Code,[23] which provides an exhaustive list of relationships that fall within the scope of domestic violence and does not cover, e.g., ex-spouses. While earlier cases (2022–2023) prosecuted intimate partner or ex-partner stalking predominantly, the most recent ones (2024–2025) address a wide range of perpetrators, thereby justifying the legislator's decision to adopt a broad definition. Therefore, this study covers victimization of all partners related cases: an ex-partner, wife of perpetrator's intimate partner, son's dating partner, partner's ex-partner, a person with whom the perpetrator seeks intimacy, etc. (#1A-216-397/2025; 2K-42-719/2024; #3; 1A-398-898/2024; 1-1350-1057/2024). The author's position is consistent with the concept of domestic violence established in the Law on Protection Against Domestic Violence,[24] international practices, and research-based evidence about the specifics of the phenomenon.

22 Michael A Zona, Kaushal Kishore Sharma and John C Lane, 'A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample' (1993) 38(4) Journal of Forensic Science 894.

23 Criminal Code of the Republic of Lithuania No VIII-1968 of 26 September 2000 [2000] Official Gazette 89/2741.

24 Law of the Republic of Lithuania No XI-1425 of 26 May 2011 'On Protection Against Domestic Violence' [2011] Official Gazette 72/3475.

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The study is informed by a human rights theoretical framework. A victim-sensitive approach was taken to determine the effectiveness of tech abuse prosecution in Lithuania to respond to victims' experiences. As the national case law is assessed in the context of international standards, the study takes comparative aspects. Given the specifics of the phenomenon, the research adopts a a transdisciplinary perspective.

3 PATTERNS OF TECH STALKING: TACTICS AND DYNAMICS

While most pre-trial sample cases were discontinued, almost all court cases resulted in convictions. The results of the research support the doctrinal findings regarding motivation, typical stalking pattern, and its context. Predominantly, it was clearly gendered (male perpetrators and female victims) post-intimate relational multidimensional abuse. Previous research in Lithuania showed that written threats by electronic means (e.g., texting, emailing, communication in social networks, as well as phone calls) are one of the most prevalent stalking behaviors.[25] In addition to these, sample cases revealed other tactics: following a victim on foot or by car, blackmailing, non-consensual sharing of intimate material, hacking and using fake social media profiles, misappropriation of personal information and data online or by secret video and audio recording, smear campaigns, false accusations of child neglect, tax fraud, theft, breach of contract, or ethical violations, on-the-job harassment, proxy cyber-stalking, leaving unwanted gifts, property damage, restricting free movement (blocking the way, locking the door). In all sample cases beyond physical approach, a range of technical devices and services were used to stalk a victim: phone calls, text messages, emails, contacts through intercom and social media, doorbell, GPS tracking, damaging the car (deflating the car tire, damaging fuel tank or hose, removing the car's battery or wheels), disconnecting the power supply, etc. These patterns support research findings that stalking, including digital ones is not a replacement but rather an extension of violence,[26] e.g., in 1-1350-1057/2024, every time the perpetrator was active on social media, it was only when he was away from Lithuania; in 1-2358-1132/2023 and #2, the abusers contacted victims while being imprisoned. Certain professional activities of the victim (e.g., social content creators, medical or beauty service workers) become an additional risk factor for cyber-stalking (due to the person's public profile and greater accessibility on the Internet, social networks, public spaces), increase victim's vulnerability, lead to more serious consequences (e.g., damaged professional reputation (1-1350-1057/2024; #5). *Inter alia*, criminal records, medical conditions, and alcohol abuse were frequent traits among perpetrators (e.g., M1-791-1156/2024; eT-136-900/2023; 1-2358-1132/2023; e1-1169-903/2021; #1, etc.). These indicators can also be related to potential risk.[27]

25 Laurinaitytė, Michailovič and Jarutienė (n 21).

26 Renee Fiolet and others, 'Exploring the Impact of Technology-Facilitated Abuse and Its Relationship with Domestic Violence: A Qualitative Study on Experts' Perceptions' (2021) 8 Global Qualitative Nursing Research, doi:10.1177/23333936211028176.

27 Bendlin and Sheridan (n 11).

Persistent, obsessive, systemic, repeat stalking targeting multiple victims was reported in most cases, even violating a court order not to approach the victim, and even after multiple verdicts (1-723-1242/2025; 1A-311-1121/2024; 1A-206-926/2024; 1-1350-1057/2024; 1-2358-1132/2023; e1-1515-408/2023; e1-1169-903/2021). This indicates that the criminal instruments are still underutilized (when court orders not to approach the victim are not issued) and/or protection orders are not adequately enforced (when recidivism is not effectively prevented and sanctioned). Sometimes preventative measures are not fully tailored to the pattern of abuse: e.g., in cases of multiform stalking, including cyber stalking, the court imposed only a physical no-approaching order, not a prohibition of technology-facilitated contacts specifically (1A-216-397/2025; 2K-42-719/2024). Ordering an anti-violence intervention program (Criminal Code, Art. 72-2) rather than a contact prohibition (as, e.g., in 1A-75-1069/2024; 1A-95-898/2024; 1-723-1242/2025) is not sufficiently justified as these mechanisms differ in terms of objectives and benefits for the victim. This is especially important in stalking cases where non-consensual contact is at the core of criminal actions. In some cases, none of these were imposed even when a civil protection order was violated (e1-943-865/2025). Only in one sample case of violation of a restriction order was it considered among other grounds for revoking the suspension of the sentence and sending the perpetrator to prison (1S-31-923/2025). Again, in just one case was the prohibition to approach a victim order changed to a stricter preventive measure - intensive monitoring (1A-193-879/2024). Often, family members of direct victims are also involved, especially children, when they are directly targeted or affected by witnessing tech abuse. However, in all sample cases, only directly injured people were considered victims. Research argues that in cases of technology-facilitated parental stalking, children should be seen as victims/survivors of parental coercive control in their own right.[28] On the other hand, in some sample cases, restriction orders were extended to protect both the direct victim and her children (1A-206-926/2024).

3.1. Concept of Stalking under Lithuania's law

The Lithuanian legal system does not have specific criminal legislation on cyber stalking; accordingly, a generic anti-stalking provision of the Criminal Code (Art. 148-1) covers it. The courts' jurisprudence also acknowledges a diversity of stalking: physical contact (waiting near the victim's home, following in public places, etc.) and cyber-stalking (multiple phone calls, text messages, emails, or other means of electronic communication (1A-10-957/2025; 2K-42-719/2024; 1-136-1011/2024; 1A-398-898/2024; 1A-311-1121/2024).

28 Bendlin and Sheridan (n 11); Anna Nikupeteri and Merja Laitinen, 'Addressing Post-Separation Parental Stalking: A Multimethod Qualitative Approach to Producing Knowledge of Stalking in Children's Lives' (2023) 38 Journal of Family Violence 1165, doi:10.1007/s10896-023-00537-3; Anna Nikupeteri, Emma Katz and Merja Laitinen, 'Coercive Control and Technology-Facilitated Parental Stalking in Children's and Young People's Lives' (2021) 5(3) Journal of Gender-Based Violence 395, doi:10.1332/239868021X16285243258834.

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Due to this, even when ordering preventive measures, the courts usually define prohibition to approach the victim in broad terms, e.g., no contacts in any form by any means (1-1823-667/2025; 1A-398-898/2024; 1-1350-1057/2024; 1-136-1011/2024; 2K-242-594/2023; 1A-201-309/2023), and only sometimes specifying the details, e.g., verbally, in writing, by phone, SMS messages, or other electronic correspondence programs (1A-206-926/2024).

Though the law establishes the elements of the violation, it does not provide a definition or an exhaustive list of stalking behaviors, and, as the courts correctly conclude, this is impossible (2K-242-594/2023). Therefore, its concept is interpreted in courts' jurisprudence according to which stalking, as a criminal offense, is characterized by active, persistent contact seeking with the victim who has expressed a clear will to have no contact with the perpetrator (1-136-1011/2024). The Judicial system refers to stalking as systematic phone calls, emails, immoral text messages, following, overt tracking of a person on the way to or from work or home, waiting at a person's home, workplace, or other places frequented by the victim, disclosing personal information to third parties, and similar actions (2K-88-942/2016; 1A-216-397/2025; 2K-42-719/2024). According to the case law, stalking is a systematic criminal activity carried out against a person's clearly expressed will, which has an adverse impact on that person's social life and/or emotional state, disrupting their daily activities, violating their privacy, restricting their freedom of action, causing then constant tension, and damaging their professional life and social relationships (which may force victims to change their place of residence, work or study, circle of friends, etc.). In cases of stalking, it is not the content of the actions (threats to kill, injure, etc.) that is frightening, but the persistent unwanted actions of the stalker, which cause psychological and emotional harm (1A-216-397/2025; 2K-42-719/2024; 1A-398-898/2024; 1A-311-1121/2024). The case-law has already explained the constituent elements of stalking misdemeanor in terms of *mens rea* (direct and indirect intent; irrelevance of the perpetrator's motives and objectives for incriminating stalking) and *actus reus* (clear will to go no-contact to be established on an *ad hoc* basis; approaching without legal basis; stalking behaviors and systematicity; adverse effect on victim's social life and/or emotional wellbeing; causal link between action and impact (2K-42-719; 1A-10-957/2025; 1A-398-898/2024; #6; 2K-242-594/2023; 1A-201-309/2023; 1-1350-1057/2024; 1-2358-1132/2023).

The trend of lenient sanctioning is becoming more pronounced in legislation. Art. 148-1 does not impose imprisonment. The recent amendment to the Criminal Code established less severe sentences by introducing alternatives to imprisonment (arrest and restriction of freedom) for terrorizing a person (Art. 145.2), which can be incriminated when stalking escalates. This was promptly implemented into practice, even in cases of repeated multiple violent criminal offenses against the same victim while a protection order was in force (1-723-1242/2025; 1-26-457/2025). Therefore, in recent years, the sentences imposed by courts have not differed significantly, even though criminal acts are of different categories of severity: stalking is a misdemeanor, and terrorizing is classified as a more serious crime.

Thus, the most prevalent sentence for stalking found in sample cases was a fine and/or restriction of liberty.

In some cases, the court suspended the sentence even when the person was convicted both for stalking and terrorizing (1A-206-926/2024; 1-723-1242/2025). Only in two sample cases did the court increase the penalties from a restriction of liberty to arrest or imprisonment (1S-31-923/2025; e1S-126-354/2022). In most sample cases, the courts held that post-conviction stalking, violations of probation, and restriction orders were not particularly gross and malign (1A-665-383/2022; T-1605-336/2023; eT-136-900/2023; 1-1112-667/2022). These findings support the discussion that probation conditions in Lithuania are not sufficiently individualized.[29] Imprisonment was sanctioned in only three cases on the grounds of multiple crimes and/or recidivism (1A-279-485/2023; 1-2358-1132/2023). Such a punishment practice is not well balanced and, combined with small prosecution rates as well as courts' reluctance to impose restriction orders, does not ensure an adequate level of stalking prevention and victim protection. This mechanism hardly meets the minimum standards of due diligence, deterrent sentencing, and adequate response to special protection needs of domestic violence victims that are established in the Victims' Rights Directive[30] and EU Directive 2024/1385.

3.2. Legal qualification of tech stalking

Empirical data indicate that legal system is normally capable of recognizing stalking behaviors. Inaccuracies were noticed just in several sample cases: e.g., where prosecutors failed to identify stalking as a form of domestic violence (#6) or where unwanted flowers left by the perpetrator were interpreted as a means of apology (#7) but not as an episode of research-based stalking pattern.

Lithuania was one of the last EU states to criminalize stalking specifically. Due to systemic inconsistencies and poor legal technique, anti-stalking legislation in Lithuania creates competition between stalking (Art. 148-1) and the more serious crime of threatening and terrorizing a person (Art. 145.[31] The Supreme Court has already indicated the factors that are relevant to differentiate terrorizing from stalking: 1) subject of violation (whether a person's life and health or freedom), 2) intensity, 3) content, 4) motivation and intention of the actions, 5) victim's perception of the actions, 6) current or former victim-perpetrator relationship (2K-242-594/2023). Recently, the courts elaborated on this: the violation specified in Art. 148-1.1 is classified as a misdemeanor, indicating that it is considered by

29 Simonas Nikartas and Liubovė Jarutienė, 'Individualising Probation Conditions in Cases of Domestic Violence: The Study of Sentencing Practice in Lithuania' (2022) 14(2) European Journal of Probation 128, doi:10.1177/20662203221106408.

30 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

31 Jakštienė (n 21).

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the legislator to be significantly less dangerous; accordingly, liability under this legal norm is possible only when the actions of the accused, similar in content, do not meet the criteria of the crime established in Art. 145.2 (1A-10-957/2025; 2K-242-594/2023). Cases in which intimidation is expressed not by threats targeting life, health, or property, but by other actions (insults, intimidating phone calls, making noise to cause fear or anxiety, etc.) are even more complicated (1A-311-1121/2024; 1A-75-1069/2024; 2K-242-594/2023). Therefore, the difficulty of delineation between the criminal offenses persists. Pre-trial investigation officers more often than the courts stumbled in qualifying stalking and interpreting both the constituent elements of Article 148-1.1 and the evidence. Sometimes, even after judicial review, inaccurate charging decisions could not be overruled due to the principle of *non bis in idem* (1A-398-898/2024). Though the courts consistently follow the interpretation rules, however, in some cases, courts also failed to convincingly justify decision to incriminate stalking (Art. 148-1.1) instead of threatening and terrorizing a person (Art. 145): e. g., in case 1A-10-957/2025 the court relied on messages where the accused person expressed her wish to harm rather than directly threatened to injure and never escalated into actual physical contact; therefore, the court concluded that messages were not objectively real and dangerous; in 1-2358-1132/2023, though the court established that the abuser systematically stalked, intimidated, terrorized, threatened to harm the victim and her relatives, but held him liable just for stalking. Nonconsensual use of personal data (creation of fake profiles on social media using victim's pictures (M1-791-1156/2024), collecting of personal information by GPS tracking (1A-201-309/2023; M1-791-1156/2024) did not always receive a proper legal assessment, though the Criminal Code establishes criminal liability for crimes against the individual's privacy (e.g., Art. 167, 168) and categorizes them as more severe criminal offenses than stalking. The good practice is to press multiple charges (e.g., Art. 140; 148-1; 165; 167 in 1A-193-879/2024; Art. 140; 145, 148-1; 187 in 1-723-1242/2025; Art. 145, 253, 284 in 1-26-457/2025), as stalking misdemeanors do not cover more severe crimes against privacy, damage or destruction of property, violation of public order and other offenses. However, these behaviors often overlap or are experienced simultaneously in stalking cases.

When stalking targets values of different natures (liberty, privacy, property, honor, health), legal qualification is not particularly challenging, but when it comes to similar legal goods, it becomes complicated. Multiple criminal charges are possible, e.g., both Art. 145 and 148-1, but each charge should be substantiated separately (e.g., in 1A-206-926/2024; 1-723-1242/2025; 1-1350-1057/2024). As stalking patterns often manifest as polyvictimization,[32] Art. 148-1 does not always fully cover perpetrators' behaviors. Therefore, multiple violations must be prosecuted, e.g., Arts. 140.1, 148-1.1, 154 (libel), and 178 (theft; e1-627-1023/2023); Arts. 140.2, 148-1.1, and 167 (collecting information about a person's private life; #1); 145.2 str., 148-1, 168 (unauthorized disclosure or use of

32 Rogers and others (n 3).

information about a person's private life; 1A-279-485/2023); Arts. 140.1; 148-1; 165 (unlawful break in); 167; Art. 140.2; 145.1, 148-1; 187.1 (property damage; 1-723-1242/2025); Arts. 145, 253.1 (illegal possession of firearms), 284 (violation of public order; 1-26-457/2025). However, in some sample cases, the charges were not accurately drafted resulting in some of the perpetrator's actions not being properly qualified: e.g., GPS tracking (collecting the information about a person's private life (1A-201-309/2023; #3; 4), using victim's pictures on social media (unlawful disclosure or use of information about a person's private life (1-1350-1057/2024, e1-574-671/2022).

Thus, legal qualification of stalking became more elaborate and grounded in the courts' jurisprudence. However, victim-blaming attitude was evident in several sample cases, e.g., in 1-1350-1057/2024, the court qualified the victim's behavior as risky, provocative, and even incompatible with moral standards, simply because she accepted gifts, and money transfers and was not verbally passive during arguments with the perpetrator. This is a case where moral judgment is unduly preferred over the human rights approach. Therefore, the court of appeals reached the opposite conclusion (1A-193-879/2024).

Violent behavior in sample cases often manifested as sexual abuse (harassment, sexting, blackmail, shaming, nonconsensual sharing of private data and intimate content, etc.). This pattern was qualified as stalking (1-124-721/2023; e1-867-749/2022; e1-1688-900/2022) and/or terrorizing a person (1A-75-1069/2024; 1A-279-485/2023).

Many sample cases tackled different forms of economic abuse (employment sabotage, economic control or exploitation), and they were mostly interpreted as episodes of stalking or terrorizing (e.g., on-the-job harassment, unreasonable financial claims, impeding ownership rights (2K-42-719/204; 1A-206-926/2024; 1-2358-1132/2023; 1-1112-667/2022) or its adverse effect (e.g., involuntary job change (1-136-1011/2024). These empirical data support the argument that the Lithuanian criminal law's response to economic abuse as a separate ground for criminal charges is very limited and is mainly addressed in the context of physical or psychological violence.[33]

Ensuring adequate victim protection is especially complicated in cases when the accused person cannot be held criminally liable due to a mental condition and/or addiction (#1). In M1-791-1156/2024, a male, while being previously tried for terrorizing a person (Art. 145.2) and subjected to a compulsory medical treatment – outpatient monitoring – committed a new criminal act – stalking – and the same measure was applied by a new court decision.

The literature suggests that gender stereotypes, previous training, and personal and/or professional experience dealing with stalking cases are significant variables concerning law

33 Ramunė Jakštienė, 'Economic Abuse and Criminal Responsibility: Lithuanian Case Law on Domestic Violence' (2022) 22(2) International and Comparative Law Review 215, doi:10.2478/iclr-2022-0023.

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enforcement perceptions.[34] These considerations substantiate the need for specific, comprehensive, and targeted training for law enforcement officers.

3.3. Evidencing Technology Enabled Stalking

In line with previous studies,[35] the national case law analysis showed that the success of criminal proceedings (prosecution and conviction) was closely related to the victim's engagement and her contribution in gathering and submitting evidence. This can be explained by the inadequate competencies and resources of legal agents.[36] Moreover, a focus on the evidence shifts the spotlight from the dynamics of abuse.[37] Nonetheless, in sample cases the probability of proving stalking and establishing a clear victim's no-contact intent increased where the victim saved and provided multiple text messages, pictures, audio, and video records. Examination of an electronic device (e.g., cell phone; SMS card) can provide evidence of its use at a specific time, even when it is impossible to determine the content of messages, e.g., when they have been deleted (#1). However, claims for no-contact, unsupported by technologically facilitated evidence, were not validated (#3; 5), even when the victim followed the advice of victim support staff and met the perpetrator to declare the end of the relationship face-to-face (#11). The use of devices served as evidence to prove the adverse effect of stalking, e.g., the victim installed video cameras to monitor who entered the stairwell and her apartment just because she was intimidated and felt unsafe (2K-42-719/2024) or had to change personal phone number, email address, social media profile, and delete profile from the dating app, as she was unable to work and live his personal life, including online, calmly and undisturbed (e1-627-1023/2023). These examples suggest that criminal proceedings are more likely to be successful when a victim is actively engaged in data gathering. On one hand, it is recommended by experts,[38] but on the other hand, this shifts the burden of evidence on a victim (the evidence may be inaccessible, ephemeral, or destroyed due to technical functionality[39] and may manifest victim blaming, further privacy invasion, secondary victimization, or stereotyping that cause additional inconvenience and legal battles: e.g., in #5 and 12 the victim was blamed for mixed signals for texting back; in 1A-193-879/2024 the accused person claimed property rights when the victim found a GPS tracking device secretly attached to her car by the

34 Rita Mesquita and others, 'Post Break-up Stalking: Police-Officers' Perceptions' (2022) 40(5) Behavioral Sciences & the Law 677, doi:10.1002/bsl.2595; Tim Boehnlein and others, 'Responding to Stalking Victims: Perceptions, Barriers, and Directions for Future Research' (2020) 35 Journal of Family Violence 755, doi:10.1007/s10896-020-00147-3.

35 e.g., Pina and others (n 3); Joakim Petersson and Susanne JM Strand, 'Victim Retraction from Police Investigations of Intimate Partner Violence' (2024) 14(1) Psychology of Violence 45, doi:10.1037/vio0000492.

36 Douglas and others (n 17).

37 O'Brien and Maras (n 15).

38 Boehnlein and others (n 34).

39 Fiolet and others (n 26).

perpetrator and handed it over to the police to secure evidence; in 1-136-1011/2024 the defense blamed the victim for inactivity to take protective measures using e-mail functions (blocking, deleting emails sent by perpetrator, etc.) though she followed an opposite advice by lawyers. The courts duly conclude, in this regard, that the law does not impose a specific obligation on victims to take action to prevent stalking. Moreover, blocking is useless when a perpetrator uses different accounts, multiple SIM cards, or employs proxy stalking (1-136-1011/2024; 1A-357-876/2023; 1A-665-383/2022; #10). However, active mutual communication via electronic means and failure to save its content may be grounds for dropping charges (1-207-1133/2024).

Other technologically facilitated evidence was also successfully utilized in sample cases to support charges, e.g., video recordings (both private and public (e.g., shopping mall, clinic), pictures, police officers' body camera recordings, and recordings of calls to the general assistance center. Criminal justice heavily relies on evidence; therefore, investigations and trial of tech abuse cases can involve the proceedings with a large volume of evidence (e.g., 816 SMS messages and 712 phone calls, 2567 messages and 1261 calls just in one case (1-723-1242/2025; e1-471-367/2022), additional legal, forensic, and technical procedures. Research reports that evidence may also be impeded by device ownership and consent disputes, lack of provider cooperation, jurisdictional issues, or the need for specialized digital expertise.[40]

The case law analysis revealed several problematic aspects of substantiating cyber-stalking. One of them concerns technological issues, e.g., identifying of the perpetrator when a person uses unidentified accounts or SIM cards. In this case, it might be impossible to relate unspecified phone numbers to their owners and users. The jurisprudence of Lithuania's courts is inconsistent in this regard. In some cases, the courts relied on the full context of the evidence (multidimensional stalking, the quantity and intensity of contacts) and reasonably linked incognito communication to the perpetrator. But in other cases, the accused person took advantage of the doubt, leading to the dismissal of charges. Attribution problems are also reported in other jurisdictions.[41]

Sometimes it is a combination of technical, legislative limitations, and/or defective practices that prevents stopping illegal activity. A year ago in Lithuania, there was a case where a woman trying to escape her stalker changed her place of residence and phone number, but did not report the matter to the police. The perpetrator then started using bank transfers as a platform for correspondence, transferring symbolic amounts of money and leaving threatening messages in the transfer description field. When the woman requested that the bank block the unwanted transfers, she was denied, as the law required that the funds

40 Pina and others (n 3); Woodlock (n 10).

41 David M Adamson and others, 'Cyberstalking: A Growing Challenge for the US Legal System' (*RAND Corporation*, 29 June 2023) <https://www.rand.org/pubs/research_reports/RRA2637-1.html> accessed 14 November 2025.

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transferred by the payer be credited to the recipient's account. She was advised to close the bank account, thus intensifying the adverse social effects of the abuse she experienced. The only positive aspect of this story is that online banking secured evidence in this way.[42]

Another challenging factor is the legitimacy of evidence generated by technologically. In some cases, the defense questioned if recordings of phone calls met legal requirements, e.g., when the victim, advised by the pre-trial investigation officer, recorded conversations with the perpetrator on their own initiative without informing the perpetrator. Referring to the fact that the phone calls were always initiated by the perpetrator to the parties of recorded calls (just the victim and perpetrator), the timing (even before reporting to the police), motive (to protect herself, defend her rights, and present evidence), the Supreme Court ruled that this was legitimate evidence gathering and cannot be considered disproportionate to the offender's right to respect for private life. Even if this later became known to the authorities, this does not *per se* mean that the victim was performing a task for the law enforcement authorities, which is subject to the strict requirement of legality (2K-42-719). Such assessment of evidence is consistent with the practice of both the European Court of Human Rights and national courts: different procedural rules applied when assessing the admissibility of data collected by state institutions and private individuals and presented as evidence in criminal proceedings is not, as a rule, in itself a violation of the right to privacy when all the requirements for a fair trial are met in relation to the evidence in question (*Turquin v. France*, 2002; *Shannon v. the United Kingdom*, 2004[43] 2K-63-511/2021; 2K-250/2012). It is a good approach to ground such judicial practice on the specific nature of domestic violence, particularly its latent nature, which makes it difficult, and sometimes even impossible, to collect such data with the assistance of law enforcement agencies (2K-63-511/2021; 2K-42-719/2024). However, sometimes law enforcement officers misinterpreted the use of technologies by perpetrators and admitted them as lawful evidence gathering rather than illegal stalking behavior, e.g., in #4, despite the established case law regarding spouses' rights to privacy (1A-357-876/2023; 2K-198/2013), the prosecutor justified secret GPS tracking and recording on the grounds of evidencing the wife's infidelity; in #3, GPS use was related to securing the car's location due to property claims, disregarding the data of the case indicating its ownership by the victim.

Interpretation of cyber-stalking in comparison to traditional patterns also caused difficulties for the law enforcement system and lacks consistency. In several sample cases, cyberstalking was underestimated and simplified by treating it as less severe than a face-to-

42 'Į moters sąskaitą plaukia šimtai eurų, tačiau jai didžiausią nerimą kelia siuntėjo paliekamos žinutė' (*Lrytas.lt*, 28 March 2024) <https://www.lrytas.lt/bendraukime/isklausykite/2024/03/28/news/i-moters-saskaita-plaukia-simtai-euru-taciau-jai-didziausia-nerima-kelia-siuntejo-paliekamos-zinutes-31145369> accessed 14 November 2025.

43 *Turquin v France* App no 43467/98 (ECtHR, 24 January 2002) <https://hudoc.echr.coe.int/fre?i=001-43225> accessed 14 November 2025; *Shannon v the United Kingdom* App no 67537/01 (ECtHR, 6 April 2004) <https://hudoc.echr.coe.int/eng?i=001-23863> accessed 14 November 2025.

face physical approach, arguing that it does not actually endanger the victim's life and health (1-124-721/2023; #8). However, such a perspective disregards the courts' recognition of the adverse impact of stalking not only on the content of actions but especially on their persistent and unsolicited nature (2K-42-719/2024; 1A-357-876/2023; 1-2358-1132/2023). Moreover, it ignores doctrinal knowledge about cyberstalking, its tactics, prevalence, gravity, effects (e.g., a sense of the perpetrator's omnipresence, isolation, humiliation, amplified fear, etc.), and failures to recognize this.[44] Minimization of digital abuse stems from a fixation on physical violence and bodily harm and looks the other way on power dynamics.[45] An inappropriate approach was sometimes extended to substantiating cyberstalking as a course of conduct. Though according to the long-established case-law of the Supreme Court intimidation and/or stalking is systemic if it is repetitive, involves at least three episodes which are related by common intent and are not distant in time (e.g., 2K-42-719/2024; 2K-172-495/2023; 1-124-721/2023), yet in some sample cases contacting victim by phone was unduly regarded as not intensive enough to be considered as stalking (i.e., in case of 46 phone calls and 6 text messages in 3 months (#5) and GPS tracking was unreasonably associated to long-term and was not established on the ground that the suspect used the equipment for a relatively short period of time (approximately 2 months or 2 days (#3; 4). On the contrary, in some cases, victim's contacts with perpetrators by phone or email were unjustifiably overemphasized and misinterpreted as initiation, maintaining, or even encouragement of the communication, while disregarding the whole context of data indicating a victim's intent of no-contact (e.g., uninstalling GPS tracking equipment, trying to avoid the suspect's visits at work; violation of restriction order by perpetrator or neglecting the official warning of the police officer not to approach the victim (#3; 4; 8). Strict no-contact conditions seem like a double standard, as in some cases, victims were ordered to participate in face-to-face confrontations with the suspect as part of a criminal procedure during pre-trial investigation (1A-357-876/2023; 1A-665-383/2022), which, on the other hand, might trigger secondary victimization. Moreover, such an approach disregards the diversity of coping mechanisms and relationships as sometimes, unfortunately, victims of stalking are legally obligated to communicate with perpetrators, e.g., in case of shared child custody.

44 Kelly Bracewell, Paul Hargreaves and Nicky Stanley, 'The Consequences of the COVID-19 Lockdown on Stalking Victimisation' (2022) 37 Journal of Family Violence 951, doi:10.1007/s10896-020-00201-0; Douglas and others (n 17); Fiolet and others (n 26); Woodlock (n 10).

45 O'Brien and Maras (n 15); Anastasia Powell and Nicola Henry, 'Policing Technology-Facilitated Sexual Violence against Adult Victims: Police and Service Sector Perspectives' (2018) 28(3) Policing and Society 291, doi:10.1080/10439463.2016.1154964.

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4 CONCLUSIONS

The case law analysis supports research findings regarding high prevalence, recidivism, motivation, and typical tactics of technology-facilitated partner stalking, employed as a prolonged extension of partner abuse in the course of coercive control. Deficiencies in national anti-stalking legislation reinforce the difficulties of prosecuting cases of tech abuse. The small number of court cases and high rates of discontinued pre-trial investigations indicate that the law enforcement system has insufficient capacities to recognize and adequately respond to this form of violence, particularly non-physical violence in general. Generic criminal law applies to cases of technology-enabled stalking. However, charging decisions are not consistent and become more complicated in cases of polyvictimization and non-physical violence. Lenient penalties, widespread practice of suspended sentences, and reluctance to order protection measures, even in the case of repeat offending or breaches of restraining orders, results in soft sanctioning system. While tech stalking is generally acknowledged as a form of partner abuse, sometimes it is minimized or overemphasized, ignoring its content and the context of other data. Criminal justice is focused on evidence with a high threshold, thus increasing the burden criminal agents and shifting the burden of proof onto victims, which may result in repeat, extended, or secondary victimization and delayed legal response. Courts respond best to multi-source (online and offline), time-aligned evidence. Beyond legal challenges (establishing the constituent elements of stalking, competition among different provisions of the Criminal Code, and the admissibility of evidence), technical nuances (accessibility, securing, and attribution of data) create additional hardship in criminal procedure. Nonetheless, even within the current legal framework, there is potential to improve prosecutions by relying on specialized knowledge and a victim-sensitive, trauma-informed approach.

Increasing the population's digital literacy of population offers good prospects for preventing the spread of tech abuse and its harms. Education should specifically target groups that are especially vulnerable to digital partner violence, e.g., minors, elderly women, and other people with intersectional vulnerabilities. First and foremost, they should be instructed on online safety, privacy protection strategies, how to secure evidence of violations, and to report them. It is worth considering including such awareness-raising in the victim support services. However, advice from law agencies or support organizations must be professional, consistent, coordinated, and lead to efficient resistance and empowerment of survivors, rather than overburdening them with evidence gathering. A key recommendation at the legislative level is to shift from reactive lawmaking to a timely response to the digital evolution. Transposing EU regulations into national law without delay would contribute to this. Multi-sectoral cooperation is also a promising approach to enhancing legal responses to this form of violence. Tech developers should be included, and their legal responsibility should be extended for certain technical functionality related to the availability, accessibility, identification, storage, etc. of data or services. Law enforcement

officers must be equipped with specialized professional capacities (both legal and technical) and adequate resources. When legislation and jurisprudence address tech abuse in the context of power dynamics and coercive control, it enables better tailoring of redress for victims. The findings of this research are subject to some limitations. Published case law excludes unreported cases; therefore, not all authentic experiences may receive an adequate legal response. Some of the sampled cases may be subject to appellate review. The national courts' jurisprudence regarding stalking laws is still being shaped; therefore, the results should be verified through more detailed case law and a larger sample size, with a longitudinal perspective. Comparative analysis with criminal cases prosecuted as other crimes (e.g., terrorizing, violations of the right to privacy, or crimes against the security of electronic data and information systems) might provide new, context-specific insights into prosecuting technology-facilitated partner stalking. Rapid technological change, reinforcing emerging stalking patterns, may outpace judicial interpretation. Accordingly, there is a clear need for future research and practice development in this field.

REFERENCES

1. Adamson DM and others, 'Cyberstalking: A Growing Challenge for the US Legal System' (*RAND Corporation*, 29 June 2023) https://www.rand.org/pubs/research_reports/RRA2637-1.html accessed 14 November 2025.
2. Bansal V and others, 'Help-Seeking Behaviours of Those Experiencing Technology-Facilitated GBV in Asia: Implications for Policy and Programming' (2023) 7(2) Journal of Gender-Based Violence 352, doi:10.1332/239868021X16697232129517
3. Bendlin M and Sheridan L, 'Risk Factors for Severe Violence in Intimate Partner Stalking Situations: An Analysis of Police Records' (2021) 36(17-18) Journal of Interpersonal Violence 7895, doi:10.1177/0886260519847776
4. Boehnlein T and others, 'Responding to Stalking Victims: Perceptions, Barriers, and Directions for Future Research' (2020) 35 Journal of Family Violence 755, doi:10.1007/s10896-020-00147-3
5. Bouffard LA and others, 'Still in the Shadows: The Unresponsiveness of Stalking Prosecution Rates to Increased Legislative Attention' (2021) 73 Journal of Criminal Justice 101794, doi:10.1016/j.jcrimjus.2021.101794
6. Boxall H, Lawler S and Morgan A, 'Unpacking Variation in Technology-Facilitated Intimate Partner Violence: A Conceptual and Empirical Analysis' [2025] Journal of Family Violence, doi:10.1007/s10896-025-00928-8
7. Bracewell K, Hargreaves P and Stanley N, 'The Consequences of the COVID-19 Lockdown on Stalking Victimisation' (2022) 37 Journal of Family Violence 951, doi:10.1007/s10896-020-00201-0

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8. Brookfield K, Fyson R and Goulden M, 'Technology-Facilitated Domestic Abuse: An Under-Recognised Safeguarding Issue?' (2024) 54(1) British Journal of Social Work 419, doi:10.1093/bjsw/bcad206

9. Chatzisymeonidis S and Pina A, 'Exploring Police Attitudes on Victims' Delayed Reporting and Victim Blame in Technology-Facilitated IPV' (2024) 13(12) Crime Science 12, doi:10.1186/s40163-024-00213-x

10. Douglas H and others, 'Policing Technology-Facilitated Domestic Abuse (TFDA): Views of Service Providers in Australia and the United Kingdom' (2025) 40 Journal of Family Violence 341, doi:10.1007/s10896-023-00619-2

11. Dragiewicz M and others, 'Technology Facilitated Coercive Control: Domestic Violence and the Competing Roles of Digital Media Platforms' (2018) 18(4) Feminist Media Studies 609, doi:10.1080/14680777.2018.1447341

12. Emezue C, 'Digital or Digitally Delivered Responses to Domestic and Intimate Partner Violence during COVID-19' (2020) 6(3) JMIR Public Health Surveill e19831, doi:10.2196/19831

13. Eterovic-Soric B and others, 'Stalking the Stalkers – Detecting and Deterring Stalking Behaviours Using Technology: A Review' (2017) 70 Computers & Security 278, doi:10.1016/j.cose.2017.06.008

14. Fiolet R and others, 'Exploring the Impact of Technology-Facilitated Abuse and Its Relationship with Domestic Violence: A Qualitative Study on Experts' Perceptions' (2021) 8 Global Qualitative Nursing Research, doi:10.1177/23333936211028176

15. Gregory A and Williamson E, '"I Think It Just Made Everything Very Much More Intense": A Qualitative Secondary Analysis Exploring the Role of Friends and Family Providing Support to Survivors of Domestic Abuse during the COVID-19 Pandemic' (2022) 37 Journal of Family Violence 991, doi:10.1007/s10896-021-00292-3

16. Jakštienė R, 'A New Norm on Stalking: Is This the New Normal in Lithuania?' (2022) 15(2) Baltic Journal of Law & Politics 29, doi:10.2478/bjlp-2022-0009

17. Jakštienė R, 'Economic Abuse and Criminal Responsibility: Lithuanian Case Law on Domestic Violence' (2022) 22(2) International and Comparative Law Review 215, doi:10.2478/iclr-2022-0023

18. Laurinaitytė I, Michailovič I and Jarutienė L, 'Dealing with Stalking Cases in Lithuania: The Role of Public Perceptions and Legal Response' (2022) 40(5) Behavioral Sciences & the Law 660, doi:10.1002/bsl.2597

19. Logan TK and Jennifer Cole, '"I Felt as If My Body Wasn't Mine Anymore": Ex-Partner Stalking Victims' Overlapping Experiences of Sexual Harassment and Sexual Assault' (2023) 38(7) Journal of Family Violence 1341, doi:10.1007/s10896-022-00455-w

20. Logan TK and Walker R, 'Stalking: A Multidimensional Framework for Assessment and Safety Planning' (2017) 18(2) Trauma, Violence & Abuse 200, doi:10.1177/1524838015603210

21. Mesquita R and others, 'Post Break-up Stalking: Police-Officers' Perceptions' (2022) 40(5) Behavioral Sciences & the Law 677, doi:10.1002/bsl.2595

22. Nikartas S and Jarutienė L, 'Individualising Probation Conditions in Cases of Domestic Violence: The Study of Sentencing Practice in Lithuania' (2022) 14(2) European Journal of Probation 128, doi:10.1177/20662203221106408

23. Nikupeteri A and Laitinen M, 'Addressing Post-Separation Parental Stalking: A Multimethod Qualitative Approach to Producing Knowledge of Stalking in Children's Lives' (2023) 38 Journal of Family Violence 1165, doi:10.1007/s10896-023-00537-3

24. Nikupeteri A, Katz E and Laitinen M, 'Coercive Control and Technology-Facilitated Parental Stalking in Children's and Young People's Lives' (2021) 5(3) Journal of Gender-Based Violence 395, doi:10.1332/239868021X16285243258834

25. O'Brien W and Maras MH, 'Technology-Facilitated Coercive Control: Response, Redress, Risk, and Reform' (2024) 38(2) International Review of Law, Computers & Technology 174, doi:10.1080/13600869.2023.2295097

26. O'Shea B, Asquith NL and Prichard J, 'Mapping Cyber-Enabled Crime: Understanding Police Responses' (2022) 11(4) Crime, Justice & Social Democracy 25, doi: 10.5204/ijcjsd.2096

27. Owens JG, 'Why Definitions Matter: Stalking Victimization in the United States' (2016) 31(12) Journal of Interpersonal Violence 2196, doi:10.1177/0886260515573577

28. Pak SHL and others, 'Measuring Technology-Facilitated Sexual Violence and Abuse: A Scoping Review Protocol of Existing Measurements' (2024) 14 BMJ Open e089296, doi:10.1136/bmjopen-2024-089296

29. Petersson J and Strand SJM, 'Victim Retraction from Police Investigations of Intimate Partner Violence' (2024) 14(1) Psychology of Violence 45, doi:10.1037/vio0000492

30. Pina A and others, *Technology-Facilitated Intimate Partner Violence: A Multidisciplinary Examination of Prevalence, Methods Used by Perpetrators and the Impact of COVID-19* (Home Office Report, University of Kent ICSS 2021) https://kar.kent.ac.uk/95001/ accessed 14 November 2025

31. Powell A and Henry N, 'Policing Technology-Facilitated Sexual Violence against Adult Victims: Police and Service Sector Perspectives' (2018) 28(3) Policing and Society 291, doi:10.1080/10439463.2016.1154964

32. Rigotti C, McGlynn C and Benning F, 'Image-Based Sexual Abuse and EU Law: A Critical Analysis' (2024) 25(9) German Law Journal 1472, doi:10.1017/glj.2024.49

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33. Rogers MM and others, 'Technology-Facilitated Abuse in Intimate Relationships: A Scoping Review' (2023) 24(4) Trauma, Violence & Abuse 2210, doi:10.1177/15248380221090218

34. Sugiura L and others, 'The Technification of Domestic Abuse: Methods, Tools and Criminal Justice Responses' [2024] Criminology & Criminal Justice, doi:10.1177/17488958241266760

35. Wilson C, Sheridan L and Garratt-Reed D, 'What Is Cyberstalking? A Review of Measurements' (2021) 37(11-12) Journal of Interpersonal Violence NP9763, doi:10.1177/0886260520985489

36. Woodlock D, 'The Abuse of Technology in Domestic Violence and Stalking' (2017) 23(5) Violence Against Women 584, doi:10.1177/1077801216646277

37. Zona MA, Sharma KK and Lane JC, 'A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample' (1993) 38(4) Journal of Forensic Science 894

ANNEX. Sample Cases and Case Law

1 indictment (Kaunas Regional Prosecution Office)

2 – # 22 decisions to terminate the pre-trial investigation (Kaunas Regional Prosecution Office)

Case No 2K-250/2012 (Supreme Court of Lithuania, 29 May 2012) https://www-infolex-lt.skaitykla.mruni.eu/tp/380546?id=20&item=doc&aktoid=380546 accessed 4 December 2025

Case No 2K-198/2013 (Supreme Court of Lithuania, 23 April 2013) https://www-infolex-lt.skaitykla.mruni.eu/tp/Default.aspx?Id=20&item=results&BylosNr=2K-198/2013&Teismas=1&order=1&desc=1&#middle accessed 5 November 2025

Case No 2K-88-942/2016 (Supreme Court of Lithuania, 24 February 2016) https://www-infolex-lt.skaitykla.mruni.eu/tp/1219006 accessed 6 October 2025

Case No 2K-63-511/2021 (Supreme Court of Lithuania, 3 March 2021) https://www-infolex-lt.skaitykla.mruni.eu/tp/1979750 accessed 1 November 2025

Case No 2K-172-495/2023 (Supreme Court of Lithuania, 20 June 2023) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=dc9e0a10-f618-4d64-aa17-db0f48b066c4 accessed 6 October 2025

Case No 2K-242-594/2023 (Supreme Court of Lithuania, 31 October 2023) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=4f535059-f4b7-4407-806e-fe5b5eea89c2 accessed 6 October 2025

Case No 2K-42-719/2024 (Supreme Court of Lithuania, 28 February 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2228725 accessed 5 November 2025

Case No 1-1112-667/2022 (Kaunas district court, 11 November 2022) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=dd3f3834-55a2-4844-a638-cc66e155a204 accessed 6 October 2025

Case No 1A-665-383/2022 (Kaunas district court, 29 November 2022) https://www-infolex-lt.skaitykla.mruni.eu/tp/2187060?id=20&item=doc&aktoid=2187060 accessed 6 October 2025

Case No e1-627-1023/2023 (Kaunas district court, 5 January 2023) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=289c0d93-956b-4c6f-a978-46e045b25528 accessed 6 October 2025

Case No e1-1515-408/2023 (Kaunas district court, 3 April 2023) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=bafae067-176f-48f6-93ea-55c5fd5a9667 accessed 6 October 2025

Case No 1-2358-1132/2023 (Kaunas district court, 24 August 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2187060?id=20&item=doc&aktoid=2187060 accessed 6 October 2025

Case No T-1605-336/2023 (Kaunas district court, 1 June 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2170917 accessed 6 October 2025

Case No 1-1823-667/2025 (Kaunas district court, 30 July 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2332248?id=20&item=doc&aktoid=2332248 accessed 6 October 2025

Case No 1A-279-485/2023 (Kaunas regional court, 6 June 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2168867 accessed 6 October 2025

Case No 1A-357-876/2023 (Kaunas regional court, 29 June 2023) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3e52e56d-1ef9-4428-bf4e-0bf1ca322ca1 accessed 6 October 2025

Case No 1A-206-926/2024 (Kaunas regional court, 18 April 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2239732?id=20&item=doc&aktoid=2239732 accessed 6 October 2025

Case No 1S-31-923/2025 (Kaunas regional court, 23 January 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2292607?id=20&item=doc&aktoid=2292607 accessed 6 October 2025

Case No 1A-216-397/2025 (Kaunas regional court, 29 April 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2313917 accessed 5 October 2025

Case No e1-1169-903/2021 (Klaipėda district court, 23 December 2021) https://www-infolex-lt.skaitykla.mruni.eu/tp/2056210 accessed 6 October 2025

Case No 1A-75-1069/2024 (Klaipėda regional court, 18 April 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2239742?id=20&item=doc&aktoid=2239742 accessed 6 October 2025

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Case No e1-867-749/2022 (Panevėžys district court, 10 August 2022) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=fbbc64d9-98fe-405a-95bd-1d1b86cfbb47 accessed 6 October 2025

Case No 1A-193-879/2024 (Panevėžys regional court, 10 December 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2284241 accessed 6 October 2025

Case No e1S-126-354/2022 (Šiauliai regional court, 9 November 2022) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=81bd3c4e-0c19-488b-8f0e-82f237ed807e accessed 5 October 2025

Case No e1-1688-900/2022 (Šiauliai district court, 5 December 2022) https://www-infolex-lt.skaitykla.mruni.eu/tp/2130966 accessed 6 October 2025

Case No eT-136-900/2023 (Šiauliai district court, 1 February 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2142956 accessed 6 October 2025

Case No 1A-201-309/2023 (Šiauliai regional court, 18 October 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2197646?id=20&item=doc&aktoid=2197646 accessed 6 October 2025

Case No 1-26-457/2025 (Šiauliai district court, 5 March 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2304510?id=20&item=doc&aktoid=2304510 accessed 6 October 2025

Case No e1-471-367/2022 (Tauragė district court, 2 August 2022) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=ee4418c5-3b97-46f5-bd16-e43db458d8d3 accessed 6 October 2025

Case No e1-574-671/2022 (Telšiai district court, 4 November 2022) https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=d26ad040-4cf9-40bd-b220-9b4a14169b03 accessed 6 October 2025

Case No 1-124-721/2023 (Telšiai district Mažeikiai court, 23 February 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2150721 accessed 6 October 2025

Case No 1-207-1133/2024 (Vilnius district court, 27 March 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2272576?id=20&item=doc&aktoid=2272576 accessed 6 October 2025

Case No 1-136-1011/2024 (Vilnius district court, 2 April 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2241917?id=20&item=doc&aktoid=2241917 accessed 6 October 2025

Case No 1-1350-1057/2024 (Vilnius district court, 26 September 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2273802?id=20&item=doc&aktoid=2273802 accessed 6 October 2025

Case No e1-943-865/2025 (Vilnius district court, 13 February 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2324003?id=20&item=doc&aktoid=2324003 accessed 6 October 2025

Case No 1-723-1242/2025 (Vilnius district court, 10 April 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2327602?id=20&item=doc&aktoid=2327602 accessed 6 October 2025

Case No M1-791-1156/2024 (Vilnius district Švenčionys court, 1 July 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2259775?id=20&item=doc&aktoid=2259775 accessed 6 October 2025

Case No 1A-95-898/2024 (Vilnius regional court, 25 January 2023) https://www-infolex-lt.skaitykla.mruni.eu/tp/2222325 accessed 5 October 2025

Case No 1A-311-1121/2024 (Vilnius regional court, 3 September 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2266024 accessed 5 October 2025

Case No 1A-398-898/2024 (Vilnius regional court, 23 October 2024) https://www-infolex-lt.skaitykla.mruni.eu/tp/2275057 accessed 5 October 2025

Case No 1A-10-957/2025 (Vilnius regional court, 11 February 2025) https://www-infolex-lt.skaitykla.mruni.eu/tp/2295445 accessed 5 October 2025

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЦИФРОВЕ ВІДСТЕЖЕННЯ ЖЕРТВ ТА ЗЛОЧИНЦІВ: СУДОВА ПРАКТИКА ЛИТВИ ЩОДО ПЕРЕСЛІДУВАННЯ ПАРТНЕРА ЗА ДОПОМОГОЮ ТЕХНОЛОГІЙ

Рамуне Якштієне

АНОТАЦІЯ

Вступ. *Хоча переслідування партнерів за допомогою технологій є поширеною формою насильства, дослідження у сфері кримінального переслідування є недостатньо розвиненими. Онлайн- та офлайн-насильство підкріплюють одне одного, але ця взаємодія може бути використана як форма технологічно опосередкованого спротиву та як докази.*

Методи. *У цій статті використовується доктринальний юридичний дослідницький підхід у поєднанні з якісним контент-аналізом, зосередженим на національній судовій практиці Литви. Для дослідження було зібрано 57 судових та досудових рішень. Головною метою цієї праці є визначення типових форм переслідування з використанням технологій та реакції кримінального законодавства на них.*

Результати та висновки. *Аналіз національної судової практики підтверджує попередні емпіричні висновки щодо мотивації, типової тактики та наслідків переслідування партнера за допомогою технологій. Недоліки національного законодавства про боротьбу з переслідуванням посилюють труднощі зумовлені технологічними зловживаннями. Рішення щодо висунення обвинувачень не є*

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послідовними та стають ще складнішими у випадках полівіктимізації та нефізичного насильства. Успіх кримінального провадження здебільшого залежить від активної участі жертв, що потенційно призводить до повторної, тривалої та вторинної віктимізації. Практика м'якого покарання та технічні проблеми додають обмежень для ефективного судового переслідування. Однак, навіть у межах наявної національної правової бази існує потенціал для покращення реагування кримінального законодавства за допомогою розвитку цифрової грамотності населення, нарощування спеціалізованого професійного потенціалу (як юридичного, так і технічного) у правоохоронних органах та розширення обов'язків розробників технологій.

Ключові слова. *Переслідування партнера за допомогою технологій; кіберпереслідування; переслідування інтимного партнера.*

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Research Article

FROM ACCESS TO STAGNATION: LEGAL AND INSTITUTIONAL OBSTACLES TO AGRICULTURAL LAND TURNOVER IN KAZAKHSTAN

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ABSTRACT

Background: *This article explores the evolution and current state of legal regulation governing the turnover of agricultural land in the Republic of Kazakhstan through the lens of access to justice. It argues that the stagnation of agricultural land reform is not merely the outcome of economic inefficiency or legislative inconsistency but a manifestation of systemic procedural deficiencies that hinder fair participation, transparency, and effective remedies in land governance. By examining the trajectory of post-Soviet reforms—from the 1995 Presidential Decree "On Land" and the 2003 Land Code to the suspended 2015 reform and the subsequent "Zher Amanaty" initiative—the study reveals how the absence of procedural safeguards and meaningful public consultation undermined both market functionality and institutional legitimacy.*

Methods: *The article integrates comparative insights from Germany and Poland to assess Kazakhstan's legal framework against established European models of procedural justice in*

land relations. In Germany, administrative approval and judicial review ensure transparency and prevent excessive concentration, while in Poland, pre-emption rights and statutory size limits under the Act on the Shaping of the Agricultural System protect equitable access for active farmers. These systems exemplify how access to justice operates through both administrative and judicial mechanisms, balancing market efficiency with social fairness—principles that remain underdeveloped in Kazakhstan.

Results and conclusions: *Drawing on legal, institutional, and empirical analysis, including data on pledged agricultural land, concentration of holdings, and restitution outcomes under the Zher Amanaty program, the study demonstrates that Kazakhstan's land turnover mechanisms remain largely formal and insufficiently enforced. The paper concludes that the future of land reform depends on embedding procedural justice into all stages of land governance—through transparent administrative review, enforceable judicial oversight, and inclusive public participation. Strengthening these elements would not only enhance access to remedies and institutional trust but also transform agricultural land from a contested political resource into a foundation for equitable and sustainable development.*

1 INTRODUCTION

The rational use and equitable turnover of agricultural land are fundamental to the sustainable development of the agricultural sector and to the realisation of the constitutional principle that land belongs to the people of Kazakhstan. However, the effectiveness of land reform depends not only on the existence of legal norms but also on the accessibility and fairness of the institutions that enforce them. In other words, the success of agricultural land circulation is inseparable from the quality of access to justice in land governance.

In the Republic of Kazakhstan—one of the largest agrarian states in Eurasia with a total area of 272.5 million hectares[1]—the legal regulation of land turnover has become central to debates about food security, investment, and rural development. Yet, despite successive reforms since independence, the mechanisms ensuring fair participation, transparency, and legal protection of land users remain fragile. Weak procedural safeguards, limited judicial oversight, and the lack of effective administrative remedies have led to recurring cycles of reform and rollback.

After independence in 1991, Kazakhstan inherited 218.4 million hectares of agricultural land, but by 2021, this area had almost halved to 113.96 million hectares.[2] The decline is not only the result of ecological degradation, urbanisation, and the

1 Ministry of Agriculture of the Republic of Kazakhstan, *Consolidated Analytical Report on the State and Use of the Lands of the Republic of Kazakhstan for 2021* (Committee on Land Administration 2022) 14 [in Kazakh] <https://www.gov.kz/memleket/entities/land/documents/details/291911?lang=kk> accessed 9 July 2025.

2 ibid 15.

reclassification of land for non-agricultural purposes—it also reflects institutional failures to enforce lawful and rational land use. Large tracts of land have been withdrawn from production or concentrated in the hands of a few entities, often without adequate public scrutiny or judicial control.

Although numerous legal acts have sought to liberalise the land market, the actual circulation of agricultural land remains constrained by administrative opacity, complex procedures, and limited opportunities for legal redress. The 2015 reform and its subsequent suspension following nationwide protests illustrate how the absence of procedural justice and meaningful consultation can erode public trust and stall the transition toward an equitable land market.

This article argues that the stagnation of agricultural land turnover in Kazakhstan is not merely an outcome of economic inefficiency or legislative inconsistency, but rather a manifestation of systemic deficiencies in access to justice. By analysing the historical evolution of land reforms, the institutional and procedural barriers to effective remedies, and the comparative experience of Germany and Poland, the study seeks to demonstrate how fair, transparent, and accessible remedial mechanisms are essential for achieving sustainable and socially legitimate land governance.

2 METHODOLOGY

This study adopts an interdisciplinary and problem-oriented research design structured around the concept of access to justice in land governance. It combines formal legal, institutional, historical, comparative, and empirical methods to analyse how Kazakhstan's agricultural land regulation reflects and constrains the procedural rights of land users. The goal is not only to describe legal norms but to evaluate their effectiveness as mechanisms ensuring fairness, transparency, and accountability in land turnover.

The formal-legal method serves as the primary analytical tool, enabling a systematic examination of the 2003 Land Code of the Republic of Kazakhstan, the 2015 reform amendments, and the 2021 legislative revisions. Special attention is given to the provisions governing ownership, lease, and alienation of agricultural land, as well as the mechanisms for administrative and judicial protection of land rights. The analysis assesses how legislative design affects the realisation of procedural justice and the enforceability of land rights.

The institutional approach allows the study to evaluate the structure and performance of Kazakhstan's land governance institutions—particularly the roles of the Ministry of Agriculture, local executive bodies (akimats), and the Zher Amanaty Commission—in ensuring legal remedies and state oversight. Through this lens, the research examines whether institutional frameworks enable or restrict access to justice for land users in disputes over land allocation, seizure, or misuse.

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The historical method contextualises these developments by tracing the trajectory of Kazakhstan's land policy from the early post-Soviet period to the 2015–2016 protests and subsequent reforms. This perspective reveals how historical legacies of centralised control, social perceptions of land ownership, and the politicisation of land reform have shaped procedural accessibility and public trust in legal institutions.

The comparative method provides an external benchmark by examining the experiences of Germany and Poland—countries that have achieved a balance between market efficiency and procedural fairness. In Germany, administrative approval (Genehmigungspflicht) and judicial review ensure that land transactions comply with public interest and prevent excessive concentration. In Poland, the pre-emption right (prawo pierwokupu) and statutory size limits protect equity and access for active farmers. By comparing these procedural safeguards with Kazakhstan's system, the study identifies structural gaps and institutional adaptation models relevant to national reform.

Finally, the empirical method supports the theoretical analysis with quantitative and documentary data, including official statistics on land concentration, the number and area of pledged agricultural lands, the outcomes of land restitution under the Zher Amanaty program, and publicly available judicial case summaries. These data provide a factual basis for assessing whether access-to-justice mechanisms effectively contribute to fair and sustainable land use.

Together, these methodological approaches form a comprehensive analytical framework that bridges legal doctrine, institutional practice, and empirical evidence. This integration makes it possible to assess Kazakhstan's agricultural land turnover not only as an economic process but as a test of procedural justice and institutional accountability in a transitional legal system.

3 POST-SOVIET PERIOD: FROM ADMINISTRATIVE CONTROL TO PROCEDURAL JUSTICE IN LAND REFORM

The early post-Soviet transformation of land relations in Kazakhstan reflected not only a shift from collective to market-oriented ownership but also the gradual emergence of procedural guarantees for protecting land rights. After independence in 1991, land relations continued to be governed by the Land Code of the Kazakh SSR of November 16, 1990,[3] which maintained the principle of exclusive state ownership of land. Under this system, land could be granted only for permanent or temporary use, with no private ownership and no clear remedial procedures in cases of administrative abuse. The

3 Land Code of the Kazakh SSR No 332-XII (16 November 1990) <https://adilet.zan.kz/rus/docs/K900000332_> accessed 9 July 2025. The Code has ceased to be effective in accordance with the Decree of the President of the Republic of Kazakhstan No 2717 of 22 December 1995.

absence of judicial protection for land users and the lack of appeal mechanisms meant that land allocation remained a discretionary administrative act, subject to unequal treatment and limited transparency.[4]

The Presidential Decree "On Land" of 22 December 1995,[5] marked the first attempt to reform this model by introducing the concept of private land ownership for citizens and legal entities of the Republic of Kazakhstan. For the first time, landowners were granted formal rights to sell, exchange, lease, and mortgage land plots. This represented not only an economic innovation but also a legal milestone in establishing enforceable property rights and access to judicial protection in land matters. The Decree also extended lease opportunities to foreign entities, aiming to attract investment and strengthen economic efficiency.

However, these reforms were primarily economic in nature and lacked a procedural framework ensuring fairness, accountability, and public participation. Decisions on land privatisation and allocation were concentrated in administrative bodies, often without transparent criteria or the possibility of independent review. As a result, early land privatisation reproduced inequality rather than reducing it, while judicial institutions remained passive in resolving land disputes. The emerging right to private ownership was therefore formal rather than effectively protected, as access to justice mechanisms—such as administrative appeals or judicial review—were still underdeveloped.

A more systematic approach emerged with the adoption of the Land Code of the Republic of Kazakhstan on 20 June 2003,[6] which codified the main provisions of the 1995 Decree. The Code legally recognised the alienation of temporary land-use rights, including their sale, transfer, and mortgage. These innovations were intended to stimulate a transparent and dynamic land market. Yet the 2003 Land Code also preserved extensive state control over land transactions through a licensing and approval system that limited procedural autonomy and access to impartial review.

Although the Code formally guaranteed equality of access to land ownership and use, its implementation depended heavily on administrative discretion. Many decisions of local executive bodies (*akimats*) could be challenged only through cumbersome court procedures, and the effectiveness of judicial remedies remained inconsistent. Thus, while the 2003 reform consolidated market instruments in land relations, it fell short of creating an institutional environment in which land users could rely on predictable, transparent, and fair legal processes.

4 Vasyl Kvartiuk and Martin Petrick, 'Liberal Land Reform in Kazakhstan? The Effect on Land Rental and Credit Markets' (2021) 138 World Development 105285. doi:10.1016/j.worlddev.2020.105285.

5 Decree of the President of the Republic of Kazakhstan No 2717 'On Land' (22 December 1995) [in Kazakh] <https://adilet.zan.kz/kaz/docs/U950002717_> accessed 9 July 2025. The Decree had the force of a Law, repealed by the Law of the Republic of Kazakhstan No 153 ~Z010153 of 24 January 2001.

6 Land Code of the Republic of Kazakhstan No 442 (20 June 2003) <https://adilet.zan.kz/eng/docs/K030000442_> accessed 9 July 2025.

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In summary, the post-Soviet period established the legal basis for land market relations but failed to embed strong procedural safeguards ensuring access to justice. The early reforms achieved formal recognition of ownership but not the practical enforceability of land rights. The resulting gap between economic liberalisation and procedural justice would later become one of the structural causes of the 2015 land reform crisis.

4 FORMALISATION WITHOUT MARKET EFFICIENCY: THE EXERCISE OF LAND USE RIGHTS AS AN ILLUSION OF MARKETABILITY

The introduction of transferable land-use rights in Kazakhstan was designed to emulate global practices and accelerate the integration of agricultural land into market circulation. In legal terms, the 2003 Land Code allowed the sale and mortgage of temporarily compensated land-use rights. However, the reform's success was undermined by the absence of reliable procedures for registration, oversight, and dispute resolution. As a result, the formal exercise of these rights did not guarantee either market efficiency or fairness of legal protection. The gap between declarative rights and the accessibility of effective remedies has created what may be described as an *illusion of marketability*—a system that recognises land-use rights in law but provides few institutional avenues to enforce or defend them.

The practice of disposing of land-use rights is not new and is characteristic of many countries in Eastern Europe and Asia. Comparative examples illustrate that where procedural justice and institutional guarantees are embedded, land-use rights become real economic and legal instruments rather than formal constructs.

For example, Vietnam shares many similarities with the Republic of Kazakhstan. In Vietnam, the land titles system is fundamentally different from those in many jurisdictions worldwide, although there are some parallels. Under the Constitution of Vietnam and relevant Vietnamese law, all of the land in Vietnam is owned collectively by the people, and the State administers it on their behalf.[7] In carrying out this land administration function, the State—through various organs—allocates or leases to persons and entities "land-use rights," which entitle them to use a specified parcel of land for a specified purpose, sometimes for a finite period and sometimes indefinitely. The holding of land-use rights is recorded in a State-issued certificate, known as a *Certificate of Land Use Rights and Ownership of Residential Houses and Other Assets Attached to Land* (LURC). Thus, under Vietnamese law, while a person or entity can "own" the buildings constructed on land, no one can own the land itself; individuals can only be registered holders of land-use rights over a specific parcel.[8]

7 Law of the National Assembly of Vietnam No 31/2024/QH15 'On Land' (18 January 2024) <https://dazpro.com/law-31-2024-vietnam-on-land/ > accessed 8 July 2025.

8 ibid, ch 10; 'LURCs under Land Law 2024' (*Frasers Law Company*, 19 March 2024) <https://www.frasersvn.com/legal-updates-and-publications/lur-cs-under-land-law-2024> accessed 8 July 2025.

In Vietnam, the system of land rights is traditionally structured around three distinct categories: ownership, management, and use. According to the 1993 Land Law, ownership was articulated as "land is the property of the entire people, administered by the state, which allocates or leases land-use rights to users." This formulation was refined in the 2003 amendment, which emphasised that "land belongs to the entire people, with the state acting as the representative owner on their behalf." Each of the three categories—ownership, management, and use—carries different implications for rights and responsibilities. The concept of "management" grants the state authority to control and administer land, whereas "use rights" entitle individuals, households, and organisations to exercise direct control, benefit from land use, and transfer or otherwise dispose of those rights.[9]

While the transition away from collective farming began in the early 1980s, it was only with the 1988 Land Law that land-use rights were formally granted to individuals, households, and organisations. Since that time, the scope and content of these rights have undergone a significant transformation. The 2003 amendment to the Land Law, for example, considerably broadened the powers of holders of land-use right certificates, allowing them not only to use land but also to exchange, transfer, lease, mortgage, inherit, or even donate their rights. Importantly, Vietnam's system links these rights to *procedural guarantees*: registration of every transfer is mandatory, administrative decisions can be appealed, and judicial review of allocation disputes is available. This procedural infrastructure makes land-use rights enforceable in practice—an element largely missing in Kazakhstan's implementation.[10]

The Republic of Uzbekistan, Kazakhstan's closest neighbour, provides another instructive comparison. Within the framework of market relations, the interconnection among the disposal, possession, and use of land—particularly its function as collateral for securing credit obligations—remains a key issue in light of its significance and economic role. Under Article 264 of the Civil Code, a pledge is defined as a means by which one party transfers property or rights to another to secure obligations. In contrast, Article 265 extends this principle by allowing mortgages to take the form of a pledge of rights. In this context, real estate foreclosure constitutes a mortgage.[11] The Law "On Mortgage" further elaborates the regulatory framework,[12] providing, inter alia, that: (i) pursuant to legislative requirements, rights related to the construction of land plots may be pledged as unfinished property; (ii) lifetime possession rights in a land plot, which may be

9 Nguyen Van Suu, 'Contending Views and Conflicts Over Land in Vietnam's Red River Delta' (2007) 38(2) Journal of Southeast Asian Studies 309. doi:10.1017/S0022463407000069.

10 Nguyen Vu Hoang, 'Constructing Civil Society on a Demolition Site in Hanoi' in Hue-Tam Ho Tai and Mark Sidel (eds), *State, Society and the Market in Contemporary Vietnam: Property, Power and Values* (Routledge 2013) 88. doi:10.4324/9780203098318.

11 Civil Code of the Republic of Uzbekistan No 163-I (21 December 1995) [in Uzbek] <https://lex.uz/docs/-111189> accessed 8 July 2025.

12 Law of the Republic of Uzbekistan No ZRU-58 'On Mortgages' (4 October 2006) [in Uzbek] <https://cis-legislation.com/document.fwx?rgn=13815> accessed 8 July 2025.

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inherited for individual housing or the operation of a peasant farm, may be pledged; (iii) unless otherwise stipulated by contract or law, a lessee is entitled to pledge leasehold rights arising from a real estate rental agreement; and (iv) under similar conditions, lease rights to a land plot may also be subject to pledge.[13]

Article 53 of the Land Code provides that, for the purpose of obtaining credit, a farmer may pledge not only his property but also leasehold rights to a land plot.[14] The farmer is entitled to pledge such rights without the consent of the lessor only in cases expressly established by law or by the terms of the lease agreement. Likewise, Article 13 of the Law "On Farming" designates the land plots allocated to a farmer's holding for a strictly defined purpose.[15] It prohibits farmers from privatising such plots and from selling, mortgaging, donating, exchanging, or subleasing them. Nevertheless, the right to lease a land plot may serve as collateral when a farmer seeks to obtain loans.[16]

These provisions demonstrate that Uzbekistan's legislation strikes a procedural balance between creditors and land users: foreclosure requires judicial authorisation, and disputes are resolved through established administrative and judicial channels. Such safeguards ensure that the economic function of land as collateral does not override procedural fairness—again, a dimension that Kazakhstan's regulatory practice lacks.

Although the institution of private ownership of agricultural land was introduced in Kazakhstan in 2003, only 1.3% of agricultural land is currently in private ownership.[17] In addition to granting the right to sell land-use rights, the legislator also allowed land users to pledge their rights as collateral for obtaining loans from second-tier banks. This mechanism was intended as a major step toward developing the land market and attracting financial resources into the economy. Theoretically, the ability to pledge land-use rights would enable farmers to obtain long-term financing, while banks would gain an additional guarantee of loan repayment.

However, the practical outcome has been different. Despite the legal framework, this mechanism has not demonstrated the expected effectiveness in activating agricultural land turnover. The reasons are largely procedural and institutional: legal uncertainty regarding

13 Abdurashid Altiev, 'Regulation of the System of Use of Land (2023) 7(Spes) Research in Agricultural & Veterinary Sciences 87.

14 Land Code of the Republic of Uzbekistan No 598-I (30 April 1998) [in Uzbek] <https://lex.uz/docs/-152653> accessed 8 July 2025.

15 Law of the Republic of Uzbekistan No 662-II 'On Farming' (26 August 2004) [in Uzbek] <https://test.lex.uz/uz/docs/-275195?ONDATE=26.12.2009> accessed 8 July 2025.

16 Altiev Abdurashid and Mahsudov Muhammadbek, 'Improvement of the Regulation Mechanisms of the Land Use Diversification' (2020) 12(4) International Journal of Pharmaceutical Research 668. doi:10.31838/ijpr/2020.12.04.110.

17 Ksenia Voronina, '1.3 Million Hectares of Agricultural Land are Privately Owned – Ministry of National Economy of the Republic of Kazakhstan' *Egemen Qazaqstan* (Astana, 6 April 2016) <https://kazpravda.kz/n/13-mln-ga-zemel-selhoznaznacheniya-nahodyatsya-v-chastnoy-sobstvennosti-mne-rk/> accessed 8 July 2025.

the status of pledged rights, lack of transparency in registration, limited judicial recourse, and insufficient administrative monitoring. As of today, 2,661 agricultural land plots—including those formed from conditional land shares—are under pledge in Kazakhstan, with a total area of approximately 4.1 million hectares.[18]

This situation gives rise to systemic problems affecting both the economic and legal sustainability of land use. First, the encumbrance of these plots through pledges often results in their de facto withdrawal from agricultural circulation, especially when borrowers default, and the land is transferred to banks, which are not agricultural actors. Consequently, land remains idle, violating Article 94 of the Land Code, which requires that land be used according to its designated purpose. Second, speculative pledging—when land users pledge rights without intent to repay—reflects the absence of institutional oversight and judicial deterrence mechanisms.

The coexistence of conflicting legal interests—state, land user, and bank—has exposed Kazakhstan's lack of effective remedial instruments. If local executive bodies (akimats) seize unused land under Article 94, banks, as bona fide pledge holders, are left without procedural standing to defend their interests. Conversely, when courts uphold creditors' claims, the state struggles to maintain its goal of rational land use. Unclear procedural coordination between administrative and civil jurisdictions further deepens this imbalance.

This conflict of interest demonstrates a structural weakness in access to justice. There is no comprehensive remedial pathway to reconcile public and private interests within a predictable legal process. Administrative procedures lack transparency, and litigation is slow, fragmented, and often ineffective. The result is a cycle of weak enforcement and declining trust in both judicial and administrative institutions.

The Chinese experience shows that the same legal concept—land-use rights—can function effectively when embedded in a transparent procedural system. In China, foreign investors may obtain land-use rights either directly from the state or from existing users. Under Order No. 55, the government may grant or allocate such rights, and land users who have legally acquired land-use rights from the state are permitted to transfer, lease, or pledge them. When land-use rights are pledged, the buildings and other attachments on the land must be pledged together, and registration of the pledge is essential for establishing the creditor's legal title. If the creditor obtains the land-use rights due to the pledger's insolvency, registration of the transfer is also required. This system ensures that all transactions are transparent, documented, and judicially reviewable—minimising disputes and protecting both public and private interests.[19]

18 Serik Sabekov, 'More than 2 thousand Agricultural Land Plots in Kazakhstan are Pledged' (*Kazinform News Agency*, 29 May 2023) <https://www.inform.kz/ru/bolee-2-tysyach-zemel-nyh-uchastkov-sel-hoznaznacheniya-v-kazahstane-nahodyatsya-v-zaloge_a4072476> accessed 8 July 2025.

19 'Obtaining Land-Use Rights for FIEs in China' (*China Briefing*, 19 February 2014) <https://www.china-briefing.com/news/obtaining-land-use-rights-for-fies-in-china/> accessed 8 July 2025.

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By contrast, in Kazakhstan, the absence of uniform registration procedures, judicial oversight, and clear deadlines for administrative action has produced uncertainty and inefficiency. The state often resorts to ex post seizure or reallocation of land rather than preventive procedural control. As a result, the law formally allows market circulation of land-use rights, but the justice system does not yet ensure their enforceability or fairness in practice.

In conclusion, the Kazakh model exemplifies a situation where *formal rights exist without functional remedies*. The country's challenge is not the absence of economic tools, but the weakness of procedural institutions that should guarantee access to justice for all actors in land relations. Strengthening these mechanisms—through judicial review of administrative decisions, transparent registration systems, and consistent coordination between courts and executive bodies—is essential for transforming the current illusion of marketability into a genuine system of rights-based, fair, and sustainable land governance.

5 LAND POLICY: THE FAILED TRANSFORMATION INTO AN INVESTMENT-ATTRACTIVE ASSET

The 2015 amendments to the Land Code of the Republic of Kazakhstan represented the state's most ambitious attempt to transform agricultural land into an investment-attractive asset and to integrate it into a fully functioning market. Adopted on 2 November 2015,[20] the reform aimed to liberalise land relations, increase the efficiency of land use, and create incentives for long-term investment in the agricultural sector.[21] One of its central provisions was the granting of private ownership of agricultural land to citizens of Kazakhstan and legal entities without foreign participation, while allowing foreign entities to lease land for up to 25 years. The rationale behind this decision was to attract investment, modernise agricultural infrastructure, and improve productivity.

Formally, the reform sought to emulate the land governance models of developed European states such as Germany, Poland[22] and the United States,[23] where private ownership and long-term leases coexist with strong administrative oversight and

20 Law of the Republic of Kazakhstan No 389-V 'On Amendments and Additions to the Land Code of the Republic of Kazakhstan' (2 November 2015) [in Kazakh] <https://online.zakon.kz/Document/?doc_id=35597766> accessed 8 July 2025. The entry into force of this Law is suspended until December 31, 2026 by the Law of the Republic of Kazakhstan dated June 30, 2016 No. 5-VI.

21 Zafar Kurbanov, Nodir Djanibekov and Thomas Herzfeld, 'Land Property Rights and Investment Incentives in Movable Farm Assets: Evidence from Post-Soviet Central Asia' (2025) 67(1) Comparative Economic Studies 396. doi:10.1057/s41294-024-00251-z.

22 Liesbet Vranken and others, *Agricultural Land Market Regulations in the EU Member States* (EUR 30838 EN, Publications Office of the European Union 2021) doi:10.2760/86127.

23 Margaret Rosso Grossman, 'Agricultural Land Ownership in the United States' (2024) 1 CEDR Journal of Rural Law 25. doi:10.5281/zenodo.12155338.

procedural safeguards. In Germany, for instance, all transactions involving agricultural land require prior administrative approval from specialised land transfer authorities (*Genehmigungsbehörde*). These bodies assess whether the transaction might lead to excessive concentration or speculation and may refuse approval if it undermines the public interest in maintaining viable family farms.[24] Moreover, every party has the right to appeal such administrative decisions, and courts routinely review them for procedural legality. Poland follows a similar logic: while land ownership is open to private individuals, the *Agency for Agricultural Property* exercises a right of pre-emption (*prawo pierwokupu*) to prevent speculative concentration and to guarantee that agricultural land remains in the hands of active farmers. These procedural safeguards ensure both transparency and legitimacy of land turnover.[25]

By contrast, the 2015 reform in Kazakhstan was introduced without comparable administrative control or procedural mechanisms of appeal. Although the government promised open auctions and digitalised land registries, the process lacked meaningful public consultation or independent review. When Minister of National Economy Yerbolat Dossayev announced that agricultural land would be available for sale and that leases for foreigners would be extended from ten to twenty-five years, the public reaction was immediate and severe. Citizens perceived the reform as opaque, imposed from above, and threatening to national sovereignty. Protests broke out in Aktau, Aktobe, Uralsk, Semey, Almaty, and Astana. The scale of discontent revealed not only the population's fear of losing control over a strategic resource but also their frustration with the absence of procedural justice—there had been no consultation, no explanation, and no opportunity to challenge or even understand the new legal framework. As opposition leader Zauresh Battalova remarked, "What angered us most was the absence of communication. We knew nothing about the reforms."[26]

The mass protests that followed forced the government to suspend the law's implementation. In May 2016, President Nursultan Nazarbayev introduced a moratorium on the sale and lease of agricultural land, initially until the end of 2016, later extended until 31 December 2026.[27] This extraordinary measure functioned as a de facto

24 Luise Meissner, Lisa Kappenberg and Oliver Musshoff, 'An Analytical Framework for Evaluating Farmland Market Regulation: Examining the German Land Transaction Law' (2022) 11(10) Land 1759. doi:10.3390/land11101759.

25 Alina Źróbek-Różańska and Joanna Zielińska-Szczepkowska, 'National Land Use Policy against the Misuse of the Agricultural Land—Causes and Effects: Evidence from Poland' (2019) 11(22) Sustainability 6403. doi:10.3390/su11226403.

26 Akbikesh Mukhtarova, 'Land Commissions in Kazakhstan: The Problem of Civil Society Participation in Land Governance' (PhD thesis, Nazarbayev University Graduate School of Public Policy).

27 Decree of the President of the Republic of Kazakhstan No 248 'On the Introduction of a Moratorium on the Application of Certain Norms of Land Legislation' (6 May 2016) [in Kazakh] <https://online.zakon.kz/Document/?doc_id=39686875> accessed 8 July 2025; Dena Sholk, 'Kazakhstan's Land Reforms' (*The Diplomat*, 15 June 2016) <https://thediplomat.com/2016/06/kazakhstans-land-reforms/> accessed 8 July 2025.

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acknowledgement that the reform's procedural legitimacy had collapsed. The episode demonstrated that the public rejection of the reform was not purely emotional but stemmed from a lack of access to participatory and remedial mechanisms that could have mediated conflict between the state and citizens.

Public anger was amplified by the visible inequality in land distribution and by weak judicial control over administrative decisions in the land sector. According to the 2010 statistical yearbook, large landholders with holdings exceeding 20,000 hectares accounted for only 7.8 percent of agricultural enterprises but controlled nearly 63 percent of all agricultural land—about 45.6 million hectares. If the 8.35 million hectares held by the largest peasant farms are added, the total land area held by large entities exceeds the territory of Germany and approaches that of Japan. Approximately 420 agricultural enterprises each possessed more than 20,000 hectares.[28] The concentration of such vast landholdings created structural inequality and eroded the sense of fairness in land allocation.

Here again, the contrast with Poland and Germany is revealing. In Poland, since the 2003 *Act on the Shaping of the Agricultural System*, buyers of farmland must meet strict eligibility criteria: they must be resident farmers actively engaged in agriculture, and the total area of their land cannot exceed statutory limits. Moreover, any sale of agricultural land triggers the state's pre-emption right, allowing authorities to intervene when the transaction risks excessive concentration.[29] In Germany, land transactions are likewise monitored through a dual control system combining administrative authorisation and judicial review, which ensures both efficiency and procedural justice.[30] In Kazakhstan, however, land concentration progressed with little oversight, as neither administrative nor judicial bodies were institutionally equipped to prevent the accumulation of land or to review allocation decisions transparently.

The failure of the 2015 reform thus lay not in its economic objectives but in its procedural deficiencies. Unlike Germany or Poland, where land governance relies on transparent, rule-based systems and enforceable appeal mechanisms, Kazakhstan attempted to liberalise the land market without first building a procedural architecture of accountability. The lack of consultation, weak administrative control, and limited judicial remedies turned a technical reform into a political crisis.

The government's response was reactive rather than systemic. The 2015 amendments were suspended, and for several years (2016–2020), land reform effectively remained frozen. The issue resurfaced only after 2021, under the presidency of Kassym-Jomart Tokayev, who sought to rebuild the legitimacy of land governance through a new legal and institutional

28 Arman Jacob, 'Latifundists of Kazakhstan' *Kursiv* (Almaty, 20 October 2016) 1.

29 Renata Marks-Bielska, 'Conditions of Agricultural Land Prices Development in Poland' (2018) 2(1) Agrofor 109. doi:10.7251/AGRENG1701109M.

30 Fabian Thiel, '"Property Entails Obligations": Land and Property Law in Germany' (2011) 1 European-Asian Journal of Law and Governance 78.

framework. The Law "On Amendments and Additions to Certain Legislative Acts on Land Relations", signed in 2021, explicitly prohibited foreign ownership and use of agricultural land by foreigners, foreign legal entities, and companies with foreign participation.[31] This categorical ban resolved the immediate controversy but also reaffirmed that land reform in Kazakhstan must proceed within clear procedural boundaries and public consensus.

The 2022 constitutional reform deepened this institutional correction by declaring that land, subsoil, water, flora and fauna, and other natural resources belong to the people, with ownership exercised on their behalf by the state. This constitutional shift was not merely symbolic; it reframed land as a public trust subject to procedural fairness and equitable distribution.

At the same time, new empirical challenges emerged. To combat excessive land concentration, the government established the "Zher Amanaty" (Land Trust) commission in March 2022.[32] In less than three years, the Commission restored state control over more than 10.8 million hectares of agricultural land and has already redistributed approximately three million hectors among the population.[33] Furthermore, in January 2023, the government introduced maximum thresholds for agricultural land holdings, differentiated by region and land type, to prevent latifundia and ensure equal access to resources.[34] These reforms moved Kazakhstan closer to the procedural logic of Poland's and Germany's systems, where the prevention of excessive concentration is enforced not through moratoria but through transparent, rule-based control mechanisms.

The Kazakh experience also resonates with that of Ukraine, which maintained a moratorium on the sale of agricultural land for nearly two decades. In Ukraine, the prolonged ban politicised land reform, fostered shadow transactions, and weakened institutional trust, demonstrating that prohibitions without procedural alternatives lead to stagnation rather than stability. Only after introducing transparent valuation, pre-emption rights, and digital cadastral registration did Ukraine begin to restore public

31 Law of the Republic of Kazakhstan No 59-VII 'On Amendments and Additions to Certain Legislative Acts on Land Relations' (30 June 2021) [in Kazakh] <https://adilet.zan.kz/kaz/docs/Z1100000464> accessed 8 July 2025.

32 'The Hotline on Land Issues Was Opened by the Commission "Zher Amanaty"' (*Amanat*, 7 July 2022) <https://amanatpartiasy.kz/news/news-detail/293421?lang=kz> accessed 8 July 2025.

33 Asel Ibadullayeva, '"Zher Amanat": Nearly 11 million Hectares of Land Returned to the State' *Liter* (Astana, 30 August 2024) <https://liter.kz/zher-amanaty-pochti-11-mln-ga-zemli-vozvrashcheno-gosudarstvu-1725521189/> accessed 9 July 2025.

34 Resolution of the Government of the Republic of Kazakhstan No 42 'On Approval of Maximum Sizes of Agricultural Land Plots by Type of Agricultural Land Within the Republic and Within a Single Administrative District (City), Region, that May be Held Under Temporary Land-Use Rights by Citizens of the Republic of Kazakhstan for Peasant or Farm Enterprises, as Well as by Non-State Legal Entities of the Republic of Kazakhstan Without Foreign Participation and their Affiliates for Agricultural Production' (25 January 2023) [in Kazakh] <https://adilet.zan.kz/kaz/docs/P2300000042> accessed 8 July 2025.

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confidence. The lesson is that access to justice in land relations is achieved not through restriction but through procedural openness.[35]

Ultimately, the 2015 reform in Kazakhstan failed because it treated land as a purely economic asset while neglecting the procedural dimension of justice. The subsequent policy shift—embodied in the "Fair Kazakhstan" initiative and the activities of the Zher Amanaty commission—signals a gradual recognition that fairness, participation, and transparency are the essential conditions of legitimate land governance. In contrast to the German and Polish models, where rule-based procedures ensure both efficiency and social legitimacy, Kazakhstan's earlier approach relied on administrative discretion and post hoc correction through moratoria. Sustainable reform will require institutionalising the principles of procedural justice: public consultation before the adoption of laws, administrative review of allocation decisions, and judicial oversight of both state and private transactions. Only then can the country transform agricultural land from a politically sensitive and contested resource into a genuinely fair, secure, and investment-attractive asset.

6 JUDICIAL AND ADMINISTRATIVE REMEDIES AS A DRIVER OF FARMLAND TURNOVER

Access to justice in land relations entails a structured hierarchy of complementary remedies combined with reasonably predictable procedural horizons. At the pre-litigation stage, instruments such as a substantiated claim directed to the competent authority or contractual counterparty, as well as mediation procedures, serve as effective mechanisms to clarify the scope of the dispute, set out a plan for remedial measures, and establish a timetable for compliance.

Once the matter proceeds to adjudication, two principal avenues of judicial protection can be distinguished. The first lies in the sphere of administrative justice,[36] where parties may contest non-regulatory acts, actions, or omissions of public authorities, typically seeking a declaration of illegality, annulment, or an order compelling the authority to perform a legally required act. The second avenue is grounded in civil law,[37] encompassing claims for recognition of real and contractual rights in land, orders to conclude or register agreements, removal of encumbrances, invalidation of transactions with corresponding restitution, and

35 Mykola Koroteyev and others, 'Prospects for the market turnover of agricultural land in Ukraine' (2017) 15(2-2) Problems and Perspectives in Management 344. doi:10.21511/ppm.15(2-2).2017.04.

36 Yerik Akhmetov and Bergengul Ahmet, 'Application of the Principle of Active Role of Courts in Proving an Administrative Case in Kazakhstan' (2024) 70(1) Osteuropa Recht 92. doi:10.5771/0030-6444-2024-1-92.

37 Ermek B Abdrasulov and Bagila T Tleulesova, 'Constitutional Control Body of the Republic of Kazakhstan on Issues Regarding the Conception of Property, the Equality of State and Private Property' (2024) 70(1) Osteuropa Recht 29. doi:10.5771/0030-6444-2024-1-29.

recovery of damages or unjust enrichment. Within this procedural framework, interim relief plays a pivotal role, including injunctions suspending registration actions, prohibiting auctions, or staying enforcement of contested decisions, thereby preserving the status quo pending adjudication on the merits.

The temporal dimension of access to remedies is equally significant: administrative claims are typically subject to short special limitation periods—often around one month from the moment the violation becomes known, unless a specific statute prescribes otherwise—while the standard three-year statute of limitations generally governs civil claims. Challenges to auctions and tender procedures are usually constrained to a narrow window of 10 to 30 days. The range of potential legal outcomes is correspondingly diverse, extending from annulment of the impugned administrative act, through orders requiring authorities to register rights, enter cadastral data, or allocate plots, to judicial recognition of rights coupled with mandatory registration, as well as declarations of unlawful administrative inaction with court-imposed deadlines for compliance. In the civil sphere, outcomes also include restitution and compensation of damages in cases where transactions are declared void. Collectively, these layers of administrative and judicial remedies provide the remedial infrastructure through which the integrity of land relations and the circulation of agricultural land are maintained.

***Table* 1. Remedies in Land Relations: Jurisdiction, Objectives, Deadlines, and Possible[38]**

Remedy	Jurisdiction	Objective	Filing Deadline	Possible Outcome
Mediation	Mediator	Pre-trial settlement	Before the expiration of the limitation	Voluntary rectification, settlement agreement
Administrative claim	Specialised administrative court	Annulment or compulsion of an administrative act	1 month	Annulment, mandatory order, enforcement control
Civil claim	Civil court	Recognition of rights, compulsion to perform	3 years	Recognition of right
Prosecutorial intervention	Prosecutor's office	Protection of the public interest	No specific deadline	Protest / submission

38 The table was created independently by the authors, based on the current legislation of the Republic of Kazakhstan.

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Remedy	Jurisdiction	Objective	Filing Deadline	Possible Outcome
Constitutional complaint	Constitutional Court	Normative review	No deadline	Annulment of an unconstitutional provision

The practical logic of these remedies becomes most apparent when illustrated through generalised fact patterns. In cases where a land plot is subject to expropriation for alleged "non-use," despite the existence of a bank's security interest in the leasehold right, an effective litigation strategy combines an administrative claim challenging the expropriation decision—focusing on evidence of actual land use and the procedural standards applied in the inspection—with parallel civil claims against the lessee seeking rectification of contractual breaches, all reinforced by an application for interim relief prohibiting registration actions. The typical outcome is a suspension of the expropriation pending judicial review, followed by a renewed administrative examination that takes into account agronomic evidence, thereby preserving the mortgagee's rights until a final resolution is reached.

The comparative perspective of Germany illustrates a stable model of public oversight of transactions involving agricultural and forest land, while at the same time preserving the principle of private autonomy in property circulation.[39] The Federal Land Transactions Act (GrdstVG) requires administrative approval for the alienation of agricultural and forest land; refusal of consent may be issued, inter alia, in cases of "unhealthy distribution of land," "uneconomic fragmentation," or a "gross disparity" between price and value (§ 9 GrdstVG).[40]

The supplementary Land Lease Transactions Act (LPachtVG) introduces a notification and supervisory regime for agricultural lease agreements.[41] Enforcement is carried out both through sectoral authorities at the Länder level and through judicial administrative review. Scholarly literature emphasises that, in comparative perspective, the German regime remains relatively liberal compared to several other EU Member States, yet retains targeted instruments designed to prevent adverse structural shifts and speculative price dynamics. These findings are corroborated by official legal sources as well as peer-reviewed publications, which consistently describe the GrdstVG as a foundational instrument of "fine-tuning" the land market in the interest of preserving a sustainable agrarian structure.[42]

39 Meissner, Kappenberg and Musshoff (n 24).

40 Gesetz über Maßnahmen zur Verbesserung der Agrarstruktur und zur Sicherung land- und forstwirtschaftlicher Betriebe (Grundstückverkehrsgesetz - GrdstVG) (28 July 1961) <https://www.gesetze-im-internet.de/grdstvg/BJNR010910961.html> accessed 8 July 2025.

41 Gesetz über die Anzeige und Beanstandung von Landpachtverträgen (Landpachtverkehrsgesetz - LPachtVG) (8 November 1985) <https://www.gesetze-im-internet.de/lpachtvg/BJNR020750985.html> accessed 8 July 2025.

42 Vranken and others (n 22).

The Polish model, following the 2016 reforms, is characterised by an expanded framework of public control and a strong prioritisation of family farms in access to land.[43] The key legislative instrument in this regard is the Act on the Shaping of the Agricultural System,[44] among other provisions, the Act restricted the circle of eligible acquirers—centering on the "individual farmer" as defined by statutory qualification and residency criteria and subject to maximum area thresholds—introduced prohibitions on alienation within a prescribed period, and vested the National Support Centre for Agriculture (Krajowy Ośrodek Wsparcia Rolnictwa, KOWR) with rights of pre-emption and repurchase, as well as the authority to approve certain categories of transactions.[45]

Empirical studies published in peer-reviewed journals demonstrate that the intensification of interventionism in 2016 had a significant impact on the structure of land transactions, effectively reducing opportunities for speculative acquisitions.[46] Subsequent amendments adopted between 2019 and 2023 partially mitigated excessive barriers and refined the scope of application of the rules, while at the same time preserving the central role of the National Support Centre for Agriculture (KOWR) as the institutional bearer of the public interest.[47] Scholarly literature further emphasises the public-law character of control mechanisms (pre-emption and repurchase) and their impact on prices and land concentration, with the principles of protecting family farming serving as a systemic legislative rationale.

In a comparative perspective, Germany and Poland represent two sequential yet differently calibrated architectures of access to justice and legal protection in the field of agricultural land. The German system relies on a mandatory administrative "layer" of approvals for transactions involving agricultural land and leases (*GrdstVG/LPachtVG*), underpinned by clearly articulated refusal criteria and a developed framework of judicial review. Analytical reconstructions of this model suggest that its effectiveness depends on the transparency of the "unhealthy distribution" standard, the incorporation of broader economic considerations, and the timeliness of responses by the competent Länder authorities.[48] The Polish system, by contrast, institutionalises a more rigid public-law filtration of access to land—through requirements relating to purchaser status, residency, maximum holding size,

43 Bożena Karwat-Woźniak, Agnieszka Wrzochalska and Sylwia Łaba, 'Legal Conditions in Agricultural Land Trade in Poland' (2023) 29(1) Bulgarian Journal of Agricultural Science 21.

44 Ustawa o kształtowaniu ustroju rolnego (11 April 2003) <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20030640592> accessed 8 July 2025.

45 Hubert Kryszk, Krystyna Kurowska, and Renata Marks-Bielsk, 'Legal and Socio-Economic Conditions Underlying the Shaping of the Agricultural System in Poland' (2022) 14(20) Sustainability 13174. doi:10.3390/su142013174.

46 Agnieszka Stacherzak and others, 'State Interventionism in Agricultural Land Turnover in Poland' (2019) 11(6) Sustainability 1534. doi:10.3390/su11061534.

47 Jerzy Bieluk, 'Kilka uwag o nowelizacji ustawy o kształtowaniu ustroju rolnego z 23 lipca 2023' (2023) 31(2) Przegląd Prawa Rolnego 25. doi:10.14746/ppr.2023.33.2.2.

48 Benjamin Davy, 'The German Verkehrswert (Market Value) of Land: Statutory Land Valuation, Spatial Planning, and Land Policy' (2024) 136 Land Use Policy 106975. doi:10.1016/j.landusepol.2023.106975.

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and prohibitions on early resale—while vesting core powers in the National Support Centre for Agriculture (KOWR), including rights of pre-emption, repurchase, and transactional approval.[49] The amendments adopted between 2019 and 2023 illustrate an ongoing search for balance between the protection of family farms and the need for greater economic flexibility in the land market.[50]

For the design of remedial instruments and procedures for reviewing regulatory decisions under such regimes, several elements are of critical importance: the normative specification of refusal grounds accompanied by mandatory reasoning; meaningful timeframes and standards for both administrative and judicial review; a symmetrical consideration of public objectives—such as the prevention of excessive land concentration and the promotion of sustainable land use—alongside the protection of private rights, including creditors' security interests in leasehold rights; and, finally, the digitalization of cadastral systems and the transparency of registration practices, both of which reduce transaction costs and minimize the risk of judicial error.

7 CONCLUSIONS

The legal regulation of agricultural land turnover in the Republic of Kazakhstan represents a complex and ongoing transformation from an administrative-planned model to a market-oriented one, marked by persistent institutional, economic, and legal challenges. Despite the existence of formal legal mechanisms – such as the right to sell or pledge land use rights – these instruments have not evolved into fully functional market levers capable of effectively integrating agricultural land into economic circulation. In practice, the exercise of land use rights remains more formal than functional, revealing the incompleteness of land reform and the limited effectiveness of the current regulatory model.

The key obstacles include legal uncertainty surrounding transactions involving land use rights, the absence of unified registration standards, low market demand, and a general lack of trust in institutions. The issue of pledged agricultural land is particularly acute: approximately 4.1 million hectares in Kazakhstan are under pledge, much of which is unused, leading to de facto withdrawal from agricultural turnover, decreased productivity, and risks to financial stability. The unsuccessful 2015 reform—triggering mass protests—highlighted the importance of procedural legitimacy, transparency, and public participation. The subsequent creation of the Zher Amanaty Commission (2021–2022), which returned over 10 million hectares to state ownership, became a response to social demand for fairness and accountability.

49 Barbara Kutkowska and Bożena Tańska-Hus, 'Changes in the Agricultural Land Market in Poland after 2004' (2022) 24(2) Annals PAAAE 55. doi:10.5604/01.3001.0015.8642.

50 Katarzyna Sobolewska-Mikulsk and others, 'Models of Farms in Spatial Terms in Sustainable and Multifunctional Development of Rural Areas in Poland' (2024) 32(3) Sustainable Development 2325. doi:10.1002/sd.2785.

The experience of Kazakhstan demonstrates that legal formalisation alone cannot ensure sustainable land governance without procedural justice and effective access to remedies. In this regard, comparative insights from Germany and Poland offer valuable benchmarks.

In Germany, all transactions involving agricultural land are subject to prior administrative approval (*Genehmigungspflicht*) to prevent excessive concentration and ensure fair market participation. The administrative authority's decisions are subject to judicial review, safeguarding both procedural fairness and public confidence.

Poland's legal framework provides another model of balancing market efficiency with procedural safeguards. Through the Agricultural Property Agency (KOWR), the state exercises a statutory pre-emption right (*prawo pierwokupu*), enforces maximum size limits, and ensures access to administrative and judicial appeals.[51] These mechanisms not only prevent land monopolisation but also maintain procedural equality among market participants – elements that are still underdeveloped in Kazakhstan's system.

The contrast suggests that Kazakhstan's challenges lie not in the absence of legal instruments but in their weak procedural embedding. The 2015 reform lacked the transparent administrative review and appeal mechanisms that underpin legitimacy in Germany and Poland. Consequently, the absence of procedural justice led to social resistance and political rollback, transforming an economic reform into a crisis of institutional trust.

Kazakhstan's land policy requires a shift from formal legality toward substantive access to justice. The reform of agricultural land turnover should prioritise the introduction of transparent allocation procedures, enforceable administrative remedies, and judicial oversight mechanisms.

Key measures may include:

- strengthening administrative appeal processes for land allocation and withdrawal decisions;
- establishing independent review bodies to monitor compliance with land use obligations;
- integrating digital transparency tools (public cadastral registries, online lease auctions, civic monitoring platforms);
- enhancing public participation and consultation in legislative and policy processes.

At the same time, Kazakhstan should maintain safeguards against speculative resales, degradation, and foreign control over strategic land resources. The challenge is to balance economic efficiency with procedural fairness – transforming land regulation from a tool of control into an instrument of justice.

51 Marks-Bielska (n 29).

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The turnover of agricultural land in Kazakhstan cannot be viewed solely through an economic lens. It embodies deeper questions of national sovereignty, social equity, and public legitimacy. The current model of restricted turnover—where private ownership exists in law but is constrained in practice—reflects a transitional state between administrative control and market governance.

The comparative experience of Germany and Poland underscores that sustainable land markets require more than ownership rights – they depend on the institutionalisation of procedural justice, access to remedies, and transparent governance. Embedding these principles within Kazakhstan's evolving legal framework would help restore public trust, attract responsible investment, and ensure that agricultural land serves not only as an economic asset but also as a foundation of equitable and sustainable development.

REFERENCES

1. Abdrasulov EB and Tleulesova BT, 'Constitutional Control Body of the Republic of Kazakhstan on Issues Regarding the Conception of Property, the Equality of State and Private Property' (2024) 70(1) Osteuropa Recht 29. doi:10.5771/0030-6444-2024-1-29
2. Abdurashid A and Muhammadbek M, 'Improvement of the Regulation Mechanisms of the Land Use Diversification' (2020) 12(4) International Journal of Pharmaceutical Research 668. doi:10.31838/ijpr/2020.12.04.110
3. Akhmetov Y and Ahmet B, 'Application of the Principle of Active Role of Courts in Proving an Administrative Case in Kazakhstan' (2024) 70(1) Osteuropa Recht 92. doi:10.5771/0030-6444-2024-1-92
4. Altiev A, 'Regulation of the System of Use of Land (2023) 7(Spes) Research in Agricultural & Veterinary Sciences 87
5. Bieluk J, 'Kilka uwag o nowelizacji ustawy o kształtowaniu ustroju rolnego z 23 lipca 2023' (2023) 31(2) Przegląd Prawa Rolnego 25. doi:10.14746/ppr.2023.33.2.2
6. Davy B, 'The German Verkehrswert (Market Value) of Land: Statutory Land Valuation, Spatial Planning, and Land Policy' (2024) 136 Land Use Policy 106975. doi:10.1016/j.landusepol.2023.106975
7. Grossman MR, 'Agricultural Land Ownership in the United States' (2024) 1 CEDR Journal of Rural Law 25. doi:10.5281/zenodo.12155338
8. Ibadullayeva A, '"Zher Amanat": Nearly 11 Million Hectares of Land Returned to the State' *Liter* (Astana, 30 August 2024) <https://liter.kz/zher-amanaty-pochti-11-mln-ga-zemli-vozvrashcheno-gosudarstvu-1725521189/> accessed 9 July 2025.
9. Jacob A, 'Latifundists of Kazakhstan' *Kursiv* (Almaty, 20 October 2016) 1

10. Karwat-Woźniak B, Wrzochalska A and Łaba S, 'Legal Conditions in Agricultural Land Trade in Poland' (2023) 29(1) Bulgarian Journal of Agricultural Science 21

11. Koroteyev M and others, 'Prospects for the market turnover of agricultural land in Ukraine' (2017) 15(2-2) Problems and Perspectives in Management 344. doi:10.21511/ppm.15(2-2).2017.04

12. Kryszk H, Kurowska K, and Marks-Bielsk R, 'Legal and Socio-Economic Conditions Underlying the Shaping of the Agricultural System in Poland' (2022) 14(20) Sustainability 13174. doi:10.3390/su142013174

13. Kurbanov Z, Djanibekov N and Herzfeld T, 'Land Property Rights and Investment Incentives in Movable Farm Assets: Evidence from Post-Soviet Central Asia' (2025) 67(1) Comparative Economic Studies 396. doi:10.1057/s41294-024-00251-z

14. Kutkowska B and Tańska-Hus B, 'Changes in the Agricultural Land Market in Poland after 2004' (2022) 24(2) Annals PAAAE 55. doi:10.5604/01.3001.0015.8642

15. Kvartiuk V and Petrick M, 'Liberal Land Reform in Kazakhstan? The Effect on Land Rental and Credit Markets' (2021) 138 World Development 105285. doi:10.1016/j.worlddev.2020.105285

16. Marks-Bielska R, 'Conditions of Agricultural Land Prices Development in Poland' (2018) 2(1) Agrofor 109. doi:10.7251/AGRENG1701109M

17. Meissner L, Kappenberg L and Musshoff O, 'An Analytical Framework for Evaluating Farmland Market Regulation: Examining the German Land Transaction Law' (2022) 11(10) Land 1759. doi:10.3390/land11101759

18. Mukhtarova A, 'Land Commissions in Kazakhstan: The Problem of Civil Society Participation in Land Governance' (PhD thesis, Nazarbayev University Graduate School of Public Policy)

19. Nguyen VH, 'Constructing Civil Society on a Demolition Site in Hanoi' in Tai HTH and Sidel M (eds), *State, Society and the Market in Contemporary Vietnam: Property, Power and Values* (Routledge 2013) 88. doi:10.4324/9780203098318

20. Nguyen VS, 'Contending Views and Conflicts Over Land in Vietnam's Red River Delta' (2007) 38(2) Journal of Southeast Asian Studies 309. doi:10.1017/S0022463407000069

21. Sabekov S, 'More than 2 Thousand Agricultural Land Plots in Kazakhstan are Pledged' (*Kazinform News Agency*, 29 May 2023) <https://www.inform.kz/ru/bolee-2-tysyach-zemel-nyh-uchastkov-sel-hoznaznacheniya-v-kazahstane-nahodyatsya-v-zaloge_a4072476> accessed 8 July 2025

22. Sholk D, 'Kazakhstan's Land Reforms' (*The Diplomat*, 15 June 2016) <https://thediplomat.com/2016/06/kazakhstans-land-reforms/> accessed 8 July 2025

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23. Sobolewska-Mikulsk K and others, 'Models of Farms in Spatial Terms in Sustainable and Multifunctional Development of Rural Areas in Poland' (2024) 32(3) Sustainable Development 2325. doi:10.1002/sd.2785

24. Stacherzak A and others, 'State Interventionism in Agricultural Land Turnover in Poland' (2019) 11(6) Sustainability 1534. doi:10.3390/su11061534

25. Thiel F, '"Property Entails Obligations": Land and Property Law in Germany' (2011) 1 European-Asian Journal of Law and Governance 78

26. Voronina K, '1.3 Million Hectares of Agricultural Land are Privately Owned – Ministry of National Economy of the Republic of Kazakhstan' *Egemen Qazaqstan* (Astana, 6 April 2016) <https://kazpravda.kz/n/13-mln-ga-zemel-selhoznaznacheniya-nahodyatsya-v-chastnoy-sobstvennosti-mne-rk/> accessed 8 July 2025

27. Vranken L and others, *Agricultural Land Market Regulations in the EU Member States* (EUR 30838 EN, Publications Office of the European Union 2021) doi:10.2760/86127

28. Źróbek-Różańska A and Zielińska-Szczepkowska J, 'National Land Use Policy against the Misuse of the Agricultural Land—Causes and Effects: Evidence from Poland' (2019) 11(22) Sustainability 6403. doi:10.3390/su11226403

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Summary: 1. Introduction. – 2. Methodology. – 3. Post-Soviet Period: From Administrative Control to Procedural Justice in Land Reform. – 4. Formalisation Without Market Efficiency: The Exercise of Land Use Rights as an Illusion of Marketability. – 5. Land Policy: The Failed Transformation into an Investment-Attractive Asset. – 6. Judicial and Administrative Remedies as a Driver of Farmland Turnover. – 7. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВІД ДОСТУПУ ДО СТАГНАЦІЇ: ПРАВОВІ ТА ІНСТИТУЦІЙНІ ПЕРЕШКОДИ ДЛЯ ОБІГУ СІЛЬСЬКОГОСПОДАРСЬКИХ ЗЕМЕЛЬ У КАЗАХСТАНІ

Алішер Ібраєв*, Назгуль Ібраєва, Анор Мукашева, Мереке Журунова та Саулет Кожахметова

АНОТАЦІЯ

Вступ. *У цій статті досліджується еволюція та сучасний стан правового регулювання обігу сільськогосподарських земель у Республіці Казахстан крізь призму доступу до правосуддя. У ній стверджується, що стагнація реформи сільськогосподарських земель є не просто результатом економічної неефективності чи законодавчої непослідовності, а проявом системних процедурних недоліків, які перешкоджають справедливій участі, прозорості та ефективним засобам правового захисту в управлінні земельними ресурсами. Досліджуючи траєкторію пострадянських реформ — від Указу Президента 1995 року «Про землю» та Земельного кодексу 2003 року до призупиненої реформи 2015 року та подальшої ініціативи «Zher Amanaty» — дослідження показує, як відсутність процедурних гарантій та змістовних громадських консультацій підірвала як функціональність ринку, так і інституційну легітимність.*

Методи. *Стаття об'єднує порівняльні дослідження Німеччини та Польщі для оцінки правової бази Казахстану порівняно з усталеними європейськими моделями процедурної справедливості у земельних відносинах. У Німеччині адміністративне схвалення та судовий контроль забезпечують прозорість та запобігають надмірній концентрації, тоді як у Польщі переважне право на купівлю земель та законодавчі обмеження розміру земельної ділянки згідно із «Законом про формування сільськогосподарської системи» захищають право на рівний доступ для фермерів. Ці системи є прикладом того, як доступ до правосуддя здійснюється за допомогою адміністративних і судових механізмів, забезпечуючи баланс між ринковою ефективністю та соціальною справедливістю — принципи, які залишаються недостатньо розвиненими в Казахстані.*

Результати та висновки. *Спираючись на правовий, інституційний та емпіричний аналіз, зокрема дані про заставлені сільськогосподарські землі, концентрацію володінь та результати реституції за програмою «Zher Amanaty», дослідження демонструє, що механізми обігу земель у Казахстані залишаються здебільшого формальними та недостатньо застосованими. У статті було зроблено висновок, що майбутнє земельної реформи залежить від впровадження процедурної справедливості на всіх етапах управління земельними ресурсами – через прозору адміністративну процедуру, ефективний судовий контроль та інклюзивну участь громадськості. Посилення цих елементів не лише розширить доступ до засобів правового захисту та інституційну довіру, але й перетворить сільськогосподарські землі з суперечливого політичного ресурсу на основу для справедливого та сталого розвитку.*

Ключові слова. *Сільськогосподарські землі, обіг земель, правове регулювання, Казахстан, ринок землі, земельна реформа, права землекористування, процедурна справедливість, судові засоби правового захисту, адміністративна процедура.*

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Research Article

THE ROLE OF ARTIFICIAL INTELLIGENCE IN ENHANCING CORPORATE GOVERNANCE AND ACHIEVING SUSTAINABLE DEVELOPMENT

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ABSTRACT

Background: *Corporate governance is an essential framework for enhancing performance efficiency, accountability, and ethical behavior within corporations. Emerging technologies, particularly artificial intelligence (AI), have infiltrated traditional corporate governance models, management practices, and decision-making processes due to their tremendous capabilities. However, implementation poses a significant challenge due to unresolved legal and ethical issues concerning the anthropocentric model of law, governance, and AI - particularly regarding judicial systems, to diminish corporate misconduct because of improved corporate governance and transparency in the resolution of corporate disputes.*

Method: *The paper adopts an analytical and comparative legal method. It seeks to analyze the conceptual basis of artificial intelligence (AI) and corporate governance, present relevant legislation and regulations in the United Arab Emirates (UAE), and provide a comparative legal analysis of selected frameworks and international indicators to understand how AI might be utilized to enhance governance systems and contribute to sustainable development.*

Results and conclusions: *This article posits that the introduction of AI tools, such as predictive analytics, automated audits, and electronic disclosure methods, may enhance corporate transparency, accountability, and efficiency, thereby facilitating sustainable growth. However, some concerns remain unresolved, such as privacy, algorithmic bias, deficiencies in accountability, and the 'black-box' problem, which may affect trustworthiness and reliance on AI-based governance. This article suggests that AI can be a useful legal and technological instrument for sustainable development when fully integrated into corporate governance. However, amendments to existing legal frameworks for accountability and ethics must accompany this innovation to maintain transparency and accountability.*

1 INTRODUCTION

Artificial intelligence (AI) is an emerging technology that has attracted significant investment due to its capacity to learn, analyze data, generate insights, and support decision-making in performing specific tasks.[1] In this context, companies and institutions seek to achieve development, sustainability, and continuity by improving the efficiency of information technology management, thereby enabling them to address challenges and mitigate risks.

Despite the recognized importance of effective governance, many instances of corporate negligence, such as those involving *Enron*, *WorldCom*, and *Volkswagen*, demonstrate the ongoing obstacles and the urgency of enhancing governance mechanisms. This highlights the significance of this new technology in enhancing corporate governance, thereby contributing to raising trust in the national economy, strengthening the role of the stock market, mobilizing savings, increasing investment rates, and preserving the rights of minorities and small investors. Therefore, it is essential to expand the use of AI and leverage its potential as a sophisticated tool for effective governance and sustainable development. This applies at the corporate level and the judicial system, particularly when companies fail to adopt sound, transparent practices to prevent litigation. In such cases, the judicial system intervenes through its various interpretations to impose sanctions or resolve disputes between stakeholders. Thus, corporate governance and judicial administration intersect in their shared pursuit of enhancing transparency and accountability through artificial intelligence technologies.[2]

The research problem lies in the gap between the governance provisions of the new Companies Law and their practical implementation, as responsibility for enforcing governance rules largely rests with company boards or management, whose practices may

1 Daniel Munro, 'La gouvernance de l'IA: risques, incertitudes et avantages' (*Forum des politiques publiques*, 11 January 2019) 4 <https://ppforum.ca/fr/publications/la-gouvernance-de-lia/> accessed 8 April 2025.

2 SAGE, 'Corporate Governance' in *SAGE Brief Guide to Corporate Social Responsibility* (SAGE Publications Inc 2012) 98, doi:10.4135/9781452243986.n12.

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vary in effectiveness. To be clear, this study focuses on the legal system of the United Arab Emirates, particularly the UAE Commercial Companies Law, drawing on comparative material from international and regional laws and governance systems as appropriate.

The study examines how AI improves corporate governance and sustainable development. It examines the legal underpinnings and methods for corporate governance in AI systems to determine how AI helps shareholders and stakeholders supervise management. The research will define these two concepts, analyze the legal and practical foundations for improving governance with AI, and determine AI's role in monitoring corporate disclosure and transparency. It will also examine the board of directors' or management's role in implementing governance rules as well as the legal consequences of governance violations. Finally, the study will examine the ethical and legal implications of AI-enabled governance frameworks, particularly regarding privacy, accountability, and fairness, and propose a framework that balances innovation with corporate responsibility and transparency.

2 METHODOLOGY

The study adopts a legal analytical approach to understanding AI, as both a concept and a technology, and how it relates and aligns with corporate governance. In this context, it examines definitions by international organization(s) such as the World Intellectual Property Organization (WIPO) and the United Nations Commission on International Trade Law (UNCITRAL), and utilizes a similar process of contextual analysis to corporate governance by reviewing the Organization for Economic Co-Operation and Development (OECD), and the International Finance Corporation as well as the Egyptian Guide to Corporate Governance and Accountability, the Saudi Capital Market Authority Guide, and UAE legislation such as Federal Decree-Law No. (32) of 2021. This analysis draws attention to the basic pillars of governance, which include transparency, accountability, and protection of shareholders in the context of digital transformation.

This research views AI as a tool supporting decision-making in corporate governance rather than functioning as a fully-fledged decision-maker, leading the study to focus on the legalities of AI governance, that still allow humans to remain in control and accountable.

The study also employs a comparative methodology to examine similarities and differences across different experiences, such as the Bahraini law on AI and governance, the European Ethical Charter on the use of artificial intelligence (AI) in judicial systems, and the OECD's flexible principles. This combination of comparison and analysis enables characterizing AI's disruptive role in governance and demonstrates the legal, ethical, and technical challenges involved, i.e., privacy, algorithmic bias, and transparency. The research aims to balance UAE legislation with the best international practices within an applicable legal framework that enables AI to support good governance, protect shareholders, and promote sustainable development goals.

Besides international and national legislative sources, the research references include academic articles published in peer-reviewed journals and evaluative institutional reports that cover a range of theoretical and applied legal principles. It provides the possibilities to clarify the existing structures and identify gaps in UAE legislation that might impede the successful implementation of effective governance.

3 DISCUSSIONS

3.1. Conceptual and Legal Foundations

The term AI refers to programs and systems that imitate human intelligence to perform tasks assigned to them by humans, enabling them to achieve performance comparable to that of humans in cognitive functions. These programs aim to strengthen human capabilities and contributions[3] by simulating human mental steps[4] and using specific algorithms and procedures to perform a specific task or work.[5] In the same respect, the WIPO defines artificial intelligence as "a new computer science technology designed to create systems that can perform tasks deemed as requiring human intelligence, with or without limited human intervention."[6]

Approached differently, the United Nations Commission on International Trade Law on the Legal Aspects of Smart Contracts and AI, defines this advanced technology as "the science of deriving systems that can figure out solutions and perform tasks by simulating cognitive processes. AI can be constructed to resolve a problem, but it also has the capability of studying the problem and figuring out solutions on its own without human intervention."[7]

From a jurisprudential perspective, some scholars define AI as "a subset of computer science designed to simulate a cognitive ability to replace humans in performing

3 Wassim Ahmed Salem Badran, 'The Role of Patents in the Development of Business in the Age of Artificial Intelligence: Case Study of the Development of Netflix from 1997 to 2021' (2022) 5(3) The Scientific Journal of Intellectual Property and Innovation Management 397 [in Arabic].

4 Ahmed Majid, *Artificial Intelligence in the United Arab Emirates* (UAE First Quarter Initiatives, Department of Economic Studies and Policies, Ministry of Economy 2018) [in Arabic].

5 Margaret A Boden, *Artificial Intelligence: A Very Short Introduction* (OUP 2018) 5, doi:10.1093/actrade/9780199602919.001.0001.

6 WIPO Secretariat, *WIPO Conversation on Intellectual Property and Artificial Intelligence: Revised List of Issues on Intellectual Property and Artificial Intelligence Policy* (WIPO/IP/AI/2/GE/20/1 REV, 2nd ses, 21 May 2020) 4 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504> accessed 8 April 2025.

7 UNCITRAL, *Legal Aspects of Smart Contracts and Artificial Intelligence: submission by the Czechia* (A/CN.9/960, 51st ses, 25 June–13 July 2018) 5 ff <https://undocs.org/en/A/CN.9/960> accessed 8 April 2025.

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appropriate tasks in a specific context based on intelligence,"[8] and to carry out operations that depend on perception, thinking, acting, and responding to changing situations.[9] AI can produce results, perform task-relevant information processing, and learn from data trends and patterns.[10] This new technology primarily relies on robots that simulate human intelligence to achieve basic goals, the most significant of which is completing tasks with maximum efficiency and precision.[11]

The above definitions affirm that AI can analyse and interpret data through measurement and inference frameworks, in addition to its autonomy in making decisions independent of the user's continuous will or direct control.[12]

From a legislative perspective, it is apparent that almost all Arab legislation lacks a clear definition of AI. Nevertheless, the UAE Federal Decree-Law No. (46) of 2021, defines the automated electronic intermediary in its first Article as "an electronic information system that operates automatically and independently, in whole or in part, without the intervention of any natural person at the time the work is being carried out or responded to."[13] It is important to emphasize however, that AI cannot be confined to the notion of a mere electronic agent.

The types of AI vary according to their capabilities.[14] Some systems are built to handle simple, routine tasks, while others are far more advanced, capable of learning, reasoning, and adapting to new situations. No matter where they fall on this spectrum, AI tools have already shown their value in business management. They help boards of directors make smarter strategic decisions, tackle difficult problems, and strengthen governance practices.[15]

8 Fatima Zohra Belhamou and Arzi Fethi, 'The Contribution of Expert Systems in Improving Decision-Making in Institutions' (2017) 2(1) Revue Maghrébine Management des Organisations 66 [in Arabic].

9 Inas bent Khalaf Al-Khaledi, 'Artificial Intelligence Governance In the Judicial Work: Legal Reading in the European Ethical Charter on the Use of Artificial Intelligence (AI) in Judicial Systems and their Environment (CEPEJ)' (2021) 10(116) Journal of Sharia Research and Studies 155 [in Arabic].

10 Siham Darrbal, *Artificial Intelligence: A Legal Study* (The Scientific Group for Printing and Publishing 2022) 12 [in Arabic].

11 George Michel, 'The Role of Artificial Intelligence in Corporate Governance' (2023) 4(2) International Journal of Jurisprudence, Judiciary, and Legislation 404, doi:10.21608/ijdjl.2023.178158.1186 [in Arabic].

12 Musaab Thayir Abdul Sattar and Bashar Quis Mohammed, 'Tort Liability Related to Artificial Intelligence' (2021) 10(2) Journal of Legal and Political Sciences 392, doi:10.55716/jjps.2021.10.2.11 [in Arabic]; Farida Ben Othman, 'Artificial Intelligence: A Legal Approach' (2020) 12(2) Journal of Political and Legal Notebooks 159 [in Arabic].

13 UAE Federal Decree-Law No (46) of 2021 'Concerning the Federal Judicial Authority' [2021] Official Gazette 737, art 1.

14 Ahmed Ali Hassan Othman, 'The Implications of Artificial Intelligence on Civil Law: A Comparative Study' (2021) 11(76) Journal of Legal and Economic Research 1533, doi:10.21608/mjle.2021.199765 [in Arabic].

15 Mohamed Irfan Al-Khatib, 'Robots' Legal Status: Personality and Responsibility: A Comparative Rooting Study: A Reading of The European Civil Law Rules on Robots 2017' (2018) 6(24) Journal of Kuwait International Law School 99 [in Arabic].

At its core, AI imitates certain aspects of human intelligence through automation—carrying out tasks on its own without constant human input. However, its role goes well beyond efficiency. AI enables organizations to uncover deeper insights, streamline operations, and boost productivity across nearly every industry. This combination of problem-solving power and performance enhancement makes AI more than just a helpful tool; it is a transformative force reshaping how companies and their leaders operate today and will continue to do so in the future.

The UAE legislator describes governance as "a framework of regulations, standards and procedures that ensure institutional discipline in corporate management, adhering to international regulations. This includes identifying the responsibilities and duties of the board of directors while safeguarding the rights of shareholders and stakeholders."[16]

It is also defined as "norms for governing and managing the company, encompassing frameworks for structuring the relationships among the stakeholders, directors, and shareholders by enacting specific provisions and rules to enhance the decision-making process and impart a transparent and credible nature."[17]

Some scholars view it as "the system through which the corporation's tasks are governed and controlled at the highest level to attain its objectives and uphold requisite standards of accountability, integrity, and transparency."[18]

According to the Egyptian Guide to Corporate Governance and Accountability, governance is a collection of foundations, principles, and rules that determine how the board of directors, owners of the corporation, and other stakeholders interact to protect and balance their respective interests.[19] Some Arab countries, such as Saudi Arabia, have adopted this approach via the Saudi Capital Market Authority, which has developed a guide for Saudi firms that facilitates this very concept. The guide outlines specific procedures to help provide the decision-making process with a sense of transparency and credibility, as well as to protect the rights of shareholders and stakeholders, thereby encouraging fairness, competitiveness, and transparency in the high-quality business marketplace.[20]

16 Capital Market Authority (KSA), *Corporate Governance: Booklet* (KSA CMA nd) https://cma.gov.sa/en/Awareness/Publications/booklets/Booklet_13.pdf accessed 8 April 2025.

17 Oksana Khotynska-Nor, 'Judicial Transparency: Towards Sustainable Development in Post-Soviet Civil Society' (2022) 5(2) Access to Justice in Eastern Europe 83, doi:10.33327/AJEE-18-5.2-n000212; Maksym Maika, 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) Access to Justice in Eastern Europe 249, doi:10.33327/AJEE-18-5.2-n000320.

18 Michel (n 11) 408.

19 Egyptian Institute of Directors, *The Egyptian Corporate Governance Code* (EIoD 2016) https://www.ebrd.com/content/dam/ebrd_dxp/assets/pdfs/legal-reform/corporate-governance/sector-assessment/e/Egyptian%20CG%20Code.pdf accessed 8 April 2025.

20 Omar N Al-Boridi, 'Exploring the Role of AI in Corporate Governance: Leveraging Potential for Productivity, Efficiency, and Competitive Advantage' (2023) 3(2) International Journal of Green Management and Business Studies 54, doi:10.56830/IJGMBS12202301.

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It is clear from the above that corporate governance is defined by a set of characteristics, the most important of which are: ensuring the existence of an effective corporate governance framework and separating the ownership of the company from management to reduce conflict among stakeholders. Other features include the principle of equality among all shareholders in the company, the protection of their rights, and preventing the majority shareholders from voting in a way that is harmful to minority partners or to a certain class of shareholders in a biased manner, or in violation of shareholder equality.[21] Accordingly, governance aims to enhance the board of directors' responsibility for managing the company, both towards the company itself and all shareholders and stakeholders.[22]

Based on the above, the company's board of directors or managers, depending on the circumstances, are liable to implement the company's governance rules. The Federal legislator, in Articles (362 and 7) of the Commercial Companies Law, has laid down administrative fines ranging from one hundred dirhams to ten million dirhams for companies, board chairs, members, managers, and auditors in the case of violating these regulations. The administrative fine is doubled in case of repeated violations, without exceeding the limit of twenty million dirhams.[23]

The UAE Commercial Companies Law includes provisions for administrative sanctions, including monetary penalties on the respective companies, board members, managers, and auditors. Nonetheless, that does not exclude civil liability, where is caused by breaches of governance responsibilities, or the fact that there is no criminal liability, which is to be determined when the necessary elements of an offence exist under the governing rules. The incorporation of AI into corporate governance does not diminish any of these. AI actively constitutes a support or operational tool.

There is no dispute that the introduction of AI does not shift the responsibility, and nothing more, to members of the board of directors and other top executives. The introduction of AI might, as the circumstances warrant, shift the responsibility to a greater degree, involve automated systems less, or result from oversight or misrepresentation that incited automated systems. Thus, decisions made or supported by these automated systems should still be attributed to the bodies corporate and to the members of the corporate governance, as deep-seated principles of law would dictate, as far as the UAE is concerned.

21 UAE Cabinet Resolution No (102) of 2022 'Promulgating the Administrative Penalties Regulations Regarding Acts Committed in Violation of the Provisions of Federal Decree by Law No (32) of 2021 Regarding Commercial Companies' [2022] Official Gazette 739, arts 3, 4.

22 Ridoan Karim, 'Corporate Governance', *International Encyclopedia of Business Management* (2026) vol 1, 456, doi: 10.1016/B978-0-443-13701-3.00036-0.

23 UAE Federal Decree-Law No (32) of 2021 'On Commercial Companies' [2021] Official Gazette 712, arts 7, 362. For more details, see UAE Cabinet Resolution No (102) of 2022 (n 21) arts 3, 4.

3.2. Legal and Institutional Framework for AI in Governance

This paper first examines the legal framework governing the application of AI in corporate governance in the UAE, followed by a comparative analysis of regional and international trends.

3.2.1. The UAE Legal Framework

The Federal Decree-Law No. (35) of 2022 on Evidence in Civil and Commercial Transactions, particularly Articles 53-56, defines electronic evidence to include "all data or information created, stored, extracted, copied, transmitted, communicated, or received using information technology and which can be accessed in intelligible format."[24] The electronic framework encompasses all forms of electronic data and digital materials. There are many aspects of digital transformation in the UAE Commercial Companies Law, which authorize corporations to retain an electronic copies of original documents and records submitted to them.[25] The Minister was granted the power to promulgate a resolution regulating the filing of companies' documents to registered firms via electronic and alternative means of communication. Article (140/1) also mandates that firms post their articles of incorporation, bylaws, and any other papers or information required by the Securities and Commodities Authority on their websites. After the Authority approves, the invitation to a general assembly meeting must be communicated to all shareholders by registered mail or other contemporary means as stipulated in the company's articles of incorporation.[26] The law also authorizes holding general assembly meetings and the participation of the shareholders in its deliberations and voting on its decisions through modern technology means for remote attendance.[27] Electronic voting will be used for the voting process, provided the rules and regulations set out by the Authority are followed.[28]

The above makes it clear that the UAE legislator is paving the way for the use of AI in corporate governance. Therefore, it can be said that while the digitization of data, documents, and records provides the necessary basis for AI use, it also creates the legal framework for advancing AI in corporate governance and achieving sustainable development. This complies with the governance of the judicial system, particularly with

24 UAE Federal Decree-Law No (35) of 2022 'On Evidence in Civil and Commercial Transactions' [2022] Official Gazette 737, arts 53–56.

25 UAE Federal Decree-Law No (32) of 2021 (n 23) art 26(2).

26 ibid, art 174(1)(c).

27 ibid, art 174(3); UAE SCA, 'Circular on the Annual General Assembly Meetings of Public Joint-Stock Companies for 2024' (*UAE Securities and Commodities Authority*, 2024) Fifth: Attending the General Assembly meeting using modern technical means <https://www.sca.gov.ae/assets/54c01814/circular-on-the-annual-general-assembly-meetings-of-public-joint-stock-companies-for-2024-en.aspx> accessed 8 April 2025.

28 UAE Federal Decree-Law No (32) of 2021 (n 23) art 188(1).

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regard to the digitization of courts, judicial oversight, and procedural justice within judicial institutions, which aims to digitally improve professional activities, facilitate human work, reduce the time required to complete tasks, and accelerate the achievement of sustainable goals.[29] For example, the artificial intelligence tools used in the UAE's digital courts include scheduling hearings, machine translation of foreign texts, automation of court filing systems, summarizing legal facts, and, in some particular cases, issuing rulings. [30] Thus it is confirmed that corporate governance and judicial administration converging in their shared objective of enhancing transparency and accountability through artificial intelligence technologies.

3.2.2. Comparative Perspectives

Comparative legislation mandates that corporations disclose information and maintain transparency, establishing the general principle for publishing data on companies and their activities in accordance with the applicable legal conditions.

By regulating corporations in accordance with international standards, the UAE Commercial Companies Law aims to improve the business environment and the country's economic standing, particularly strengthening governance, safeguarding the rights of partners and shareholders, attracting foreign investment, and encouraging corporate social responsibility.[31]

The UAE legislator requires companies to submit data and records related to their activities to relevant public authorities. This obligation commences with company's legal existence, as it does not acquire legal personality until it is registered in the commercial registry.[32] This registration requires disclosure to the competent authority, whether federal or local, of all details related to the establishment of the company.[33] This includes publishing a summary of the company's articles of incorporation,[34] documenting the incorporation agreement, registering any subsequent amendments to the agreement.[35] Additionally, the incorporation

29 Steluța Ionescu, Cristian Mareș and Alin Petrea, 'Digitalization of the Judicial System in Romania: Important Strategic Objective and Guarantee for a Modern, Fast and Effective Justice System' (2025 17th International Conference on Electronics, Computers and Artificial Intelligence (ECAI), Târgoviște, Romania, 26-27 June 2025) doi:10.1109/ECAI65401.2025.11095510.

30 Naeema Kamal Ali and Ali Taha Akram, 'Artificial Intelligence and its Applications in the Judiciary: A Comparative Study' (2025) 22(2) University of Sharjah Journal of Legal Sciences 289, doi:10.36394/jls.v22.i2.12 [in Arabic].

31 UAE Federal Decree-Law No (32) of 2021 (n 23) art 3; UAE Cabinet Resolution No (79) of 2022 'On Controls to Motivate Commercial Companies to Exercise Social Responsibility' [2022] Official Gazette 734.

32 UAE Federal Decree-Law No (32) of 2021 (n 23) art 21(1).

33 ibid, art 113(1).

34 ibid, art 115.

35 ibid, art 15(1).

decision must be published in the official gazette, and a public offering must be announced in one of the newspapers for public joint-stock companies.[36]

The establishment phase is followed by the joint stock company's obligation to list its shares on a registered financial market, in accordance with the listing norms and regulations set out by the Authority and the relevant financial market.[37] It is also dedicated to revealing to the stock market any significant events that may influence the value of listed securities upon their occurrence.

Shareholders who own at least 10% of the company's capital are entitled to request the Ministry or the Authority, as applicable, to inspect the company on the ground that directors or auditors have allegedly breached their obligations under either the law or the articles of incorporation, provided a legitimate basis for suspicion exists.[38] Companies strive to actively disclose information to partners, shareholders, and stakeholders, and shareholders should have equitable, transparent access to it.

A public joint-stock company's board of directors must draft an annual account containing a balance sheet at the end of the fiscal year and a profit and loss statement.[39] The company must also adhere to the mechanism for distributing compensation to the chairman and board members, as stipulated in Article 29 of the Governance Guide.[40] The law has defined a set of controls that a public joint-stock company must follow when appointing its board of directors.[41]

Pursuant to the Commercial Companies Law, the board of directors of the Securities and Commodities Authority shall adopt a decision that sets forth the requirements and procedures that companies must follow in establishing their boards of directors and nominating members.[42] In this regard, artificial intelligence may improve disclosure and transparency in corporate governance. Its forecasting and analytical abilities could reveal hidden trends and patterns that provide important insights for increasing transparency in service delivery decision-making. The introduction of artificial intelligence could also improve corporate accountability by creating an audit trail of decision-making and outcomes while also identifying and reducing unethical acts and misbehavior.[43]

36 ibid, art 121.
37 ibid, art 137.
38 ibid, art 342(1).
39 ibid, art 154.
40 UAE SCA Chairman of Authority's Board of Directors' Decision No (3/Chairman) of 2020 'Concerning Approval of Joint Stock Companies Governance Guide', art 29 <https://www.sca.gov.ae/en/regulations/regulations-listing?id=198#page=1> accessed 8 April 2025.
41 ibid, art 9.
42 UAE Federal Decree-Law No (32) of 2021 (n 23) art 143(5).
43 Karim (n 22) 457.

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Furthermore, the development of real-time, interactive, and codeless corporate reports improves transparency and accountability.[44]

3.3. AI in Corporate Governance Practices

By providing important insights from vast amounts of data and automating certain governance procedures, AI may enhance decision-making.[45] This minimizes human error and bias, boosts efficiency, and aligns operations with shareholder interests,[46] and enhances effective regulatory compliance.[47] Systems based on AI technology can help judicial authorities increase efficiency and consistency, and improve making-decisions procedures.[48]

3.3.1. Boards' Decision-Making

AI can enhance decision-making by collecting, analyzing, clarifying, and evaluating information related to financial and non-financial knowledge, corporate business performance, corporate social media accounts, and competitor activities.[49] Through advanced algorithms, AI enables companies to anticipate the future value of their stocks in the market and mitigate business risks. It can also help identify and eliminate unethical behaviour and misconduct by analyzing business data trends.[50]

The degree of a company's reliance on AI largely depends on the board of directors' belief in its viability for corporate management, regardless of the type of intelligence used. This belief enables the company to implement change effectively[51] through proposals and discussions about the development and purchase of AI systems.[52]

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44 Osama Samih Shaban and Arwa Omoush, 'AI-Driven Financial Transparency and Corporate Governance: Enhancing Accounting Practices with Evidence from Jordan' (2025) 17(9) Sustainability 3818, doi:10.3390/su17093818.

45 Asmaa Maqari and Fatiha Ben Azzouz, 'The Role of Artificial Intelligence in Enhancing Corporate Governance' (2023) 8(3) Legal and Political Research 142 [in Arabic]. Also see, Enas Mohamed Ali Quteishat and others, 'Predictive Modelling in Legal Decision-Making: Leveraging Machine Learning for Forecasting Legal Outcomes' (2024) 20(3) Journal of Electrical Systems 2060, doi:10.52783/jes.4006.

46 Mohamed Saeed Ahmed Ismail, 'Legal Protection Methods for E-Commerce Transactions: A Comparative Study' (PhD thesis, Ain Shams University 2005) 184 [in Arabic].

47 Anacleto Correia and Pedro B Água, 'Artificial Intelligence to Enhance Corporate Governance: A Conceptual Framework' (2023) 19(1) Corporate Board: Role, Duties and Composition 29, doi:10.22495/cbv19i1art3.

48 Žaklina Spalević and others, 'The Role of Artificial Intelligence in Judicial Systems' (2024) 12(3) International Journal of Cognitive Research in Science Engineering and Education 561, doi:10.23947/2334-8496-2024-12-3-561-569.

49 Baran Can Kaya, 'The Role of Artificial Intelligence in Corporate Governance' (*SSRN Working Paper*, 22 June 2022) doi:10.2139/ssrn.4143846 <https://ssrn.com/abstract=4143846> accessed 8 April 2025.

50 Shaban and Omoush (n 44).

51 Al-Boridi (n 20) 56.

52 Maqari and Ben Azzouz (n 45) 142.

AI can evaluate vast amounts of data relevant to the board of directors' decision-making process and automate certain board responsibilities, such as compliance monitoring, while also contributing to the design and execution of performance-based remuneration systems. Machine learning algorithms can predict the effects of various compensation structures on executive behavior and company performance, enabling more informed and effective compensation decisions.[53]

The integration of AI into corporate governance requires that the company's board of directors acquire new skills and expertise. Board members, formerly included people with experience in finance, law, and business, are now expected to possess knowledge of technology, data analysis, and AI algorithms. Therefore, it is necessary for corporate boards to include individuals who can "decode the algorithm" on.[54]

In the future, we may see AI systems in which robot managers replace human managers and make their own decisions. These systems may be referred to as "autonomous AI" and "self-autonomous AI". These autonomous systems will also be on the boards of directors of companies such as Robot Sofia.

3.3.2. Auditing and Compliance

The Commercial Companies Law requires that every public joint-stock company appoints one or more auditors[55] to ensure compliance with laws, regulations, and instructions, evaluate risk management procedures, and verify the accuracy of the financial statements presented by the board of directors.

The use of AI in auditing can improve efficiency, accuracy, and speed, as well as reduce costs. This can be done by establishing a connection between the Registration Department's website of the and the websites of companies, allowing the government to immediately or periodically review any changes to their operations or decisions.

This study draws on doctrinal and analytical legal methods and provides practical illustrations of the growing applications of artificial intelligence in corporate governance. For example, some multinationals based in Dubai, UAE, and around the world have employed AI-driven tools for auditing and compliance to monitor, detect anomalies, and ensure real-time regulatory compliance. Likewise, AI-powered tools are being used to assess risks, predict outcomes, and analyze governance compliance to support the boards in their decision-making. These instances demonstrate the extent to which AI-enabled governance tools are practicable for supporting legal compliance and enhancing transparency, accountability, and oversight.

53 Correia and Água (n 47) 32.

54 Shaban and Omoush (n 44).

55 UAE Federal Decree-Law No (32) of 2021 (n 23) art 245(1). [cf French Commercial Code 'Code de commerce', art L225-228 (2000) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/> accessed 8 April 2025].

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3.3.3. Shareholder and Employee Engagement

AI can be utilized by shareholders or stakeholders of the company. Shareholders, particularly those with limited involvement in company meetings and management, are most concerned about the company's use of AI. This category is primarily focused on year-end profits, while the majority owners make decisions and run operations. AI applications can facilitate better communication, allowing minority shareholders to participate in decisions that affect the company, ultimately helping them safeguard their rights.[56] In this respect, the federal legislator has incorporated modern technologies into the process of holding meetings, enabling shareholders to participate in discussions and vote on decisions through remote attendance technology[57]. AI can also enhance shareholder engagement and facilitate electronic voting, making it easier and more convenient for shareholders to exercise their voting rights.[58]

Company employees are often affected by the introduction of AI systems.[59] The use of AI in a company may lead to the dismissal of some workers or changes in their assigned work. This could result in violations of workers' rights as stipulated in laws and in their contracts with the company. Therefore, it is essential to involve workers in the decision to adopt AI for the company's management, ensuring they receive all their entitlements.[60]

3.4. Obstacles to the Integration of AI in Corporate Governance

The main issues in implementing AI in corporate governance are privacy, fairness, and accountability.[61] These systems, due to their ability to analyze and predict data, may violate users' privacy. Additionally, because AI systems may be influenced by biases in the data they analyze, their conclusions may not always be fair or objective, potentially eroding accountability and confidence in AI systems.[62]

The "black box" phenomenon is another issue. This relates to the difficulty of comprehending AI decision-making due to the intricacy of its algorithms and the enormous

56 Al-Boridi (n 20) 54.

57 UAE Federal Decree-Law No (32) of 2021 (n 23) art 174(3); UAE SCA (n 27) Fifth; French Commercial Code (n 55) art L225-103-1 (2000).

58 Correia and Água (n 47) 32.

59 Shaban and Omoush (n 44).

60 Susana Beatriz Checa Prieto, 'Artificial Intelligence and Fundamental Rights' in Andrés J Arenas Falótico and Jessica Bayón Pérez (eds), *The New Role of Labor Unions in the AI Era* (IGI Global Scientific Publishing 2025) 207, doi:10.4018/979-8-3693-8049-9.ch007.

61 Ghada Seif, 'Corporate Governance of Sustainable Artificial Intelligence (AI) in Strategic Communication and Digital Marketing: United Arab Emirates Guidelines' (2024) 21(S1) Migration Letters 501, doi:10.59670/ml.v21iS1.6166.

62 Michael Hilb, 'Toward Artificial Governance? The Role of Artificial Intelligence in Shaping the Future of Corporate Governance' (2020) 24 Journal of Management and Governance 851, doi:10.1007/s10997-020-09519-9.

amounts of data they process. The absence of transparency may erode confidence in AI systems and impede their adoption by stakeholders.[63] Another issue humans may face in the future with the development of AI systems is that AI algorithms will increase unemployment worldwide, and consequently, on corporate boards. Therefore, legal regulations must be put in place regarding the placement of AI on corporate boards.[64]

In addition, AI presents several cybersecurity concerns, as the exponential expansion of digital transformation has led to a surge in cybersecurity risks.[65] Accordingly, a robust framework for using AI in corporate governance is necessary to address these potential risks. International practices offer certain governance instruments that can also be used in a corporate context. One is Algorithmic Impact Assessment (AIA), created by the Canadian Digital Service, which mandates public organizations to consider the legal, ethical, and social ramifications of the algorithmic systems they intend to deploy.[66] While intended for the public realm, the rationale and design of the AIA can be easily transferred to corporate governance. The incorporation of such an approach would allow corporations to evaluate the risks of algorithmic bias, opacity, accountability, and data protection before using AI in board decision-making or compliance functions, thus enhancing the governance of AI in a more responsible and legal manner.

Such a framework would guide how AI is integrated into governance rules and standards, and how ethical, legal, and transparency issues that may arise are addressed. It is important for organizations to contribute to the development of effective legal frameworks for AI governance. In short, the challenges of integrating AI into corporate governance go beyond technical considerations and include ethical, legal, and regulatory dimensions. Organizations adopting AI must understand the ethical implications of AI-driven decisions. Taken together, these obstacles demonstrate that the successful integration of AI into corporate governance depends on the adoption of comprehensive regulatory safeguards that balance technological innovation with legal and ethical accountability.

3.5. AI, Corporate Governance, and Sustainable Development

AI has emerged as a transformative force in restructuring corporate governance and aligning it with the objective of sustainable development. At the economic level, digital transformation automates business processes, improving operational efficiency and

63 Correia and Água (n 47) 32.

64 Kaya (n 49) 13.

65 Shaban and Omoush (n 44).

66 Treasury Board of Canada Secretariat, 'Algorithmic Impact Assessment tool' (*Government of Canada*, 28 November 2025) <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html> accessed 30 November 2025; Jacob Metcalf and others, 'Algorithmic Impact Assessments and Accountability: The Co-construction of Impacts' (FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, 1 March 2021) 735, doi:10.1145/3442188.3445935.

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reducing transaction costs, thereby positively affecting productivity. AI also creates new business and investment opportunities, which in turn affect employment and entrepreneurship. In terms of public services, AI enhances the provision of health and education services and improves the interaction between individuals and institutions with the government through e-government programs. AI also affects human and individual behavior by facilitating social communication and integration within society.

From a sustainability perspective, AI contributes to balancing economic growth, social inclusion, and environmental protection by providing accurate data to facilitate decision-making, detect abuse or misconduct, and promote accountability. A prime example of this is businesses' ability to leverage AI-powered analytics to manage and streamline energy use and emissions tracking in real time, while pinpointing operational inefficiencies. This helps improve responsible consumption and production in accordance with guideline 12 of the SDG. This also supports climate change-related goals, as per guideline 13 of the SDG. This helps build trust in institutions, which is essential for achieving sustainable development. Furthermore, AI enables better resource management when big data analytics, predictive modeling, and monitoring technology are used for improved resource management, potentially leading to less waste, reduced use of energy, ensuring regulation compliance, which also supports corporate social responsibility, provides a level of transparency and accountability around corporate processes, thus establishing the principles of fairness and good governance.[67] This includes providing equal access to information, protecting the rights of minority shareholders, and enabling broader participation in decision-making.[68]

These contributions collectively demonstrate that AI can generate systematic outcomes above and beyond corporate performance to societies when appropriately and effectively integrated into governance frameworks. It can contribute to attaining economic growth, social welfare, and environmental protection. However, to achieve these goals and prevent potential risks, effective regulatory and institutional frameworks are required that uphold AI's commitment to governance through coherent principles of fairness, accountability, and transparency, so that technology is used effectively as a channel for sustainable economic development.

67 Maya Khater and others, 'Assessing the Impact of Green Tourism on Sustainable Development: A Case Study of the United Arab Emirates' (2025) 6(2) Research Journal in Advanced Humanities 1, doi:10.58256/0m0wvr07; Maya Khater and Yassine Chami, 'Effectiveness of the Legal Framework for Humanitarian Assistance during Armed Conflicts: The Aggression against Lebanon as a Case Study' (2025) 6(1) Research Journal in Advanced Humanities 1. doi:10.58256/caqpva90; Maya Khater, Yassine Chami and Mohamad Albakjaji, 'Legal Environmental Protection and Sustainable Development in the United Arab Emirates' (2025) 5(2) Journal of Human Rights, Culture and Legal System 378, doi:10.53955/jhcls.v5i2.469.

68 Goda Strikaitė-Latušinskaja, 'The Rule of Law and Technology in the Public Sector' (2023) 6(1) Access to Justice in Eastern Europe 1, doi:10.33327/AJEE-18-6.1-a000104; Amra Mahmutovic and Abdulrahman Alhamoudi, 'Understanding the Relationship between the Rule of Law and Sustainable Development' (2024) 7(1) Access to Justice in Eastern Europe 170, doi:10.33327/AJEE-18-7.1-a000102.

Nevertheless, these new technologies are not without risks. AI systems may exhibit deficiencies such as algorithmic bias, discriminatory outcomes, or adverse impacts on employment through the automation of tasks traditionally performed by human employees. These concerns highlight the urgent need for robust legal and regulatory frameworks that establish clear principles of fairness, accountability, and transparency. AI can be effectively integrated as a transformative tool to promote sustainable economic and social development while mitigating harmful consequences.

4 CONCLUSIONS

Although human intelligence remains the principal force behind corporate governance and sustainable development, it is important to recognize that AI, through ongoing development, is assuming an increasingly important role in enhancing governance practices, particularly in resolving judicial disputes arising from corporate governance issues. The findings of this research demonstrate that AI systems' capabilities to enhance corporate governance are grounded in the fundamentals of digital transformation of corporate data and documentation, supported by the principles of disclosure and control. The research highlights a close connection between corporate governance and sustainable development, as the latter is considered part of corporate governance and an extension of it, and its implementation improves efficiency across all companies. Although governance practices have increased globally due to their advantages, persistent financial and trust-related challenges remain.

Moreover, the study reaffirms that the utilization of AI systems by companies is an implementation of governance principles, achieving high levels of transparency and efficiency in practice. Among the most significant applications is the smart electronic agent, which enables companies to register with commercial registries and autonomously publishes company information that complies with the company law disclosure requirements. AI applications are also moving toward replicating human cognitive functions, with innovations such as artificial neural networks that emulate aspects of decision-making theory and practice layered into boards of directors and decision-making processes calibrated with data and learning.

Overall, this study contributes to legal scholarship and policy reform by providing a structured legal framework for integrating artificial intelligence into corporate governance systems that enhances transparency, accountability, and sustainable development while aligning with national legislation and international best practices.

Based on these conclusions, the following recommendations are proposed:

It is imperative that modern governance mechanisms based on AI are used to enhance digitization and sustainable development. Public authorities should recognize the importance of digital connectivity in their interactions with firms and develop integrated

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AI systems to improve productivity and coordination. A centralized AI-based corporate accounting system should be established to enable independent, quick, and low-cost audits of electronic records for corporate accounts, while ensuring accuracy and objectivity in line with international standards.

To facilitate the application of specific AI ethical principles within the context of corporate governance, the following actions can be taken. First, regulators must issue precise, mandatory instructions that specify the requirements for ethical AI in relation to corporate governance including transparency, accountability, equity, data protection, and so on. Second, corporations must be made to embed these requirements within their internal governance structures, particularly at the board level and their compliance programs. Third, specific courses tailored for boards and senior executives should be instituted to enable them to adequately supervise AI-enabled decision-making systems. Fourth, mechanisms for independent surveillance and auditing of AI compliance and ethical standards must be instituted. Finally, to ensure proper alignment and compliance, there should be strong legal mechanisms, including penalties and compliance regimes, for breaches.

In addition to the above, our recommendations for the responsible and legal use of AI for business compliance and management are as follows:

- Defining Legal Responsibility: There should be a clear definition of legal liability when AI fails in corporate governance. The board of directors and senior management should be legally liable for decisions made or influenced by AI, especially when technical faults, erroneous outputs, or biased algorithms cause harm to shareholders, employees, or third parties.

- Bias and risk assessments are required: Businesses should conduct regular risk assessments and audits to assess the use of AI in governance and the presence of algorithmic bias, discrimination, or systemic errors. Risk assessments and audits must be documented and made available for regulatory review.

- Liability, corrective action, and sanctions: For the misuse of AI and the breach of governance regulations, degrees of liability, sanctions, and informal compliance mechanisms that involve financial sanctions, suspension of the use of AI systems, compliance with governance, and, in extreme cases, liability of members of the board of directors, should be enacted. The reporting of such incidents, AI-related incidents such as failures, results, and or incomplete actions, and the reporting of corrective actions should be made to affected parties and the appropriate regulators.

- Supervision and accountability: There should be independent supervisory units or qualified auditing professionals who can monitor, on a continual basis, corporations' use of AI in governance to ensure compliance with ethical, legal, and transparency standards.

- Integration into governance frameworks: There should be formalized, ethically aligned AI standards incorporated into corporate governance structures, as well as internally and within policies and codes of conduct, to ensure AI complements, not replaces, human judgment and accountability.

REFERENCES

1. Abdul Sattar MT and Mohammed BQ, 'Tort Liability Related to Artificial Intelligence' (2021) 10(2) Journal of Legal and Political Sciences 385, doi:10.55716/jjps.2021.10.2.11 [in Arabic]
2. Al-Boridi ON, 'Exploring the Role of AI in Corporate Governance: Leveraging Potential for Productivity, Efficiency, and Competitive Advantage' (2023) 3(2) International Journal of Green Management and Business Studies 54, doi:10.56830/IJGMBS12202301
3. Ali NK and Akram AT, 'Artificial Intelligence and its Applications in the Judiciary: A Comparative Study' (2025) 22(2) University of Sharjah Journal of Legal Sciences 289, doi:10.36394/jls.v22.i2.12 [in Arabic]
4. Al-Khaledi IBK, 'Artificial Intelligence Governance In the Judicial Work: Legal Reading in the European Ethical Charter on the Use of Artificial Intelligence (AI) in Judicial Systems and their Environment (CEPEJ)' (2021) 10(116) Journal of Sharia Research and Studies 155 [in Arabic]
5. Al-Khatib MI, 'Robots' Legal Status: Personality and Responsibility: A Comparative Rooting Study: A Reading of The European Civil Law Rules on Robots 2017' (2018) 6(24) Journal of Kuwait International Law School 97 [in Arabic]
6. Badran WAS, 'The Role of Patents in the Development of Business in the Age of Artificial Intelligence: Case Study of the Development of Netflix from 1997 to 2021' (2022) 5(3) The Scientific Journal of Intellectual Property and Innovation Management 397 [in Arabic]
7. Belhamou FZ and Fethi A, 'The Contribution of Expert Systems in Improving Decision-Making in Institutions' (2017) 2(1) Revue Maghrébine Management des Organisations 62 [in Arabic]
8. Ben Othman F, 'Artificial Intelligence: A Legal Approach' (2020) 12(2) Journal of Political and Legal Notebooks 156 [in Arabic]
9. Boden MA, *Artificial Intelligence: A Very Short Introduction* (OUP 2018), doi:10.1093/actrade/9780199602919.001.0001
10. Checa Prieto SB, 'Artificial Intelligence and Fundamental Rights' in AJ Arenas Falótico and J Bayón Pérez (eds), *The New Role of Labor Unions in the AI Era* (IGI Global Scientific Publishing 2025) 207, doi:10.4018/979-8-3693-8049-9.ch007

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11. Correia A and Água PB, 'Artificial Intelligence to Enhance Corporate Governance: A Conceptual Framework' (2023) 19(1) Corporate Board: Role, Duties and Composition 29, doi:10.22495/cbv19i1art3

12. Darrbal S, *Artificial Intelligence: A Legal Study* (The Scientific Group for Printing and Publishing 2022) [in Arabic]

13. Hilb M, 'Toward Artificial Governance? The Role of Artificial Intelligence in Shaping the Future of Corporate Governance' (2020) 24 Journal of Management and Governance 851, doi:10.1007/s10997-020-09519-9

14. Ionescu S, Mareș C, and Petrea A, 'Digitalization of the Judicial System in Romania: Important Strategic Objective and Guarantee for a Modern, Fast and Effective Justice System' (2025 17th International Conference on Electronics, Computers and Artificial Intelligence (ECAI), Târgoviște, Romania, 26-27 June 2025) doi:10.1109/ECAI65401.2025.11095510

15. Ismail MSA, 'Legal Protection Methods for E-Commerce Transactions: A Comparative Study' (PhD thesis, Ain Shams University 2005) [in Arabic]

16. Karim R, 'Corporate Governance', *International Encyclopedia of Business Management* (2026) vol 1, 456, doi: 10.1016/B978-0-443-13701-3.00036-0

17. Kaya BC, 'The Role of Artificial Intelligence in Corporate Governance' (*SSRN Working Paper*, 22 June 2022) doi:10.2139/ssrn.4143846

18. Khater M and Chami Y, 'Effectiveness of the Legal Framework for Humanitarian Assistance during Armed Conflicts: The Aggression against Lebanon as a Case Study' (2025) 6(1) Research Journal in Advanced Humanities 1, doi:10.58256/caqpva90

19. Khater M, Chami Y, and Albakjaji M, 'Legal Environmental Protection and Sustainable Development in the United Arab Emirates' (2025) 5(2) Journal of Human Rights, Culture and Legal System 378, doi:10.53955/jhcls.v5i2.469

20. Khater M, et al., 'Assessing the Impact of Green Tourism on Sustainable Development: A Case Study of the United Arab Emirates' (2025) 6(2) Research Journal in Advanced Humanities 1, doi:10.58256/0m0wvr07

21. Khotynska-Nor O, 'Judicial Transparency: Towards Sustainable Development in Post-Soviet Civil Society' (2022) 5(2) Access to Justice in Eastern Europe 83, doi:10.33327/AJEE-18-5.2-n000212

22. Mahmutovic A and Alhamoudi A, 'Understanding the Relationship between the Rule of Law and Sustainable Development' (2024) 7(1) Access to Justice in Eastern Europe 170, doi:10.33327/AJEE-18-7.1-a000102

23. Maika M, 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) Access to Justice in Eastern Europe 249, doi:10.33327/AJEE-18-5.2-n000320

24. Majid A, *Artificial Intelligence in the United Arab Emirates* (UAE First Quarter Initiatives, Department of Economic Studies and Policies, Ministry of Economy 2018) [in Arabic]

25. Maqari A and Ben Azzouz F, 'The Role of Artificial Intelligence in Enhancing Corporate Governance' (2023) 8(3) Legal and Political Research 128 [in Arabic]

26. Metcalf J and others, 'Algorithmic Impact Assessments and Accountability: The Co-construction of Impacts' (FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, 1 March 2021) 735, doi:10.1145/3442188.3445935

27. Michel G, 'The Role of Artificial Intelligence in Corporate Governance' (2023) 4(2) International Journal of Jurisprudence, Judiciary, and Legislation 397, doi:10.21608/ijdjl.2023.178158.1186 [in Arabic]

28. Munro D, 'La gouvernance de l'IA: risques, incertitudes et avantages' (*Forum des politiques publiques*, 11 January 2019) <https://ppforum.ca/fr/publications/la-gouvernance-de-lia/> accessed 8 April 2025

29. Othman AAH, 'The Implications of Artificial Intelligence on Civil Law: A Comparative Study' (2021) 11(76) Journal of Legal and Economic Research 1516, doi:10.21608/mjle.2021.199765 [in Arabic]

30. Quteishat EMA and others, 'Predictive Modelling in Legal Decision-Making: Leveraging Machine Learning for Forecasting Legal Outcomes' (2024) 20(3) *Journal of Electrical Systems* 2060, doi:10.52783/jes.4006

31. Seif G, 'Corporate Governance of Sustainable Artificial Intelligence (AI) in Strategic Communication and Digital Marketing: United Arab Emirates Guidelines' (2024) 21(S1) Migration Letters 500, doi:10.59670/ml.v21iS1.6166

32. Shaban OS and Omoush A, 'AI-Driven Financial Transparency and Corporate Governance: Enhancing Accounting Practices with Evidence from Jordan' (2025) 17(9) *Sustainability* 3818, doi:10.3390/su17093818

33. Spalević Ž and others, 'The Role of Artificial Intelligence in Judicial Systems' (2024) 12(3) International Journal of Cognitive Research in Science Engineering and Education 561, doi:10.23947/2334-8496-2024-12-3-561-569

34. Strikaitė-Latušinskaja G, 'The Rule of Law and Technology in the Public Sector' (2023) 6(1) Access to Justice in Eastern Europe 1, doi:10.33327/AJEE-18-6.1-a000104

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Keywords: *Accountability; Corporate Governance; Financial Fines; Artificial Intelligence; Sustainable Development.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ ШТУЧНОГО ІНТЕЛЕКТУ В ПОКРАЩЕННІ КОРПОРАТИВНОГО УПРАВЛІННЯ ТА ДОСЯГНЕННІ СТАЛОГО РОЗВИТКУ

Мохамед Ель-Еріан, Діна Імад, Сузалі Сулайман, Енас Кутішат та Мая Хатер*

АНОТАЦІЯ

Вступ. *Корпоративне управління є важливою основою для підвищення ефективності діяльності, підзвітності та етичної поведінки в корпораціях. Новітні технології, зокрема штучний інтелект (ШІ), проникли в традиційні моделі корпоративного управління, практики управління та процеси ухвалення рішень завдяки своїм великим можливостям. Однак їх впровадження є значним викликом через невирішені правові та етичні питання, що стосуються антропоцентричної моделі права, управління та ШІ, зокрема у сфері судових систем, спрямованих на зменшення корпоративних зловживань*

завдяки вдосконаленню корпоративного управління та підвищенню прозорості у вирішенні корпоративних спорів.

Методи. *У статті використовується аналітичний та порівняльно-правовий метод. Метою роботи є аналіз концептуальних основ штучного інтелекту (ШІ) та корпоративного управління, представлення відповідного законодавства та нормативних актів в Об'єднаних Арабських Еміратах (ОАЕ), а також надання порівняльно-правового аналізу окремих структур та міжнародних показників, щоб зрозуміти, як ШІ може бути використаний для того, щоб вдосконалити системи управління та сприяти сталому розвитку.*

Результати та висновки. *У цій статті стверджується, що впровадження інструментів ШІ, таких як прогностична аналітика, автоматизовані аудити та електронні методи розкриття інформації, може підвищити корпоративну прозорість, підзвітність та ефективність, що в такий спосіб сприятиме сталому розвитку. Однак деякі проблеми залишаються невирішеними, такі як конфіденційність, алгоритмічна упередженість, недоліки у підзвітності та проблема «чорної скриньки», які можуть вплинути на довіру та залежність від управління на основі ШІ. У цій статті висловлюється припущення, що ШІ може бути корисним правовим та технологічним інструментом для сталого розвитку, якщо він повністю інтегрований у корпоративне управління. Однак, для підтримки прозорості та підзвітності, це нововведення має супроводжуватися змінами у межах чинного правового регулювання щодо підзвітності та етики.*

Ключові слова. *Підзвітність; корпоративне управління; фінансові штрафи; штучний інтелект; сталий розвиток.*

ABSTRACT IN ARABIC

مقال بحثي

دور الذكاء الاصطناعي في تعزيز حوكمة الشركات وتحقيق التنمية المستدامة

محمد العريان، ودينا عماد، وسوزالي سليمان، وإيناس قطيشات، ومايا خاطر*

الملخص

الخلفية: تُعد حوكمة الشركات إطارًا أساسيًا لتعزيز كفاءة الأداء، والمساءلة، والسلوك الأخلاقي داخل الشركات. وقد تسللت التقنيات الناشئة، ولا سيما الذكاء الاصطناعي، إلى نماذج حوكمة الشركات التقليدية، وممارسات الإدارة، وعمليات اتخاذ القرار، وذلك بفضل قدراتها الهائلة. غير أن تطبيق هذه التقنيات يواجه

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تحديات كبيرة نتيجة قضايا قانونية وأخلاقية لم تُحسم بعد، تتعلق بالنموذج الإنساني المتمركز حول الإنسان في القانون والحوكمة والذكاء الاصطناعي، ولا سيما فيما يتعلق بالأنظمة القضائية، وذلك بهدف الحد من المخالفات المؤسسية نتيجة تحسين حوكمة الشركات وتعزيز الشفافية في تسوية النزاعات المؤسسية.

المنهجية: يعتمد البحث المنهج التحليلي والمقارن في المجال القانوني، حيث يسعى إلى تحليل الأساس المفاهيمي للذكاء الاصطناعي وحوكمة الشركات، واستعراض التشريعات واللوائح ذات الصلة في دولة الإمارات العربية المتحدة، وتقديم تحليل قانوني مقارن لأطر مختارة ومؤشرات دولية، من أجل فهم الكيفية التي يمكن من خلالها توظيف الذكاء الاصطناعي لتعزيز أنظمة الحوكمة والمساهمة في تحقيق التنمية المستدامة.

النتائج والاستنتاجات: تفترض هذه الدراسة أن إدخال أدوات الذكاء الاصطناعي، مثل التحليلات التنبؤية، وعمليات التدقيق الآلي، ووسائل الإفصاح الإلكتروني، من شأنه أن يعزز شفافية الشركات، والمساءلة، والكفاءة، بما يسهم في دعم النمو المستدام. ومع ذلك، لا تزال هناك بعض القضايا العالقة، مثل الخصوصية، والتحيز الخوارزمي، وأوجه القصور في المساءلة، ومشكلة "الصندوق الأسود"، والتي قد تؤثر في موثوقية أنظمة الحوكمة القائمة على الذكاء الاصطناعي وإمكانية الاعتماد عليها. وتخلص الدراسة إلى أن الذكاء الاصطناعي يمكن أن يشكل أداة قانونية وتقنية فعّالة لدعم التنمية المستدامة عند دمجه بشكل كامل في حوكمة الشركات، إلا أن هذا الابتكار يجب أن يصاحبه تعديل الأطر القانونية القائمة المتعلقة بالمساءلة والأخلاقيات، بما يضمن الحفاظ على الشفافية وتحقيق المساءلة.

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Research Article

SUBJECTIVE ARBITRABILITY IN PUBLIC-PRIVATE CONCESSION DISPUTES: LEGAL FRAMEWORK OF THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

Background: *Concession agreements are becoming increasingly important in Central Asian countries as a contractual mechanism for interaction between state authorities and a foreign private entity. Furthermore, this question is becoming increasingly relevant as foreign investment in this region becomes more appealing. In this context, international arbitration, while maintaining sufficient neutrality, is becoming increasingly relevant for resolving disputes under such agreements.*

Furthermore, the issue of arbitrability in public-private arbitration disputes warrants additional attention, given the underexplored nature of the concept and its regulation. In this regard, the review of the arbitration framework in Kazakhstan serves a dual purpose: providing a foreign investor with information to better understand this issue and identifying areas for improvement in the current regulation. Such alignment is vital to maintaining legal certainty and enhancing this region's attractiveness as a destination for foreign investment, particularly in sectors reliant on long-term, capital-intensive partnerships.

Method: *This study is empirically grounded in a comprehensive examination of national legislation governing concession agreements and commercial arbitration, and Kazakhstan's jurisdiction, with particular emphasis on the extent and nature of limitations on subjective arbitrability in disputes arising from concession agreements. Furthermore, this analysis is supplemented by a comparative legal method that examines arbitration frameworks in other relevant jurisdictions. In this context, a comparative analysis is undertaken to explore the similarities and differences in the legal regulation of Kazakhstan and Kyrgyzstan. In addition, the research applies logical and legal reasoning to identify the most relevant legal doctrines that intersect with the problem of arbitrability in concession agreement disputes.*

Results and conclusion*: The findings indicate a lack of legal certainty in Kazakhstan's legislation regarding the subjective arbitrability of disputes involving state entities under concession agreements. To minimize the risk of arbitration proceedings being challenged by Kazakhstan based on grounds of subjective arbitrability, which may lead to concerns among foreign investors, it is recommended that the Kazakh arbitration legislation be amended to establish a clear requirement for state entities to obtain the prior consent of a duly authorized government agency before concluding arbitration agreements. In addition, legislation should clearly define the procedure and time frame for obtaining such consent to ensure consistency and legal predictability. Given that the concession agreement model is widespread in Kazakhstan, this legislative change will increase foreign investors' trust, potentially leading to higher investment inflows. At the same time, at the current stage, it is advisable for foreign companies considering investing in Kazakhstan to specify the seat of arbitration, which minimizes the impact of Kazakhstan legislation governing the legal capacity of state entities to enter into arbitration agreements or as a more preferable option to require the state entity to obtain the prior consent of an authorized government agency to enter into such agreements and participate in arbitration proceedings.*

1 INTRODUCTION

A society can flourish only in a corridor where the state and society restrain each other. This statement was the main paradigm of the idea of sustained liberty presented by Daron Acemoglu and James A. Robinson.[1] This topic is related to maintaining a certain balance in the relations between the state and society, which will restrain state authorities from exceeding their powers. Courts and the media play an important role in this limitation.

However, in authoritarian countries, this balance is disrupted, and the court system is directly dependent on political will. In this regard, especially for countries where an influx of foreign investment is required due to significant natural resource reserves or the need to improve infrastructure, the ability to attract independent, private, inclusive institutions is of

1 Daron Acemoglu and James A Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (Penguin Press, 2019).

paramount importance. Concerning the resolution of disputes between public and private parties to the concession agreement, international commercial arbitration, with a neutral jurisdiction serving as the seat of arbitration, is an effective and flexible means of resolving such disputes. In this context, this dispute-resolution mechanism is a definite guarantee of the return of contributions.

Given the practical significance of international commercial arbitration in providing such legal safeguards, the arbitrability of disputes, particularly those involving a foreign investor and a state acting in its sovereign capacity, is a fundamental issue at the outset of any arbitration proceedings. In this regard, a correlation can be observed between the nature of a state's political regime and the structure and development of its arbitration legislation, which may, in turn, influence the scope and effectiveness of international arbitration as a dispute resolution mechanism.

Attracting foreign investment is crucial for the economic development of many states, particularly those rich in natural resources or in need of substantial infrastructure improvements and capital-intensive projects. Among the factors influencing investment decisions, legal risk plays a central role, and the independence of the host country's judiciary is a key indicator. This judicial independence is often shaped by the prevailing political regime; in authoritarian contexts, concerns over potential interference by domestic courts in investor–state relations become especially pronounced. To mitigate such risks, international arbitration serves as a reliable and neutral dispute-resolution mechanism, enabling foreign investors to enter into contractual relationships with state entities despite political or economic uncertainties. However, the effectiveness of international arbitration can be undermined if national courts in the host state interfere in the arbitral process following the conclusion of an arbitration agreement. Such interference, particularly when it compromises the arbitral forum's exclusivity, introduces significant legal uncertainty and may adversely affect the perceived level of protection afforded to foreign investments.

It is important to highlight Patrick C. Osode's developments in connection with the implementation of the arbitration mechanism in the state contract.[2] He argued that it is inequitable for international commercial arbitrators, as well as the relevant governments and institutions, to consistently undervalue the "right to development", the significance of national interests, and the pressing developmental needs that are particularly pronounced in the domestic contexts of developing countries. This concern is especially pertinent given the historical precedent wherein currently developed nations, during their own phases of economic and social transformation, were not subject to similar constraints. At that time, efforts to curtail state regulatory authority or to restrict its capacity to act in pursuit of public welfare were not endorsed. However, regardless of the historical concept of interaction between developed and developing countries, it can be stated that, for developing countries,

2 Patrick C Osode, 'State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective' (1997) 30 Comparative and International Law Journal of Southern Africa 37.

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one of the most critical factors in attracting foreign direct investment is establishing sufficient trust among international investors. In this context, deficiencies or ambiguities in the legal and regulatory framework that may create perceived risks to investment security can significantly undermine investor confidence.

The developing countries in Central Asia are typical examples of the above description, both in their post-Soviet past, with the preservation of some features of this state system, and in their need to develop legislation to adapt the commercial paradigm and attract foreign investment. Undoubtedly, in this context, arbitration legislation is one of the elements of commercial law that requires adaptation to the requirements of foreign business to increase investment inflows.

In this context, the Republic of Kazakhstan, as one of the developing countries the Central Asia, is an excellent example for this research given the similar system of government with other countries in this region due to the presence of a common territorial border, similar features in political, legal and economic systems, as well as the establishment of one of the main policy directions in the form of attracting and increasing the flow of foreign investment.[3] Historically, Kazakhstan has been committed to increasing foreign investment inflows and has joined all major investment and arbitration conventions, including the New York Convention of 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).[4]

In the statement of the Nation Address dated 8 September 2025, President Kassym-Jomart Tokayev[5] emphasized that, despite the intensifying global competition for capital, attracting large-scale investment remains a top priority for Kazakhstan's development. He stressed the need to initiate a new investment cycle, acknowledging that the existing investment policy framework has not been sufficiently effective.

In the field of socio-economic policy, Kazakhstan's commitment to achieving this goal is confirmed by the adoption of the Concept of Civil Society Development for 2020-2025. The official purpose of this document is to strengthen cooperation between the state, business, and civil society, as well as to promote the participation of society and expert communities

3 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&pos=6;-106> accessed 14 April 2025.

4 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) [1959] UNTS 330/3; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) [1968] UNTS 575/159.

5 Kassym-Jomart Tokayev, 'Kazakhstan in the Era of Artificial Intelligence: Current Challenges and Solutions through Digital Transformation: Address of the President to the People of Kazakhstan' (*President of the Republic of Kazakhstan*, 8 September 2025) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-to-the-people-of-kazakhstan-kazakhstan-in-the-era-of-artificial-intelligence-current-challenges-and-solutions-through-digital-transformation-1083029> accessed 14 September 2025.

in relevant integration processes.[6] At the same time, progress in this area is determined by the continuous development and modernization of the regulatory framework.

Furthermore, to inform foreign investors, the OECD's Integrity Review of Kazakhstan found that Kazakhstan has demonstrated a strong commitment to addressing corruption as a strategic priority under its economic development policy, recognizing that a coherent and comprehensive integrity system is essential for economic growth. However, despite Kazakhstan's strong efforts to solve corruption issues, it should be noted that key anti-corruption institutions are still subject to undue interference.[7]

Consequently, this article will present an assessment of Kazakhstan's potential state party status to the concession agreement with foreign entities from the perspective of subjective arbitrability.

The issue of arbitrability in contract-based arbitration is complicated by the frequent use of broadly formulated arbitration clauses in concession agreements. Considering some research developments in taxation disputes, it is intellectually unsatisfactory to assert that a dispute becomes arbitrable merely by virtue of the parties' consent.[8] In practice, even where a state authority has signed such an agreement, this does not preclude the possibility that it may later contest the arbitrability of the dispute both at the commencement of arbitration proceedings and at the stage of recognition and enforcement of the arbitral award.

Summarizing research trends in this area, the regulatory restrictions of a state organization regarding the conclusion of an arbitration agreement are based on the traditional doctrine, according to which the transfer of disputes to a court not controlled by the state undermines sovereign authority.[9] Consequently, the potential invalidity of the arbitration agreement as a result of such regulatory restrictions on subjective arbitrability may lead to a decrease in the level of trust of foreign investors and investment inflows. This risk persists despite the presence of treaty-based arbitration mechanisms and Kazakhstan's participation in numerous bilateral investment treaties. In practice, commercial arbitration often serves as the first-line mechanism for foreign investors to protect and restore their rights, making its effectiveness and legal certainty critically important.

The main aim of this research article is to analyze the concept of subjective arbitrability, considering the specifics of International Public-Private contract-based Arbitration under

6 Decree of the President of the Republic of Kazakhstan No 390 of 27 August 2020 'On approval of the Concept for the Development of Civil Society in the Republic of Kazakhstan' [2020] SAPP RK 33-34/249.

7 OECD, *OECD Integrity Review of Kazakhstan: Advancing Integrity for Economic Development* (OECD Public Governance Reviews, OECD Publishing 2025). doi:10.1787/d705d02f-en.

8 Lauren Brazier, 'The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration' (2015) 32(1) Journal of International Arbitration 1. doi:10.54648/joia2015001.

9 Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 26.

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concession agreements. Secondly, to provide an analysis of the legal framework of the Republic of Kazakhstan regarding the subjective arbitrability of disputes between a private entity and the state, represented by a government agency or a state-owned enterprise (SOE). Special attention will be paid to the model of the concession agreement, which has become widespread in the development of infrastructure projects and mining in Kazakhstan. As a result, this analysis will be based on the conceptual foundations of subjective arbitrability from the scientific and practical perspectives.

Considering the foregoing, this article seeks to address the following research questions:

For the Republic of Kazakhstan: How should the current legislative framework governing subjective arbitrability be reformed to enhance legal certainty and increase foreign investor confidence?

For foreign private entities: How should an arbitration clause as part of a concession agreement be effectively drafted to prevent potential challenges by the Republic of Kazakhstan based on issues of subjective arbitrability?

The structure of this article is based on an approach in which the analysis of the above research questions, from the legal framework and judicial practice of Kazakhstan, presented in section 5, requires the preliminary formation of the relevant conceptual framework. Consequently, first, consideration of the concept and nature of international public-private contract-based arbitration enables the definition of a research field in which the issue of subjective arbitrability is examined.

Second, disclosure of the specifics of the concession agreement model enables the assessment of the emerging legal relations between the public and private parties to the agreement, thereby explaining the relevance of this contractual mechanism to the issue of subjective arbitrability.

Finally, analyzing the issue of subjective arbitrability in public-private concession disputes within Kazakhstan's legal framework of is impossible without considering the nature of this concept, as well as international approaches and arbitration practice. In this regard, these questions are presented in the following sections of this research article.

2 INTERNATIONAL PUBLIC-PRIVATE CONTRACT-BASED ARBITRATION

What are the primary benefits of international arbitration? For which party to a dispute under concession agreements are such benefits significant? Some scholars argue that international arbitration functions as a tool of neocolonialism, primarily safeguarding the interests of foreign investors from economically developed nations at the cost of less developed host states. This perspective suggests that the arbitration system reinforces global economic hierarchies by prioritizing investor protection over the regulatory autonomy and developmental needs of the Global South. At the same time, establishing

such a mechanism as an alternative to the host nation's national court system provides an additional safeguard for the preservation of investments by foreign investors. In this context, arbitration is an effective form of resolving cross-border commercial disputes, not only because it has certain unique features such as confidentiality and autonomy of the parties, but also from the point of view of procedural issues, the choice of neutral venues for arbitration proceedings prevails.[10] This, in turn, contributes to an improvement of the investment climate within the state. In the long run, the host state gains even more benefits, as it not only enhances the investment climate but, to some degree, is compelled to align its domestic legislation and economic practices with international norms and standards if it has not previously followed such standards.

By its nature, international commercial arbitration (contract-based) from a public-private arbitration perspective is a private legal mechanism grounded in an arbitration agreement between the state and the foreign entity, in which both parties operate on an equal footing. Despite it being a private dispute resolution mechanism, it has some degree of support from states that are bound by signed international conventions and agreements.[11]

At the same time, the jurisdiction of international investment arbitration (treaty-based) is founded on a bilateral investment treaty (BIT) established between the host state and the investor's home state. Consequently, treaty-based disputes concern matters related to the violation of the agreed investment regime in the host state.[12] One of the distinguishing features of international investment arbitration from commercial arbitration is that a foreign investor does not participate in the negotiation of the BIT's terms, since these are negotiated at the level of the contracting states. Another difference is that although inter-state arbitration is governed by the rules of public international law, there is no common institutional framework that could support or oversee the proceedings, as in the case of international commercial arbitration.[13]

The so-called umbrella clause, typically found in the provisions of BITs, acts as a safeguard for the investor's rights granted under a private investment agreement with the host state and protects against breaches by the state, such as through the enactment or modification of legislation or other governmental actions. In parallel, the conclusion of investment contracts gives the state the right to ensure the fulfillment of obligations assumed by the

10 Steve Ngo, 'International Commercial Arbitration for Belt and Road Initiative – Some Thoughts on China, Singapore and Hong Kong SAR as Dispute Resolution Locales' (China-ASEAN Civil and Commercial Law Forum: Proceedings Paper, Guangxi University for Nationalities, Law School, 20 December 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323302 accessed 14 April 2025.

11 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015).

12 Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 23.

13 Jacomijn J van Haersolte – Van Hof and Erik V Koppe, *International Arbitration and the Lex Arbitri* (Grotius Centre Working Paper Series 2014/33-IEL, Grotius Centre for International Legal Studies, Universiteit Leiden 2014) 10.

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investor through arbitration, most often under the International Centre for Settlement of Investment Disputes (ICSID), and contractual obligations of investors can serve as the basis for counterclaims by states in (treaty) arbitration between investors and the state.[14]

Another difference concerns the level of transparency in these arbitration mechanisms. For instance, the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration applies to investor-state arbitration initiated under the UNCITRAL Arbitration Rules in accordance with an international treaty concluded on or after 1 April, unless otherwise agreed by the parties.[15]

Disputes within the framework of international investment arbitration also have some specifics on the issue of arbitrability.[16] In cases such as *KT Asia Investment Group B.V. v. Republic of Kazakhstan,*[17] and *Caratube International Oil Company LLP v. Republic of Kazakhstan*,[18] the respondent state challenged the tribunal's jurisdiction by questioning whether the claims met the substantive requirements of an "investment" including involvement of a real economic contribution, as well as by the nature of dispute and international treaty's protection scope.

In *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*[19] the tribunal noted that Kazakhstan remains free to amend its domestic legislation regarding internal procedures, without automatically affecting its consent to arbitration under investment agreements. In particular, the tribunal found that even if there were changes in domestic legislation after the investment, Kazakhstan's consent to arbitration of disputes related to investments made during the term of the agreement remains in force, namely, the consent extended to pre-existing investments.

Thus, in international contract-based commercial arbitration, emphasis is placed on the arbitration agreement itself and, in the case of state entity participation in the agreement, on obtaining the consent of an authorized state body to conclude it, which

14 Sondra Faccio, 'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' (2023) 38(3) ICSID Review – Foreign Investment Law Journal 625. doi:10.1093/icsidreview/siad026.

15 UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration* (UN 2014).

16 UNCTAD, 'Investment Dispute Settlement Navigator: Kazakhstan' (*UN Trade & Development (UNCTAD): Investment Policy Hub*, 2025) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/107/kazakhstan/investor> accessed 14 April 2025.

17 *KT Asia Investment Group BV v Republic of Kazakhstan* Case No ARB/09/8 (ICSID, 17 October 2013) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/358/kt-asia-v-kazakhstan> accessed 14 April 2025.

18 *Caratube International Oil Company LLP v Republic of Kazakhstan* Case No ARB/08/12 (ICSID, 5 June 2012) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/297/caratube-v-kazakhstan> accessed 14 April 2025.

19 *AES Corporation and Tau Power BV v Republic of Kazakhsta*n Case No ARB/10/16 (ICSID, 1 November 2013) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/381/aes-v-kazakhstan> accessed 14 April 2025.

requires compliance with internal procedures. In contrast, international treaty-based investment arbitration, as noted above, is based on the treaties concluded between states and, consequently, operates at the public international level. In this regard, some arbitrability issues in international investment arbitration tend to focus on the scope and definition of an "investment" and the scope of protection under the international treaty, as shown in the above cases.

Despite their differences, both international commercial arbitration and investment arbitration share the primary goal of safeguarding foreign investments. In this regard, given that concession agreements typically provide for both types of international arbitration mentioned above, this key distinction sets this type of contract apart from others.

Given the existence of international investment agreements guaranteeing investment arbitration and the lack thereof in relation to commercial arbitration, it is important to note that a commercial arbitration dispute, based on an agreement between the parties, is more "vulnerable" to challenges to the jurisdiction of the arbitral forum in comparison to international investment arbitrations.

At the same time, a third category of dispute resolution mechanisms can be identified as applicable to disputes arising under concession agreement models. Notably, international dispute resolution expert Charles N. Brower introduced the term "investomercial arbitration" or contract-based public-private arbitration to describe this contract-based mechanism, which blends elements of both public and private law in resolving disputes between investors and states.[20] According to Brower, it is evident that contractual disputes involving both private and public entities inherently engage issues pertaining to both the private and public dimensions of economic regulation. Nevertheless, contract-based arbitration is frequently, and, in his view, erroneously classified solely as a form of international commercial arbitration, despite the evident interplay between public and private legal relations in such cases.[21]

Building upon Brower's conceptual framework, it is important to note that public-private contract-based arbitration in such contexts, by the nature of the dispute, is classified as commercial and does not entail the application of umbrella clauses typical of treaty-based arbitration. However, the involvement of the public sector introduces distinct legal considerations that differentiate these disputes from purely private commercial ones. These include issues regarding the arbitrability of disputes involving a government authority or SOE, and the applicability of sovereign immunity.

20 Charles N Brower, 'State Parties in Contract-Based Arbitration: Origins, Problems, and Prospects of Private-Public Arbitration' (2019) 1(2) ITA in Review <https://www.itainreview.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html> accessed 14 April 2025.

21 ibid

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In this regard, the following statements require discussion in this article:

1) The arbitrability of disputes arising from concession agreements is determined by the specific characteristics of this type of agreement and by legal interpretations and categorizations of arbitrability.

2) The implementation of this concept and features within the legislative frameworks of the jurisdictions under research.

Moreover, the reasons for outlining the conceptual framework of international public-private contract-based arbitration in this section, and for examining the article's topic within the context of this dispute resolution mechanism, have the following grounds:

Firstly, the key issue in international public-private contract-based arbitration is determining whether a state, as a subject of public law, can be a party to an arbitration agreement and, under what conditions, such an agreement will be recognized as valid and enforceable. In the context of the correlation of this issue with the legal system of Kazakhstan, this issue is directly related to the matter of subjective arbitrability, where obtaining the consent of an authorized government body to conclude an arbitration agreement is not limited to signing such an agreement, but must comply with the applicable mandatory norms of the legislation of Kazakhstan.

Secondly, the effective application of the arbitration mechanism and the stability of the legal regime for foreign companies depend on the legitimate possibility of obtaining the above consent of an authorized government body.

3 OVERVIEW OF THE CONCESSION AGREEMENT MODEL

Examining existing studies on investment arbitration, the traditional one-way nature of investment flows has led to a widely accepted conceptual distinction in international investment law between developed countries as "home" states and developing countries as "host" states. The most common legal basis for such investment arrangements is a contract between the state and the investor.

In this context, this agreement serves as an effective framework for contractual interaction between the state and the foreign investor. For the state, concessions primarily serve as a driver of the economy through infrastructure development and natural resource exploration. For foreign private organizations, such a predictable and structured framework helps them accumulate capital through investments.

The first conceptual framework for defining a concession agreement centers on its purpose and subject matter. From this perspective on the nature of a concession agreement, it should be noted that one form of this contractual arrangement is a contract between a government entity or SOE and a private party, in the form of an international transaction governed by private law with an administrative aspect.

Under Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,[22] the defining characteristic of a concession is the granting of the right to operate works or services, which necessarily entails the transfer of economic operational risk to the concessionaire. This risk includes the possibility that the concessionaire may not be able to recover its investment and operating costs under normal operating conditions, even if some of the risks remain with the contracting authority.

Concession agreements can also be defined as reciprocal legal agreements through which a state delegates the exercise of certain sovereign rights or functions to a foreign private entity or consortium. In doing so, the delegated party takes part in carrying out public functions and, as a result, obtains a special or advantageous status compared to other private law actors within the state's jurisdiction. The private party as a service provider earns a substantial portion of its income directly from the end users, primarily through various forms of fees and unlike in a standard service agreement where the provider is paid by the contracting authority and does not assume any operational or financial risk, in a service concession, the provider bears the risk associated with the service's performance and profitability.[23]

In this context, the international nature of a contract involves several aspects. First, regarding the agreement's subjective content, one of the parties is an international investor from a foreign jurisdiction. In this regard, this article explores scenarios in which a foreign investor operates as a private party, thereby analyzing the international concession agreement model from the perspective of the parties involved.

Second, even though the law of the host state governs concession agreements as substantive law, this does not preclude the possibility that such a contractual arrangement may be considered international. In the *Texaco Overseas Petroleum Co. v. Libya*[24] case, it was concluded that whenever general principles of law are referred to in the context of international arbitration, this has always been considered a sufficient basis for the international nature of a contract. While the contract itself is based on Libyan law, the court observed that Libyan law does not preclude the application of international law and that both should be applied to ensure compliance with Libyan and international law.

From an implementation perspective, concession projects are primarily carried out in sectors involving natural resources and in the development of construction initiatives to enhance the state's infrastructure. In the natural resources extraction sector, specifically the oil and gas industry, a common contractual form is a service contract or a production

22 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 'on the award of concession contracts' [2014] OJ L 94/1.

23 Christoph Ohler, 'Concessions' *Max Planck Encyclopedia of Public International Law* (2013) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1512> accessed 14 April 2025.

24 *Texaco Overseas Petroleum Co v Libya* (Int'l Arbitral Award, 19 January 1977) [1977] J Droit Int'l 104/350; tr [1978] ILM 17/1 <https://www.casebriefs.com/blog/law/international-law/international-law-keyed-todamrosche/chapter-14/texaco-overseas-petroleum-co-v-libya/> accessed 1 April 2025.

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sharing agreement (PSA). The PSA model is a contractual arrangement between a sovereign state and a private investor, in which the investor undertakes, at their own financial risk and expense, the exploration, development, and production of petroleum resources within a defined time frame. In exchange, the state grants the investor a proportionate share of the extracted petroleum. Typically, the investor is initially allocated "cost oil," to recover exploration and development expenditures, followed by "profit oil" also referred to as "compensation oil" as remuneration for production activities, which the investor may then sell on the international market.[25]

This mechanism distinguishes a PSA from a service contract where the investor is compensated for services rendered, while the host state retains greater control and oversight over the exploration and development of its natural resources. In this context, under a service contract, international oil companies, as the investor, receive predetermined compensation rather than a share of profit oil, in contrast to the arrangement under PSAs.[26]

Historically, the negotiation and renegotiation of major concession agreements inherently involve political dynamics, as they are influenced by the relative bargaining power of the foreign investor and the host nation. In cases where there are significant shifts in this power balance, the outcomes of such agreements may be affected.[27]

The second conceptual approach to defining a contract focuses on the specific characteristics that distinguish it from other contractual agreements. In this context, such contracts can be conceptualized as economic development contracts, based on several defining characteristics:

(i) they are not limited to isolated transactions involving the sale of goods or the provision of services, but instead aim to facilitate broader economic engagement through the transfer of investment and technical expertise to developing countries, particularly in areas such as mineral resource exploration, research, and the construction of industrial infrastructure on a turnkey basis, thereby contributing to the host country's economic and social development;

(ii) their typical long-term nature necessitates sustained and cooperative interaction between the state and the private investor; and

(iii) the inclusion of stabilization clauses serves to mitigate the risks associated with changes in the host state's legal or regulatory framework, thereby offering investors protection

25 Chukwuma Samuel Okoli, 'Production Sharing Agreements and Licences: A Distinction Without a Difference?' (2012) 282 International Energy Law Review 1. doi:10.2139/ssrn.2171506.

26 Rdhwan Shareef Salih and Akram Yamulki, 'Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts' (2020) 101 Journal of Law, Policy and Globalization 165. doi:10.7176/jlpg/101-17.

27 Theodore H Moran, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interest' (1974) 7(2) Vanderbilt Journal of Transnational Law 197.

against legislative instability or unilateral government actions that could lead to the annulment or termination of the agreement.[28]

Another important aspect of the concession model is the level of state attribution, especially if the public partner in the agreement is a state-owned company. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (Articles 4, 5 and 11) establishes several criteria when the conduct of a state-owned company is attributed to the state, namely (i) if the company qualifies as a public authority under domestic law, (ii) if it is legally authorized to exercise elements of a public authority and acts in that capacity, (iii) or if the state subsequently recognizes and takes over the conduct of the company as its own, even if the company is otherwise separate from the state.[29]

To summarize the above, the correlation between the concession agreement model and subjective arbitrability in Kazakhstan's legal framework is evident in the requirement that successful implementation of concession projects requires not only economic and infrastructural validity but also legal predictability. At the same time, the disclosure of the nature of the concession agreement in this section, as a long-term public-private contract with the distribution of rights, duties, and risks between the parties, creates relevance for applying arbitration as a commercial dispute resolution mechanism, which may be possible under the subjective arbitrability test.

4 SUBJECTIVE ARBITRABILITY IN INTERNATIONAL COMMERCIAL ARBITRATION

In simple words, a dispute is arbitrable if it can be submitted to an arbitration tribunal. There is no answer in international law about which legal framework regulates the matter of dispute arbitrability.[30] Furthermore, given the lack of guidance on this issue in the New York Convention, according to the commentary to this Convention, national courts should determine whether a particular subject of dispute can be settled through arbitration, either by referring to the legislation applicable to the arbitration agreement, or by referring to their own legislation.[31]

The position of Gary Born should be noted in respect of Article II of the New York Convention regarding the recognition of international arbitration agreements by the

28 Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (2nd edn, CUP 2021) 54.

29 International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001* (UN 2005) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 1 April 2025.

30 Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 205.

31 UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (UN 2016).

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Contracting State.[32] According to his opinion, a Contracting State cannot evade its obligations to recognize international arbitration agreements by adopting special rules of national legislation that invalidate such agreements, for instance, in terms of obtaining consent to conclude an arbitration agreement since such actions are incompatible with the obligations of the state with respect to good faith and the principles of estoppel applicable as general principles of law and required by the New York Convention. This issue may also be influenced by the separability doctrine, which implies (i) the invalidity of the main agreement does not necessarily mean the invalidity of the arbitration agreement, and (ii) the arbitration agreement and the main agreement may be governed by various applicable laws.[33] In this regard, before considering this issue, it is important to understand the nature and conceptual approaches of subjective arbitrability.

The possibility of resolving a dispute through arbitration is inherently more procedural than substantive, representing a preliminary issue that must be resolved before the arbitration tribunal can consider the case on its merits. If it is determined that the dispute cannot be resolved by arbitration or that the arbitration tribunal lacks jurisdiction, the proceedings cannot continue. Another key aspect that highlights the procedural nature of dispute arbitrability is the legal framework governing the concept. In addition, the choice of the applicable law, particularly the legislation of the seat of arbitration, plays a crucial role in this context.

In this regard, when considering the participation of a public partner in a concession agreement, the concept of arbitrability of a dispute includes three key elements: (i) the legal capacity of a state body or organization to conclude an arbitration agreement and be bound by it under the concession agreement (subjective arbitrability), (ii) the objective possibility of arbitration or the nature of the dispute arising in connection with a concession agreement that may be submitted to international commercial arbitration (objective arbitrability), and (iii) the jurisdiction of the arbitral tribunal in relation to disputes over concession agreements.

In this context, it is important to determine which legal system may be applicable to assess the possibility of arbitrating disputes arising from the concession agreement. The definition of this issue is crucial to ensure legal certainty and effective enforceability of arbitration agreements.

The first option is to consider the legislation of the jurisdiction in which the award will be enforced. According to paragraph 2 (a) of Article V of the 1958 New York Convention,[34] recognition and enforcement of an arbitral award may be refused if the dispute cannot be resolved through arbitration in accordance with the laws of the state of the place of enforcement of the arbitral award. Although the above does not explicitly

32 Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).
33 ibid.
34 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 4).

indicate that the law of the jurisdiction in which an arbitral award is enforced governs the question of whether a dispute is subject to arbitration, it can be concluded from the above that the definition of "that state" refers to the jurisdiction in which the award will be enforced, which must be consistent with the possibility of arbitration proceedings on the issue under consideration.

The silence of international arbitration conventions and national laws on the applicable law in such cases has led to conflicting opinions. It is accepted that arbitrators should evaluate the possibility of arbitration in accordance with the legislation applicable to the substance of the dispute. However, tribunals have sometimes considered this issue from the perspective of the law of the seat of arbitration, since arbitrators' powers of derive from that law. [35] Furthermore, it can be argued that the determination of the possibility of resolving a dispute through arbitration should be carried out at the initial stage of the arbitration proceedings by the arbitral tribunal itself and not postponed to the enforcement stage. In cases where national courts are tasked with assessing the possibility of arbitration, the court at the arbitration seat often has jurisdiction. Consequently, such a court, as a rule, evaluates the possibility of arbitration in accordance with the substantive and procedural laws of the seat of arbitration. In this regard, the legislation of the seat of arbitration may be used to determine the arbitrability of the dispute as a second option.

Moreover, as Professor Bermann indicated, the concept of dispute arbitrability covers a wide range of issues, including, but not limited to: 1) the existence of a valid arbitration agreement; 2) the possibility of enforcement of the arbitration agreement; 3) the binding nature of the agreement for the parties and whether the subject of the dispute falls under the arbitration agreement.[36] In this context, the legal framework governing the arbitration agreement plays a crucial role, especially in terms of subjective arbitrability, namely the legal ability of the party to conclude an arbitration agreement. This consideration is particularly relevant in the context of concession agreements, when one of the contracting parties is represented by a government agency, organization, or SOE.

Furthermore, according to paragraph 1 (a) of article V of the 1958 New York Convention, recognition and enforcement of the award may be refused if the parties to the arbitration agreement did not have legal capacity in relation to the conclusion of the arbitration agreement according to the law governing their legal capacity. In this case, it means that the party lacks the legal capacity under the law applicable to it to conclude an arbitration agreement. Such applicable law is understood as the law of a legal entity with respect to its nationality. Therefore, in relation to a state entity, it is necessary to consider the applicable

35 Penny Madden KC and Ceyda Knoebel, 'Arbitrability and Public Policy Challenges' in J William Rowley KC (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (4th edn, Global Arbitration Review, Law Business Research Ltd 2025) 35.

36 George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2011) 37(1) Yale Journal of International Law 8.

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law of the jurisdiction to which the organization belongs. Some Kazakh studies are also inclined towards this approach. Thus, considering the strict conflict-of-laws binding of the civil legal capacity of a legal entity, it is assumed that the Kazakh regulator, regarding the issue of obtaining consent to conclude an arbitration agreement, hardly intended to establish appropriate requirements only for those cases when arbitration proceedings and arbitration agreements are regulated by the legislation of the Republic of Kazakhstan.[37]

In such cases, the applicable law determines not only the formal validity of the arbitration agreement but also the representative' powers acting on behalf of the state. Accordingly, it should be emphasized that the three legal frameworks mentioned above are not mutually exclusive; instead, they function in a complementary and integrated manner.

Based on the above, the legislation of the jurisdiction covering issues of subjective arbitrability can be considered the law of the place of enforcement of the arbitration award, the law of the seat of arbitration, and the legal capacity of the party to enter into an arbitration agreement.

One of the well-known arbitration cases on the issue of challenging subjective arbitrability under the concession agreement dispute by a state party based on the lack of consent to sign an arbitration agreement is the case of *Malicorp Limited v. the Arab Republic of Egypt*.[38] The representative of Egypt referred to Article 1 of Egypt's Arbitration Law No. 27 of 1994, according to which the signing of an arbitration agreement as part of a concession agreement requires the consent of the Minister or other authorized official with respect to a public juridical person. However, the Tribunal refused this request, citing that the signatory was a public authority of Egypt (the Public Civil Aviation Authority), established by Presidential Decree No. 2931 of 1971. Given that the Public Civil Aviation Authority is under the supervision of the State Minister for Civil Aviation matters, the Tribunal confirmed that the Chairman of the Public Civil Aviation Authority, who signed every page of the concession agreement, including the arbitration clause, had full authority to sign it. In this regard, despite such a positive arbitration practice, which, in our opinion, obtaining consent to sign an arbitration agreement was implied under applicable law, the risk of a public party challenging the tribunal's jurisdiction under the concession agreement dispute on this basis remains.

37 Valikhan Shaikenov and Ardak 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 Institute of Legislation and Legal Information of the Republic of Kazakhstan 121.

38 *Malicorp Ltd (UK) v the Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyptian Airports Company* Case No 382/2004 (CRCICA, 7 March 2006) <https://www.italaw.com/cases/4400> accessed 1 April 2025.

5 LEGAL FRAMEWORK OF THE REPUBLIC OF KAZAKHSTAN AND COMPARATIVE ANALYSIS WITH THE KYRGYZ REPUBLIC JURISDICTION

It should be noted that the development of the arbitration legal framework in Kazakhstan has become quite relevant. For instance, according to previous studies on Kazakhstan's regulation of international arbitration, Kazakhstan should more actively implement and adapt model documents of international law, such as the UNCITRAL Model Law on International Commercial Arbitration (as amended 2006). This is justified by the possibility of recognizing the conclusion of an arbitration agreement in electronic form, considering the current digitalization of processes.[39]

A clear example of objective arbitrability is found in the restrictions established by the Law of the Republic of Kazakhstan "On Arbitration"[40] ("Law on Arbitration"). It is noteworthy that this law does not define "arbitrability" but instead focuses on delineating the jurisdictional competence of the arbitration tribunal. According to Article 8 of this Law, certain categories of disputes are excluded from the scope of arbitration proceedings. These include disputes affecting the interests of minors, individuals recognized as legally incompetent or with limited legal capacity, issues related to rehabilitation and bankruptcy, as well as disputes arising from personal non-property relations.

As for subjective arbitrability, the Law on Arbitration stipulates that disputes between government agencies and quasi-public sector entities are not subject to arbitration. At the same time, within the framework of the concession agreement, the state party participates exclusively as a contracting party, and its counterparty is a private party. However, the Republic of Kazakhstan's arbitration legislation imposes certain limitations on the legal capacity of state entities in concession agreements. Consequently, under the first part of paragraph 10 of article 8 of the Law on Arbitration, the arbitration tribunal cannot consider disputes between individuals and or legal entities of the Republic of Kazakhstan and government agencies or SOEs, except in cases where the competent authority has consented to an arbitration agreement.

Furthermore, the above-mentioned paragraph 10 of article 8 contains the second part, under which government agencies or SOE must send a request to the authorized body of the relevant industry (in relation to republican property) or the local executive body (in relation to communal property) on giving consent to executing such an agreement, indicating the projected costs of the arbitration. In this case, the legislator did not clearly distinguish whether the second part of paragraph 10 of article 8 applies to disputes between

39 Azamat Nurtan and Maygul Abilova, 'Enforcement of Foreign Arbitral Awards in Kazakhstan: A Comparative Legal Analysis of European and Asian Mechanisms' (2025) 8(3) Access to Justice in Eastern Europe 237. doi:10.33327/AJEE-18-8.3-a000117.

40 Law of the Republic of Kazakhstan No 488-V of 8 April 2016 'On Arbitration' [2016] Bulletin of the Parliament of the Republic of Kazakhstan 7-II/54.

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a state organization and a resident of the Republic of Kazakhstan, or whether it also applies to disputes with non-residents.

On the one hand, this second part is part of paragraph 10 and should be a logical continuation of the provisions of the first part of paragraph 10. However, the content of the second part of paragraph 10 has no relationship to the first part of paragraph 10 and can be interpreted as an independent provision, as well as relating to both residents and non-residents. Such an asymmetry of regulation seems illogical, especially given the strategic importance of concession agreements affecting key government assets and the relevant industry.

The explanation of "the authorized body of the relevant industry" is provided in paragraph 9 of the Regulatory Resolution of the Supreme Court No. 3 dated 2 November 2023[41] ("Regulatory Resolution"). Under this provision, in the case of an arbitration agreement, a state body that may be an authorized body of the relevant industry should be guided by the norms of legislation governing the subordination of state bodies, for instance, the authorized body for the Ministry in accordance with the Constitution and the Law "On State Property"[42] is the Government of the Republic of Kazakhstan. In this context, under paragraph 10 of article 8 of the Law on Arbitration, the authorized body of the relevant industry or the local executive body, in considering a request for such consent, must consider economic security and the interests of the state. At the same time, the legislation does not provide for a procedure for obtaining such consent.

Moreover, given the level of the bureaucratic state system and the accepted level of responsibility of the public authority, foreign companies, as non-residents, planning to conclude a concession agreement containing an arbitration clause, must consider the practical difficulty of obtaining the consent of the authorized body to conclude an arbitration agreement by the state party.

On the other hand, the private party may rely on the Regulatory Resolution, which provides that obtaining the above consent to enter into an arbitration agreement with non-residents of the Republic of Kazakhstan is not required. However, according to local legislation, the law is higher in the hierarchy of legal acts than the Regulatory Resolution. Therefore, the question remains open as to why the above-mentioned provision of the Regulatory Resolution was not initially included in Article 8 of the Law on Arbitration.

With the repeal of the Law on Concessions[43] at the beginning of 2025, the primary legal framework governing concession agreements has been replaced by the Law on Public-

41 Resolution of the Supreme Court of the Republic of Kazakhstan No 3 of 2 November 2023 'On Some Issues of Application of Arbitration Legislation by Courts' [2003] Bulletin of the Supreme Court of the Republic of Kazakhstan 11.

42 Law of the Republic of Kazakhstan No 413-IV of 1 March 2011 'On State Property' [2011] Bulletin of the Parliament of the Republic of Kazakhstan 5/42.

43 Law of the Republic of Kazakhstan No 167 of 7 July 2006 'On Concessions' [2006] Bulletin of the Parliament of the Republic of Kazakhstan 14/88.

Private Partnership dated 31 October 2015[44] ("PPP Law"). Under the PPP Law, public-private partnerships are executed through contractual arrangements, including a public-private partnership agreements, concession agreements, or service contracts. Moreover, under the PPP Law, a concession agreement is a form of public-private partnership agreement entered into by a public partner and a private partner. This agreement stipulates that the private partner is entitled to receive remuneration directly from consumers for the provision of goods, work, or services as part of the implementation of the public-private partnership project (a consumer-based payment model).

Attention should be given to Article 57 of the PPP Law, which governs the resolution of disputes arising from concession agreements and addresses both subjective (pertaining to the parties involved) and objective (pertaining to the nature of the dispute) aspects.

Moreover, to apply an objective test in the assessment of the legislation of the Republic of Kazakhstan on the research question requires a comparative analysis with another legal system. Selecting a jurisdiction with a similar legal tradition helps identify specific issues that require consideration.

The choice of the Kyrgyz Republic's legislation as a comparative jurisdiction is determined by a combination of methodological factors. First, Kazakhstan and Kyrgyzstan share post-Soviet legal tradition, shaped by similar institutional mechanisms for regulating legal relations. This ensures comparability of the basic categories of private law, including the legal capacity of subjects and the criteria for subjective arbitrability. Furthermore, an important argument is the coincidence of the strategic directions of the legal policy of these two states. In this regard, Kazakhstan and Kyrgyzstan are focused on creating favorable conditions for doing business, attracting investments, and expanding cross-border trade.

Although it is in the same region as Kazakhstan, the Kyrgyz Republic has its own legal framework. Pursuant to Article 28 (2) of the Law of the Kyrgyz Republic dated 30 July 2002 ("Law on Arbitration Courts"),[45] an arbitral award may be subject to challenge if the party against whom the award is rendered is a state authority, local self-government body, state or municipal institution or enterprise, or another legal entity with state or municipal ownership participation. Pursuant to Article 36/1(2) of the Law on Arbitration Courts, an application for the annulment of an arbitral award must be submitted to the district or city court at the seat of the arbitral tribunal. Moreover, the filing of such an application suspends the enforcement of the arbitral award. In this context, it is important to highlight that this provision contradicts the fundamental principles of international commercial arbitration, particularly regarding the limited, clearly defined grounds on which arbitral awards may be challenged and the national court's intervention in the arbitration process. This provision

44 Law of the Republic of Kazakhstan No 379-V LRK of 31 October 2015 'On Public-Private Partnership' [2015] Bulletin of the Parliament of the Republic of Kazakhstan 20-VII/116.

45 Law of the Kyrgyz Republic No 135 of 30 July 2002 'On Arbitration Courts in the Kyrgyz Republic' [2002] Regulatory acts of the Kyrgyz Republic 17.

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applies exclusively to disputes involving state authorities or SOEs, including those arising from concession agreements.

Pursuant to Article 36/1 (3) of the Law, one of the grounds for setting aside an arbitral award is the lack of legal capacity of the parties at the time of entering into the arbitration agreement. This ground inherently involves an evaluation of subjective arbitrability.

According to the Law of the Kyrgyz Republic "On Concessions and Concession Enterprises in the Kyrgyz Republic"[46] with amendments and additions as of 30 July 2013 ("Law on Concessions"), a concession refers to an authorization granted by the Government of the Kyrgyz Republic to an investor, permitting the conduct of specific entrepreneurial activities involving the temporary utilization of state-owned assets, including land and subsoil resources. In this context, the legislation notably acknowledges the dual nature of a concession, recognizing it as both an investment activity and a commercial enterprise.

It is also noteworthy that Article 12 of the Law on Concessions, which outlines the essential terms of a concession agreement, does not explicitly address dispute resolution. Instead, this matter is relegated to an optional or supplementary provision to be included at the discretion of the contracting parties.

Finally, the legal provision governing the dispute-resolution mechanism under a concession agreement lacks sufficient clarity. Specifically, Article 24 of the Law on Concessions permits the resolution of disputes not only through the courts but also through arbitration. However, it fails to specify whether such arbitration may be conducted at the international level or is limited solely to domestic arbitral institutions.

A comparative analysis of the two jurisdictions shows that Kazakhstan adheres to a less strict regulatory framework than the Kyrgyz Republic.

It is noteworthy that the Kazakh arbitration legislation does not provide a direct legal mechanism for challenging arbitral awards against state bodies, whereas the Kyrgyz Republic's arbitration legislation explicitly does.

At the same time, within the Kazakh jurisdiction, a significant regulatory issue concerns the requirement that state entities obtain the consent of an authorized government body before entering into arbitration agreements. Although under Kazakhstan law, the Regulatory Resolution clarifies that such consent is not mandatory when concluding arbitration agreements with non-resident parties, this does not exclude the possibility that government authorities will subsequently challenge the arbitration proceedings for lack of such consent. This may also apply to attempts to prevent the enforcement of arbitral awards by invoking public policy exceptions. In addition, the lack of a clearly defined procedure and time frame for obtaining the required consent contributes to legal

46 Law of the Kyrgyz Republic No 850-XII of 6 March 1992 'On Concessions and Concession Enterprises in the Kyrgyz Republic' (amended 30 July 2013) <https://cbd.minjust.gov.kg/4-762/edition/460511/kg> accessed 29 May 2025.

uncertainty. Consequently, there is an urgent need to introduce a legislative obligation to obtain the consent of an authorized government body, applicable to arbitration agreements with both residents and non-residents, accompanied by clearly defined procedural frameworks and strict deadlines for their compliance.

Nevertheless, given the current regulation, foreign entities may, as a practical measure to mitigate the above legal uncertainty, choose a seat of arbitration under a legal framework that limits the impact of legislation on the legal capacity of state entities to enter into arbitration agreements. In this context, it would be unfair to allow a State to evade arbitration in situations where the other party could reasonably believe that a government agency had the necessary authority to accept an arbitration clause, even if such authority did not actually exist.[47] This approach can serve as a strategic means of reducing the risk of problems arising from the lack of relevant consent. For instance, in Swiss Confederation jurisdiction under article 177 of Federal Act on Private International Law (PILA), 18 December 1987[48] (Status as of 1 January 2021) a State or a state-owned or state-controlled organization that is a party to an arbitration agreement may not invoke its domestic law to challenge its legal capacity to enter into arbitration or to challenge the possibility of arbitration of a dispute falling within the scope of this agreement.

Another approach concerns the choice of arbitration rules, which may also limit the application of the requirements of Kazakhstan's Law on Arbitration. This approach is considered in the context of the tendency when arbitration institutions have long been exploring ways to adapt the procedure to the specifics of the case and reduce the time and costs associated with arbitration.[49]

A practical illustration of this approach is the AIFC court's decision (CASE No: AIFC-C/CFI/2021/0008) dated 24 January 2022) on consideration of the arbitral award issued by International Arbitration Centre ("IAC") of the AIFC in connection to the dispute between Success K LLP ("Success") and the Ministry of Health of the Republic of Kazakhstan ("the Ministry") based on the public-private contract.[50] In this context, the AIFC Court is part of the Astana International Financial Center (AIFC), established on the territory of Astana,

47 Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610. doi:10.1093/jnlids/id:x0 12.

48 Federal Act of the Swiss Confederation of 18 December 1987 'On Private International Law (PILA)' (amended 1 January 2021) <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> accessed 29 May 2025.

49 UNCITRAL, *Settlement of Commercial Disputes Issues Relating to Expedited Arbitration: Note by the Secretariat* (A/CN.9/WG.II/WP.207, 16 November 2018) <https://docs.un.org/en/A/CN.9/WG.II/WP.207> accessed 29 May 2025.

50 *Success K LLP v Ministry of Healthcare of the Republic of Kazakhstan* Case No AIFC-C/CFI/2021/0008 (AIFC Court of First Instance, 24 January 2022) <https://court.aifc.kz/judgments/case-no-8-of-2021/> accessed 29 May 2025

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Kazakhstan, which is a separate jurisdiction designed to develop the financial market and attract investments with its own legal system and tax regime.

One of the applications of the Ministry was that the arbitration award should be annulled, as the arbitration agreement is invalid because it was concluded without the approval of an authorized state body, as required by paragraph 10 of Article 8 of Kazakhstan's Law on Arbitration. Consequently, the Ministry held that the law of the Republic of Kazakhstan applied to the arbitration agreement. However, the AIFC court rejected the Ministry's application on the following grounds.

First, the court understands that the substantive law governing the contract between parties is the law of the Republic of Kazakhstan; however, the court distinguishes that law from the law applicable to the arbitration process.

Second, even though the Republic of Kazakhstan was chosen as the seat of arbitration in the dispute, the parties chose the Rules on Arbitration and Mediation at the International Arbitration Centre ("IAC Rules") as the arbitration rules of the process, and the IAC has its own legal regime, different from the law of Kazakhstan. Under paragraph 7 of the AIFC Arbitration Regulations 2017, the requirements of the Law on Arbitration of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations.[51] In this regard, it can be stated that arbitration under IAC Rules is not subject to the Law on Arbitration of the Republic of Kazakhstan.

Finally, the Ministry referred to Article 18 of the IAC arbitration rules on this issue.[52] However, according to this article, the arbitration court undertakes to decide on the merits of the dispute based on the applicable law of the relevant arbitration agreement. At the same time, any designation by the parties of the legislation of this state is considered to relate to the substantive law of this state, and not to its conflict-of-laws rules. In this context, the Court concluded that the above article referred to by the Ministry concerned only the law applicable to the substance of the dispute, and not to the arbitration procedure.

Based on the above, the Court concluded that the arbitration agreement is valid under AIFC law and, therefore, paragraph 10 of Article 8 of the Law on Arbitration of the Republic of Kazakhstan does not apply. Therefore, the absence of consent of an authorized state body does not affect the validity of the arbitration agreement.

However, these approaches do not exclude the possibility of challenging an arbitral award under Article V(1)(a) of the New York Convention when the parties to the arbitration agreement were, under the law applicable to them, under some incapacity. Therefore,

51 Resolution of the AIFC Management Council of 5 December 2017 'AIFC Arbitration Regulations' <https://iac.aifc.kz/wp-content/uploads/2025/07/aifc-arbitration-regulations-eng.pdf> accessed 29 May 2025.

52 International Arbitration Centre, *Rules on Arbitration and Mediation at the International Arbitration Centre* (Astana International Financial Centre 2022) art 18 <https://aifc.kz/wp-content/uploads/2024/06/iac-arbitration-and-mediation-rules-2022-eng.pdf> accessed 29 May 2025.

requiring consent from an authorized government authority remains the preferred option on this matter. In this regard, criticism of the above AIFC court decision may relate to the fact that the approach to regulating subjective arbitrability was based solely on the law governing the arbitration agreement, and the law governing the party's legal capacity under the arbitration agreement was not considered. This issue is becoming particularly relevant, given that the Ministry is a state body.

Furthermore, it should be noted that there is a significant difference in the approach to determining subjective arbitrability between the AIFC Court and the national courts of Kazakhstan. In this regard, the Kazakh courts do not pay much attention to the law governing arbitration agreement, and the seat of arbitration, and are guided solely by the Law on Arbitration of the Republic of Kazakhstan.

The following decisions of the Kazakh courts are the justification for this conclusion:

In case No. 7119-21-00-2/4352 dated 1 July 2021 on the claim of APEX Consult LLP against the Ministry of Health of the Republic of Kazakhstan, the Court of First Instance confirmed that the arbitration clause of the contract between the parties to the dispute is invalid.[53] This conclusion was made due to the Ministry's lack of consent from the authorized body in accordance with the requirements of paragraph 10 of Article 8 of the Law on Arbitration. In the reasoning part, the court considered the arbitration agreement as a civil law agreement and referred to paragraph 1 of Article 158 of the Civil Code of the Republic of Kazakhstan[54], according to which a transaction, the content of which does not comply with the requirements of the law, as well as a transaction made for a purpose knowingly contrary to the fundamentals of law and order, is contested and may be declared invalid by the court.

On the other hand, it is not entirely clear why the court applied the law of the Republic of Kazakhstan in this case, as there were no references to the law of legal capacity or the law governing the arbitration agreement in the reasoning. Moreover, Kazakhstan was not a seat of arbitration. It should be noted that another problem was arbitration clause's the lack of key elements, but at the same time, it contained a clear intention of the parties to submit the contract dispute to arbitration rather than to the national court. Consequently, the specified intention and the claimant's right of to arbitration were violated due to the issue of subjective arbitrability and the provisions of the legislation of the Republic of Kazakhstan.

In another court case No. 7599-18-00-2a/4188 dated 29 May 2019 between SMU Burvodstroy LLP and Kyzyl Orda Su Zhuyesi Nuclear State Enterprise on debt collection based on the public-private contract, the arbitration clause was not pathological and contained all the necessary elements, including the place of arbitration and UNCITRAL

53 *APEX Consult LLP v Ministry of Health of the Republic of Kazakhstan* Case No 7119-21-00-2/4352 (Specialized Interdistrict Economic Court of Nur-Sultan, 1 July 2021) <https://sb.prg.kz/lawsuits/3525778> accessed 29 May 2025.

54 Civil Code of the Republic of Kazakhstan No 268-XIII of 27 December 1994 (amended 2025) <https://adilet.zan.kz/eng/docs/K940001000_> accessed 29 May 2025.

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arbitration rules.[55] However, the court also confirmed that the arbitration clause of the contract between the parties to the dispute is invalid based on paragraph 10 of Article 8 of Kazakhstan's Law on Arbitration.

At the same time, the court also noted that, to determine the national court's jurisdiction in this dispute, the interested party must additionally file a claim with the court to invalidate the arbitration clause, despite the parties' lack of intention to refer the dispute to the national court. Consequently, another practical problem is that the lack of subjective arbitrability may render dispute resolution impossible or delay it, as the parties cannot refer to arbitration, and the national court is not mentioned in an arbitration clause.

Finally, in the recent court case No. 1513-24-00-2/4263 dated 29 January 2025 between Amarant LLP and Kazvodkhoz State Enterprise, the court decided that, on the basis of paragraph 10 of Article 8 of the Kazakhstan's Law on Arbitration, despite the existence of an arbitration agreement, the claimant must file a claim to the national court at the place of registration of the respondent, which also implied the invalidity of the concluded arbitration agreement.[56]

The considered judicial practice of the Kazakh national courts additionally confirms the relevance of the issue of subjective arbitrability under current consideration, which results in violations of the principle of preserving the direct intention of the parties to the arbitration agreement to submit the dispute to arbitration.

Based on this judicial practice, as a practical recommendation for a party to an arbitration agreement with a state authority or entity of the Republic of Kazakhstan, greater attention should be paid to the provisions and to the inclusion of all important elements of the arbitration agreement, including the seat of arbitration and the arbitration rules. Furthermore, for the private party to the arbitration agreement, as noted above, it is extremely important to neutralize as much as possible the application of the law of the Republic of Kazakhstan (in the current version) to the issue of subjective arbitrability by choosing the appropriate seat of arbitration or arbitration rules. For Kazakhstan, on the other hand, it is important to make the above-mentioned changes to the arbitration legislation, which not only could save the right and intention of the party to arbitration from a subjective arbitrability perspective, but also, in the future, would bring this jurisdiction closer to the number of arbitration-friendly jurisdictions.

55 *SMU Burvodstroy LLP v Kyzyl Orda Su Zhuyesi Nuclear State Enterprise* Case No 7599-18-00-2a/4188 (The Appellate Judicial Board for Civil Cases of the Almaty City Court, 29 May 2019) <https://sb.prg.kz/lawsuits/1179187> accessed 29 May 2025.

56 *Amarant LLP v Kazvodkhoz State Enterprise* Case No 1513-24-00-2/4263 (Specialized Interdistrict Economic Court of Aktobe region, 29 January 2025) <https://sb.prg.kz/lawsuits/6176125> accessed 29 May 2025.

6 CONCLUSIONS

The analysis of the concept of subjective arbitration and the comparative review of its legal regulation enable us to formulate several conclusions following from this study.

When considering the conceptual foundations of subjective arbitration in the framework of a concession agreement, it becomes obvious that the existing legal regulation regarding the requirement to obtain the consent of an authorized state body, especially in cases where a SOE or a state body is a party to the agreement, does not provide a definitive solution to this issue. Considering the research issue related to foreign private investors, it should be emphasized that in accordance with the current legal framework of the Republic of Kazakhstan, an arbitration clause in a concession agreement should not only reflect the State's waiver of sovereign immunity, but also explicitly confirm that the State contract party has received the necessary permission from the competent government authority to conclude such an arbitration agreement and participation in the specified arbitration procedure. Alternatively, for foreign companies entering into arbitration agreements with government agencies or SOEs of the Republic of Kazakhstan, a reasonable approach may be to choose relevant arbitration rules or a seat of arbitration in a jurisdiction that allows 'neutralization' of the law governing the state party's capacity.

At the same time, the Republic of Kazakhstan's arbitration framework should establish a clear and unambiguous requirement that the state party obtain prior authorization from a duly authorized government agency before concluding arbitration agreements. Such a requirement would strengthen the position of a private party in cases where the state disputes the possibility of resolving the dispute through arbitration. Prior consent would demonstrate the state party's intention to submit potential disputes to arbitration, an aspect often recognized and emphasized by arbitration tribunals. In addition, legislation should clearly define the procedure and specific time frame for obtaining such consent to promote consistency, transparency, and legal predictability. It is expected that the creation of this coherent legal framework will increase the confidence of foreign investors, thereby supporting the broader policy objective of the Republic of Kazakhstan to attract and expand the inflow of foreign investment.

Finally, the problem of subjective arbitrability is comprehensive and extends beyond the issue of obtaining consent to enter into an arbitration agreement or to participate in arbitration proceedings. It is inextricably linked to broader legal doctrines, including sovereign immunity, public policy, the doctrines of state attribution and piercing the sovereign veil. Accordingly, this concept is planned to be considered in the framework of correlation with these legal doctrines in further research.

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REFERENCES

1. Acemoglu D and Robinson JA, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (Penguin Press 2019)
2. Barraclough A and Waincymer J, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 205
3. Bermann GA, 'The "Gateway" Problem in International Commercial Arbitration' (2011) 37(1) Yale Journal of International Law 1
4. Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015)
5. Born GB, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021)
6. Brazier L, 'The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration' (2015) 32(1) Journal of International Arbitration 1. doi:10.54648/joia2015001
7. Brekoulakis S, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610. doi:10.1093/jnlids/id:x0 12
8. Brower CN, 'State Parties in Contract-Based Arbitration: Origins, Problems, and Prospects of Private-Public Arbitration' (2019) 1(2) ITA in Review https://www.itainreview.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html accessed 14 April 2025
9. Faccio S, 'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' (2023) 38(3) ICSID Review – Foreign Investment Law Journal 625. doi:10.1093/icsidreview/siad026
10. Gómez KF, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019)
11. Lew JDM, Mistelis LA and Kröll SM, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
12. Lim CL, Ho J and Paparinskis M, *International Investment Law and Arbitration* (2nd edn, CUP 2021)
13. Madden KCP and Knoebel C, 'Arbitrability and Public Policy Challenges' in Rowley KCJW (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (4th edn, Global Arbitration Review, Law Business Research Ltd 2025) 35.
14. Moran TH, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interest' (1974) 7(2) Vanderbilt Journal of Transnational Law 197

15. Ngo S, 'International Commercial Arbitration for Belt and Road Initiative – Some Thoughts on China, Singapore and Hong Kong SAR as Dispute Resolution Locales' (China-ASEAN Civil and Commercial Law Forum: Proceedings Paper, Guangxi University for Nationalities, Law School, 20 December 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323302 accessed 14 April 2025

16. Nurtan A and Abilova M, 'Enforcement of Foreign Arbitral Awards in Kazakhstan: A Comparative Legal Analysis of European and Asian Mechanisms' (2025) 8(3) Access to Justice in Eastern Europe 237. doi:10.33327/AJEE-18-8.3-a000117

17. Ohler C, 'Concessions' *Max Planck Encyclopedia of Public International Law* (2013) https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1512 accessed 14 April 2025

18. Okoli CS, 'Production Sharing Agreements and Licences: A Distinction Without a Difference?' (2012) 282 International Energy Law Review 1. doi:10.2139/ssrn.2171506

19. Osode PC, 'State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective' (1997) 30 Comparative and International Law Journal of Southern Africa 37

20. Salih RS and Yamulki A, 'Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts' (2020) 101 Journal of Law, Policy and Globalization 165. doi:10.7176/jlpg/101-17

21. Shaikenov Va and Idayatova A, 'The Problem of Choosing Applicable Law to Arbitration and the Arbitration Agreement in the Context of the Kazakhstan Legislation' (2017) 1(46) Bulletin of Institute of Legislation and Legal Information of the Republic of Kazakhstan 121

22. Suleimenov MK, '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&pos=6;-106> accessed 14 April 2025

23. Tokayev KJ, 'Kazakhstan in the Era of Artificial Intelligence: Current Challenges and Solutions through Digital Transformation: Address of the President to the People of Kazakhstan' (*President of the Republic of Kazakhstan*, 8 September 2025) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-to-the-people-of-kazakhstan-kazakhstan-in-the-era-of-artificial-intelligence-current-challenges-and-solutions-through-digital-transformation-1083029> accessed 14 September 2025

24. van Haersolte – Van Hof JJ and Koppe EV, *International Arbitration and the Lex Arbitri* (Grotius Centre Working Paper Series 2014/33-IEL, Grotius Centre for International Legal Studies, Universiteit Leiden 2014)

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СУБ'ЄКТИВНА АРБІТРАБЕЛЬНІСТЬ У КОНЦЕСІЙНИХ СПОРАХ МІЖ ДЕРЖАВНИМ І ПРИВАТНИМ СЕКТОРОМ: ПРАВОВІ ОСНОВИ РЕСПУБЛІКИ КАЗАХСТАН

Нурбек Жанґалієв

АНОТАЦІЯ

Вступ. *Роль концесійного договору стає дедалі важливішою в країнах Центральної Азії як договірного механізму взаємодії між державною владою та іноземним приватним сектором. Крім того, це питання стає особливо актуальним, з огляду на зростання іноземних інвестицій у цьому регіоні. Зважаючи на це, міжнародний арбітраж, що зберігає достатній нейтралітет, стає все більш актуальним для вирішення спорів за такими договорами.*

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Крім того, питання арбітрабельності в арбітражних спорах між державним і приватним сектором потребує додаткової уваги через недостатню вивченість його концепції та регулювання. У зв'язку з цим, огляд арбітражної практики в Казахстані в цьому контексті має подвійну функцію: як інформаційну, для кращого розуміння цього питання іноземним інвестором, так і виявлення питань, які потребують удосконалення в чинному регулюванні. Таке узгодження є життєво важливим для підтримки правової визначеності та підвищення привабливості цього регіону для іноземних інвестицій, особливо в секторах, що залежать від довгострокових та капіталомістких партнерств.

Методи. *Це дослідження ґрунтується на всебічному емпіричному аналізі національного законодавства, що регулює концесійні угоди та комерційний арбітраж у Казахстані, з наголосом на ступінь та характер обмежень суб'єктивної арбітрабельності у спорах, що виникають з концесійних угод. Крім того, цей аналіз доповнюється порівняльно-правовим методом, що передбачає вивчення арбітражних систем в інших відповідних юрисдикціях. У цьому контексті проводиться порівняльний аналіз для визначення подібностей та відмінностей у правовому регулюванні між юрисдикціями Казахстану та Киргизстану. Крім того, дослідження застосовує логічне та правове обґрунтування для визначення найбільш релевантних правових доктрин, які перетинаються з проблемою арбітрабельності у спорах щодо концесійних угод.*

Результати та висновки. *Результати дослідження свідчать про відсутність правової визначеності в законодавстві Казахстану щодо суб'єктивної арбітрабельності за участю державних установ щодо концесійних угод. Щоб мінімізувати ризик оскарження арбітражного провадження Казахстаном на підставі суб'єктивної арбітрабельності, що може призвести до певних занепокоєнь серед іноземних інвесторів, рекомендується внести зміни до казахстанського арбітражного законодавства. Зокрема, слід встановити чітку вимогу для державних суб'єктів щодо отримання попередньої згоди належним чином уповноваженого державного органу перед укладанням арбітражних угод. Крім того, законодавство має чітко визначити процедуру та терміни отримання такої згоди для забезпечення узгодженості та юридичної передбачуваності. Враховуючи, що модель концесійної угоди поширена в Казахстані, ця законодавча зміна підвищить рівень довіри іноземних інвесторів, що може призвести до збільшення припливу інвестицій. Водночас, на сучасному етапі іноземним компаніям, які розглядають можливість інвестувати в Казахстан, доцільно звертати увагу на місце арбітражу, що мінімізує вплив законодавства Казахстану та регулює правоздатність державних суб'єктів укладати арбітражні угоди, або, як кращий варіант, вимагати від державного суб'єкта отримання попередньої згоди уповноваженого державного органу на укладання таких угод та участь в арбітражному провадженні.*

Ключові слова. *Міжнародний комерційний арбітраж, суб'єктивна арбітрабельність, арбітражна угода, концесійна угода.*

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LEGITIMACY AND LEGITIMATION: A COMPARATIVE ANALYSIS OF ISLAMIC LAW AND EUROPEAN STANDARDS THROUGH THE LENS OF SDG 16

Zaki Mahmed Omar Channak* and Yusuff Jelili Amuda

ABSTRACT

Background: *This study examines legitimacy and legitimation under Islamic law (Sharīʿah) and how they relate to social justice and the Sustainable Development Goals (SDGs). In Islamic jurisprudence, legitimacy flows from divine sovereignty expressed through the Qur'an, Sunnah, and scholarly consensus (ijmāʿ). This includes legal validity, moral authority, and spiritual accountability. Legitimation, by contrast, is a socio-legal process. Authority and institutions gain communal recognition through ijtihād, fatwas, and social practices. Understanding this relationship is crucial. It helps explain how Islamic law preserves justice, promotes accountability, and sustains institutional legitimacy within changing socio-political contexts. Building on this conceptual foundation, the study adopts a systematic methodology to examine these dynamics in greater detail.*

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Methods: *The study employs a qualitative, doctrinal, and comparative legal research methodology. Primary Islamic sources—the Qur'an, Hadith, and classical fiqh manuals—are analysed alongside modern constitutions, international legal frameworks, and institutional reports. The maqāṣid al-sharīʿah (higher objectives of Islamic law) framework guides the analysis, emphasising justice, dignity, and social welfare. Comparative perspectives are drawn from the European Convention on Human Rights (ECHR), the Council of Europe's principles, and the United Nations SDG 16 (Peace, Justice, and Strong Institutions) to identify areas of convergence, divergence, and mutual reinforcement. This comprehensive approach enables the study to produce findings relevant to both Islamic and international legal frameworks, as elaborated in the results and conclusions.*

Results and Conclusions: *Findings reveal that legitimacy in Islamic law provides a transcendental and normative foundation rooted in divine command and moral accountability, while legitimation functions as its operational dimension through communal validation and interpretative flexibility. This duality enables Islamic law to preserve doctrinal consistency while accommodating evolving social realities. Interpreted through the maqāṣid al-sharīʿah, Islamic notions of legitimacy and justice align closely with SDGs 5 (Gender Equality), 10 (Reduced Inequalities), and 16, demonstrating Islam's intrinsic commitment to fairness, institutional integrity, and social inclusion. The study concludes that distinguishing between textual legitimacy and contextual legitimation enhances the coherence and adaptability of Islamic legal processes. Integrating maqāṣid-based reasoning into global justice and governance frameworks complements international norms of accountability, transparency, and participatory governance. This synthesis reinforces Islam's enduring relevance to contemporary legal and ethical discourse, offering a model of legitimacy that is both divinely grounded and socially responsive.*

1 INTRODUCTION

Legitimacy and legitimation are foundational concepts that shape the authority, acceptance, and functionality of any legal system. In Islamic law (Sharīʿah), these notions are grounded not only in jurisprudential reasoning but also in divine revelation and moral accountability. Classical scholars such as al-Ghazālī and al-Juwaynī emphasised that legitimate authority must align with divine intent and uphold ethical order, thereby linking legal validity with spiritual integrity.[1] In this context, legitimacy refers to the rightful authority of a law, institution, or ruler in accordance with the Qur'an, Sunnah, and established jurisprudential principles, while legitimation encompasses the processes—such as fatwas, ijmāʿ (consensus), ijtihād (independent reasoning), and social acceptance—through which that authority gains recognition and practical validity.[2]

1 Abū Ḥāmid Al-Ghazālī, *Al-Mustaṣfā min ʿIlm Al-Uṣūl* (Dar al-Kutub al-ʿIlmiyyah 1997) [in Arabic]; ʿAbd al-Malik Al-Juwaynī, *Al-Ghiyāthī* (Dar al-Minhaj 2011) [in Arabic].

2 Wael B Hallaq, *Authority, Continuity, and Change in Islamic Law* (CUP 2001) 45-7.

Together, these concepts ensure that Islamic law remains both theologically grounded and socially responsive.

Historically, legitimacy in Islamic thought has been associated with moral governance, justice, and the preservation of social order, while legitimation has been expressed through interpretive traditions and communal validation.[3] In contemporary Muslim societies, these concepts face renewed scrutiny amid constitutional reforms, governance challenges, and global calls for social justice. As Fadel notes, debates over Sharīʿah's legitimacy increasingly revolve around reconciling classical doctrines with pluralist, democratic, and human rights-based frameworks.[4] This tension between divine authority and social legitimacy is particularly salient in post-colonial legal orders and transnational contexts where Islamic law is invoked to affirm, reform, or contest state power.[5]

Despite a rich corpus of Islamic jurisprudential scholarship, a conceptual gap remains in distinguishing legitimacy as a theological-legal foundation from legitimation as a dynamic socio-legal process. Few studies effectively bridge fiqh-based conceptions of authority with modern political theories such as Weberian or legal-rational legitimacy.[6] Moreover, limited attention has been paid to how Islamic constructs of legitimacy interact with contemporary global frameworks such as the European Convention on Human Rights[7] (ECHR), the Council of Europe's principles,[8] and the United Nations Sustainable Development Goals[9] (SDGs)—particularly Goal 16 (Peace, Justice, and Strong Institutions). These instruments promote justice, accountability, and institutional integrity—values deeply embedded in the maqāṣid al-sharīʿah, which seek to preserve faith, life, intellect, lineage, and property.

Framing legitimacy and legitimation within Islamic law through the lens of the SDGs—especially Goals 5 (Gender Equality), 10 (Reduced Inequalities), and 16—offers new insights into how Islamic jurisprudence can support global aspirations for sustainable justice and social cohesion.[10] Drawing upon classical scholars such as Al-Māwardī, Ibn

3 Abū al-Ḥasan Al-Māwardī, *Al-Ahkam As-Sultaniyyah: The laws of Islamic Governance* (Dar Ul Thaqafah 2018); Aḥmad ibn ʿAbd al-Ḥalīm Ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa al-Raʿiyyah: The Political Shariyah on Reforming the Ruler and the Ruled* (Dar ul Fiqh 2005).

4 Mohammad Fadel, 'Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought' (2018) 2(1) Journal of Islamic Ethics 59, doi:10.1163/24685542-12340015.

5 Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (OUP 2009).

6 Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia UP 2013).

7 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECtHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 September 2025.

8 European Commission for Democracy Through Law (Venice Commission), *Rule of Law Checklist* (18 March 2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> accessed 10 September 2025.

9 Transforming Our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) <https://digitallibrary.un.org/record/3923923?ln=en> accessed 10 September 2025.

10 ibid, goals 5, 10, 16.

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Taymiyyah, and Al-Ghazālī, alongside modern constitutional experiences in Muslim-majority states, this study demonstrates that legitimacy safeguards rights and moral order, while legitimation ensures adaptability and participatory governance.

This paper argues that strengthening legitimacy and legitimation in Islamic law requires doctrinal clarity, inclusive participation, and institutional reform aligned with both Sharīʿah objectives and international development priorities. Integrating maqāṣid-based reasoning with global human rights and governance frameworks enriches transnational legal discourse by providing a moral and ethical foundation for justice and legitimacy. In doing so, Islamic jurisprudence can contribute meaningfully to equitable governance, inclusive justice, and the realisation of the Sustainable Development Goals.

2 METHODOLOGY

This study adopts a qualitative legal research methodology integrating doctrinal, comparative, and content-analytical approaches to examine legitimacy and legitimation under Islamic law (Sharīʿah) and their implications for social justice and the Sustainable Development Goals (SDGs). The doctrinal method is used to analyse primary Islamic legal sources—Qurʾān, Sunnah, ijmāʿ, qiyās, and classical juristic writings—alongside international legal instruments such as the European Convention on Human Rights (ECHR), the Council of Europe's principles, and SDG 16.[11] Qualitative content analysis complements doctrinal inquiry by enabling systematic examination of primary texts and secondary literature.[12] Core Islamic sources include al-Ghazālī's *al-Mustaṣfā*, Ibn Taymiyyah's *al-Siyāsah al-Sharʿiyyah*, and al-Māwardī's *al-Aḥkām al-Sulṭāniyyah*. Secondary materials comprise scholarly analyses, fatwas, judicial decisions, and international policy documents relevant to justice, equality, and institutional governance.[13]

The comparative legal method identifies convergences and divergences between Islamic jurisprudence and international legal frameworks on legitimacy, justice, and governance. Attention is given to the alignment between *maqāṣid al-sharīʿah* and global legal objectives such as human dignity, equality, and social order.[14] Analytically, the study proceeds in two stages: first, conceptual differentiation between legitimacy as a theological-legal foundation and legitimation as a socio-legal process; second, thematic analysis focusing on governance, social justice, accountability, and institutional reform. These themes are mapped onto SDG 5, SDG 10, and SDG 16.[15]

11 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Islamic Texts Society 2003).
12 Monique Hennink, Inge Hutter, and Ajay Bailey, Qualitative Research Methods (SAGE Publications Ltd 2020).
13 Wael Hallaq, *An Introduction to Islamic Law* (CUP 2009); Fadel (n 4).
14 M Cherif Bassiouni, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace* (CUP 2014).
15 Transforming Our World (n 9).

Methodological rigor is ensured through iterative coding, triangulation across sources, and transparent analytical procedures.[16] Key concepts—including *ḥākimiyyah*, *ʿadl*, *shūrā*, and *maṣlaḥah*—are systematically analysed to trace continuity and transformation in Islamic legal reasoning.[17] Ethical considerations include respect for doctrinal diversity, contextual sensitivity, and avoidance of reductionist interpretations.[18] Overall, this integrated methodology enables a nuanced examination of how Islamic conceptions of legitimacy and legitimation can contribute to social justice, institutional accountability, and sustainable peace within both Islamic and international legal frameworks.

3 LITERATURE REVIEW

3.1. Overview of Legitimacy under Islamic Law

Legitimacy in Islamic law (Sharīʿah) denotes the rightful basis of authority, law, or governance as grounded in divine revelation. Unlike secular legal systems, which derive legitimacy from constitutional consent or legal positivism, Islamic legitimacy is theological, rooted in the sovereignty of God (*ḥākimiyyat Allāh*).[19] As the Qur'an declares, "Judgment belongs to Allah alone,"[20] classical jurists understood this verse as denying ultimate law-making authority to human institutions. Legitimacy in Islamic law is, therefore, inseparable from moral accountability and conformity with the divine will, functioning as both a legal and an ethical imperative.

According to Al-Ghazālī, legitimacy arises where human action aligns with the higher objectives (*maqāṣid*) of Sharīʿah—the preservation of faith, life, intellect, lineage, and property.[21] These objectives ensure that Islamic law operates as a moral-legal system rather than a purely coercive order. Contemporary scholars such as Mohammad Hashim Kamali similarly argue that legitimacy serves both as divine authorisation and an evaluative standard for justice in governance and legislation.[22] Where governance violates these objectives—through corruption, tyranny, or in disregard of due process—it forfeits legitimacy, even if it enjoys political stability.[23]

Historically, legitimacy under Sharīʿah has been most contested in matters of political authority (imāmah or khilāfah). Al-Māwardī and Ibn Taymiyyah emphasised that rulers

16 Luísa Pinto, 'A Qualitative Analysis of Corporate Social Responsibility in Saudi Arabia's Service Sector: Practices and Company Performance' (2023) 15(12) Sustainability 9284, doi:10.3390/su15129284.

17 Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Sage 2013).

18 Margrit Schreier, *Qualitative Content Analysis in Practice* (Sage 2012).

19 Kamali (n 11) 19-25, 287-92.

20 Qur'an 12:40.

21 Al-Ghazālī (n 1).

22 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 87-92.

23 ibid 105.

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must uphold justice (ʿadl) and divine law to retain legitimacy.[24] Ibn Taymiyyah further maintained that unjust rulers lose their right to obedience, as Sharīʿah binds both rulers and subjects alike. These principles resonate in modern constitutional frameworks of Muslim-majority states that designate Sharīʿah as a source of legislation, such as Egypt and Pakistan.[25] However, the legitimacy of such systems is often questioned when legal pluralism or executive dominance undermines the maqāṣid objectives. Modern scholarship conceptualises Islamic legitimacy as both deontological—derived from divine command—and instrumental—concerned with realising justice and welfare.[26] This duality allows legitimacy to remain principled yet adaptive, mediated through ijtihād, ijmāʿ, and societal acceptance.[27] From a comparative perspective, Islamic legitimacy parallels international doctrines of the rule of law, which emphasise predictability, transparency, and moral coherence, as articulated by the European Court of Human Rights in *The Sunday Times v United Kingdom* (1979).[28] However, the Islamic framework uniquely grounds these principles in a divine moral order rather than secular rationality.[29]

3.2. Legitimation under Islamic Law

The concept of legitimation in Islamic law (Sharīʿah) refers to the process by which authority, actions, institutions, or norms acquire recognition as legitimate in accordance with divine revelation and juristic principles. Unlike secular frameworks, in which legitimation may rest on social contracts, legal positivism, or state sovereignty, Islamic legitimation is theological, ethical, and communal. It begins with the foundational Qur'ānic principle: *"Al-ḥukm lillāh"* ("Judgment belongs to Allah") (Qur'an 12:40),[30] affirming that no law or institution possesses inherent validity unless it conforms to the Qur'an and Sunnah.[31]

Sharīʿah serves as the overarching framework of legitimacy by categorising human actions into obligatory (farḍ), recommended (mustaḥabb), permissible (mubāḥ), disliked (makrūh), and forbidden (ḥarām).[32] A ruler, institution, or policy gains legitimacy if it advances the objectives of Sharīʿah (maqāṣid al-sharīʿah): the protection of faith (dīn),

24 Al-Māwardī (n 3); Ibn Taymiyyah (n 3).

25 Constitution of the Arab Republic of Egypt (effective 18 January 2014) art 2 <https://www.constituteproject.org/constitution/Egypt_2014> accessed 10 September 2025; Constitution of the Islamic Republic of Pakistan (effective 14 August 1973) art 227 <https://constituteproject.org/constitution/Pakistan_2018> accessed 10 September 2025.

26 Fadel (n 4).

27 Hallaq, *Authority, Continuity, and Change* (n 2).

28 *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) <https://hudoc.echr.coe.int/eng?i=001-57584> accessed 10 September 2025.

29 Kamali (n 22) 110-4.

30 Qur'an 12:40.

31 Kamali (n 22) 89-92.

32 Al-Ghazālī (n 1).

life (nafs), intellect (ʿaql), progeny (nasl), and property (māl).[33] Any law or policy contradicting these objectives is deemed illegitimate, regardless of political endorsement or public approval. Legitimacy is further reinforced by ijmāʿ (scholarly consensus) and communal acceptance, reflecting both juristic reasoning and social recognition.[34]

Legitimation operates through a multi-sourced legal framework comprising the Qur'an, Sunnah, ijmāʿ, and qiyās (analogical reasoning).[35] This structure ensures that legitimacy is neither arbitrary nor purely political but anchored in ethical objectivity and procedural discipline. For example, commercial transactions are legitimate only when free from ribā (usury) and gharar (excessive uncertainty), while governance attains legitimacy through justice (ʿadl), consultation (shūrā), and public welfare (maṣlaḥah).[36] Legitimation is therefore both procedural—through adherence to uṣūl al-fiqh—and substantive, through conformity with maqāṣid al-sharīʿah.

The implications of legitimation extend deeply into governance and social justice. The Qur'an commands justice and trust in authority: *"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice."*[37] Authority is thus a divine trust (amānah), and its legitimacy depends on its just exercise.[38] Ibn Taymiyyah stressed that power devoid of justice loses legitimacy, even if maintained by force.[39] Islamic legitimacy is therefore dynamic, requiring continuous ethical conformity rather than mere formal authority. [40]

This conception resonates with contemporary international legal frameworks. The European Convention on Human Rights (ECHR) guarantees fair trial (Article 6), non-discrimination (Article 14), and the rule of law as foundations of legitimate governance.[41] Similarly, the Council of Europe's Venice Commission Rule of Law Checklist highlights legality, legal certainty, prevention of abuse of power, and equality before the law as core criteria of legitimacy. [42] These principles align closely with maqāṣid-based jurisprudence, where justice (ʿadl), accountability (muḥāsabah), and human dignity (karāmah al-insān) are central objectives.

Likewise, United Nations Sustainable Development Goal 16 underscores accountability, transparency, and access to justice as prerequisites for peaceful and inclusive societies.[43]

33 Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought 2008) 25-33, doi:10.2307/j.ctvkc67tg.
34 Hallaq, *Authority, Continuity, and Change* (n 2) 45-50.
35 Kamali (n 22) 133-6.
36 Al-Ghazālī (n 1) 115-9.
37 Qur'an 4:58.
38 Fadel (n 4).
39 Ibn Taymiyyah (n 3).
40 MA Shaban, *Islamic History: A New Interpretation* (CUP 1971) 112-4.
41 Council of Europe, *ECHR* (n 7) arts 6, 14.
42 Venice Commission, *Rule of Law Checklist* (n 8).
43 Auda (n 33) 42-8.

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Islamic law complements these aims by grounding them in a divine moral order.[44] While international law often frames legitimacy procedurally, Islamic law integrates procedural integrity with spiritual and ethical purpose, offering a holistic understanding of legitimacy as both institutional and moral.[45]

Accordingly, legitimation under Islamic law constitutes a comprehensive theological and practical framework defining what is valid, binding, and enforceable across governance, contracts, and institutions. Its emphasis on justice and ethical accountability provides an enduring foundation for social legitimacy.[46] When harmonised with global frameworks such as the ECHR and SDG 16, Islamic jurisprudence strengthens the universal pursuit of just, peaceful, and legitimate institutions. Legitimation (taṣḥīḥ or tathbīt) in Islamic jurisprudence refers to the processes through which authority, norms, or institutions are validated and socially recognised within the Muslim community. While legitimacy defines the divine rightfulness of authority, legitimation concerns its procedural, interpretive, and communal realisation.[47] It operates through juristic reasoning, institutional mechanisms, and public endorsement. The Qur'an and Sunnah provide the foundational criteria for legitimation, while ijtihād and qiyās facilitate their application to changing circumstances. As Khaled Abou El Fadl argues, this renders Islamic legitimation inherently deliberative, requiring ethical reasoning rather than mechanical application of texts.[48] Historically, the ʿulamāʾ served as custodians of legitimation, issuing fatāwā and mediating between divine norms and social realities.[49]

Communal recognition (ijmāʿ al-ummah) further reinforces legitimation, institutionalising participation through shūrā (consultation).[50] The Constitution of Medina exemplifies this principle by embedding consultative governance within a pluralistic community, a precedent often cited as an early form of participatory legitimation.[51] Contemporary scholars such as Rachid Ghannouchi and Tariq Ramadan argue that democratic mechanisms can function as modern expressions of shūrā, provided they remain within Sharīʿah constraints.[52] Legitimation, however, remains normatively bounded. As Abou El Fadl and Seyyed Hossein Nasr emphasise, majority approval cannot override divine injunctions.[53] This tension underlies modern Islamic constitutional

44 Azizah Mohd and others, 'Child Labour under Islamic Law (the Shari'ah): An Overview' (2018) 23(2) Al-Shajarah 295.
45 Transforming Our World (n 9) goal 16.
46 Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003) 59-63.
47 Fadel (n 4).
48 Khaled Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses* (Dar Taiba 2004).
49 Hallaq, *Authority, Continuity, and Change* (n 2) 87-93.
50 Qur'an 42:38.
51 Muhammad Qasim Zaman, *The Ulama in Contemporary Islam* (Princeton UP 2002).
52 Rachid Ghannouchi, *Public Freedoms in the Islamic State* (Yale UP 2022); Ramadan (n 5).
53 Abou El Fadl (n 48); Seyyed Hossein Nasr, *Islam in the Modern World: Challenged by the West, Threatened by Fundamentalism, Keeping Faith with Tradition* (HarperOne 2012).

debates, evident in divergent models ranging from Iran's wilāyat al-faqīh to secular-leaning systems such as Turkey.[54] These variations illustrate that legitimation is historically adaptable yet substantively constrained by Sharīʿah principles.

In contemporary practice, legitimation extends to Islamic finance, constitutional review, and human rights discourse. Sharīʿah Supervisory Boards legitimise financial instruments by certifying compliance with prohibitions against ribā and gharar,[55] thereby performing a role analogous to that of constitutional courts in secular systems.[56] Nonetheless, legitimation is not just procedural but moral. The Qur'an commands justice and trust in authority,[57] rendering any system illegitimate if it perpetuates injustice or violates human dignity, a principle echoed in the Cairo Declaration on Human Rights in Islam (1990).[58] Table 1 shows sources and functions of legitimation in Islamic Law.[59]

***Table* 1. Sources and Functions of Legitimation in Islamic Law**

Sources	Functions of Legitimation
Qur'an	Primary source of laws; provides divine legitimacy for actions and rulings.
Sunnah	Prophet's practices legitimise interpretations and applications of Qur'anic principles.
Ijma (Consensus)	Scholarly consensus over time legitimises practices not explicitly mentioned in Qur'an/Sunnah
Qiyas (Analogy)	Enables legitimation of new issues based on analogies with established rulings
Maslahah (Public interest)	Legitimates decisions based on the preservation of welfare and core objectives of Shariah

54 Hallaq, *The Impossible State* (n 6).

55 Auda (n 33) 52-9.

56 ibid 89-94.

57 Qur'an 4:58.

58 Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) <https://hrlibrary.umn.edu/instree/cairodeclaration.html> accessed 10 September 2025.

59 Source: Al-Ghazālī (n 1); Ibn Taymiyyah (n 3); Kamali (n 11); Mahmoud A El-Gamal, *Islamic Finance: Law, Economics, and Practice* (CUP 2006).

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3.3. Understanding Authority Moral Responsibility Under Islamic Law

The distinction between legitimacy and legitimation is central to understanding authority under Islamic law. Legitimacy is ontological, rooted in divine law, while legitimation is epistemic and procedural, realised through interpretation, consensus, and social practice.[60] Kamali describes legitimacy as the theological core of authority, with legitimation functioning as its social translation.[61]

In governance, legitimacy requires adherence to Sharīʿah and justice. The Qur'an (4:59) conditions obedience to rulers on their conformity with divine law,[62] a principle that Ibn Taymiyyah interpreted as conditional obedience based on justice.[63] Legitimation occurs through mechanisms such as bayʿah, consultative governance, and community acceptance.[64] Prophetic traditions emphasising reciprocal moral responsibility between rulers and the ruled reinforce this ethical foundation of authority. In Islamic finance, legitimacy demands Sharīʿah compliance, while legitimation is achieved through institutional oversight and public trust.[65] Scholarly interpretation here functions analogously to judicial review, ensuring ethical accountability.[66]

Modern Muslim societies face crises of legitimacy when Sharīʿah is instrumentalised for political ends.[67] Wael Hallaq argues that postcolonial governance structures have fragmented Islamic legitimacy by subordinating divine law to bureaucratic state power.[68] In contrast, Jasser Auda proposes maqāṣid-based reform as a means of restoring authentic legitimation by aligning governance with justice, welfare, and dignity.[69] This approach aligns with international standards articulated in SDG 16, the ECHR, and the Venice Commission.

3.4. Pursuit of Legitimacy through Modernisation and National Sovereignty

The abolition of the Ottoman Caliphate in 1924 marked a critical rupture in Islamic political legitimacy, creating a vacuum that was subsequently filled by competing religious, national, and ideological claims.[70] Islamist movements such as the Muslim Brotherhood and Jamaat-e-Islami framed legitimacy around Sharīʿah and public welfare, challenging

60 Hamidullah Muhammad, *The First Written Constitution in the World: An Important Document of the Time of the Holy Prophet* (Sh Muhammad Ashraf 1981).
61 Kamali (n 11).
62 Abou El Fadl (n 48) 112; Nasr (n 53).
63 Ibn Taymiyyah (n 3).
64 El-Gamal (n 59).
65 ibid 72-4.
66 Qur'an 4:58.
67 Kamali (n 22) 136-8.
68 Hallaq, *The Impossible State* (n 6).
69 Auda (n 33).
70 John L Esposito and John O Voll, *Islam and Democracy* (OUP 2001) 89-92.

secular nationalist regimes that grounded authority in Western constitutionalism.[71] Conversely, states such as Turkey, Egypt, and Tunisia pursued legitimacy through modernisation and national sovereignty, often marginalising traditional ʿulamāʾ authority.[72] A central debate concerns whether democratic institutions can be legitimate under Islamic law. Scholars such as Fadel and Abou El Fadl argue that shūrā is compatible with democracy,[73] allowing legitimacy to derive from both divine command and public consent within Sharīʿah limits.[74] In contrast, thinkers like Qutb and Maududi emphasise ḥākimiyyah as exclusive divine sovereignty, viewing extensive human legislation as doctrinally problematic.[75]

The role of the ʿulamāʾ remains pivotal. In Saudi Arabia, legitimacy is anchored in a religious–political alliance institutionalised through clerical authority,[76] while Iran's wilāyat al-faqīh fuses religious and political power under juristic guardianship.[77] Both models have been criticised for limiting pluralism and democratic accountability.[78] International human rights jurisprudence, particularly under Article 9 of the ECHR, underscores that religious authority must operate within frameworks of dignity, equality, and non-discrimination.[79] Claims of legitimacy by extremist movements invoking literalist interpretations of ḥākimiyyah have been overwhelmingly rejected by mainstream scholars due to the absence of ijmāʿ and legitimate leadership.[80] These cases illustrate the dangers of detaching legitimation from its ethical, juristic, and communal foundations. Reformist scholars advocate a reconciliatory model in which democracy serves to realise the maqāṣid al-Sharīʿah, including justice, dignity, and public welfare.[81] This approach aligns closely with SDG 16's emphasis on peace, justice, and strong institutions,[82] signalling a shift toward inclusive and ethically grounded governance.

71 Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton UP 2008).

72 Sayyid Qutb, *Milestones* (Islamic Book Service 2006).

73 Mohammad Fadel, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' (2007) 8(1) Chicago Journal of International Law 7; Abou El Fadl (n 48).

74 Abdullahi Ahmed An-Naʿim, *Islam and the Secular State: Negotiating the Future of Shariʿa* (Harvard UP 2008); Hallaq, *The Impossible State* (n 6).

75 Qutb (n 72); Syed Abul Aʿla Maududi, *The Islamic Law and Constitution* (Islamic Publications Ltd 1990).

76 Abou El Fadl (n 48).

77 Maududi (n 75).

78 Madawi Al-Rasheed, *Muted Modernists: The Struggle over Divine Politics in Saudi Arabia* (Hurst 2015).

79 Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (Transaction Publishers 2006).

80 Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (HarperOne 2005) 45-58.

81 *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) <https://hudoc.echr.coe.int/eng?i=001-57827> accessed 10 September 2025.

82 Andrew F March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (OUP 2011).

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3.5. Consequences of Legitimacy and Legitimation for Social Justice and the SDGs

The distinction between legitimacy and legitimation has significant implications for social justice and sustainable development. Legitimacy (*mashrūʿiyyah*) provides the divine normative foundation of authority, while legitimation (*tashrīʿiyyah*) translates that foundation into juristic, institutional, and communal practice.[83] Together, they align Islamic legal ethics with the objectives of the SDGs, particularly Goals 5, 10, and 16.[84]

Classical scholars such as Al-Ghazālī and Ibn Taymiyyah maintained that rulers retain legitimacy only when they uphold justice, protect welfare, and adhere to Sharīʿah.[85] Legitimation operationalises these principles through ijtihād, fatwā, and communal recognition, ensuring contextual responsiveness without sacrificing authenticity.[86] Internationally, Islamic legitimacy complements frameworks such as the ECHR and the Council of Europe's rule of law principles, which emphasise accountability, fairness, and dignity. SDG 16 similarly resonates with Qurʾānic imperatives of justice and trust in governance.[87] Moreover, Islamic legitimacy inherently encompasses distributive justice and social inclusion, reinforcing SDG 5 and SDG 10.[88] Reformist scholars argue that maqāṣid-based interpretation supports gender equity,[89] equality before the law, and protection of human dignity.[90] In sum, legitimacy anchors governance in divine justice, while legitimation ensures participatory, ethical, and adaptive institutions. This synthesis—rooted in Sharīʿah yet open to global norms—offers a coherent framework for peace, justice, and strong institutions. By engaging international legal standards alongside Islamic jurisprudence, legitimacy and legitimation emerge as mutually reinforcing foundations of equitable and sustainable governance.[91] Table 2 shows elements and explanations of legitimacy and legitimation.[92]

83 Ghannouchi (n 52).
84 Transforming Our World (n 9) goals 5, 10, 16.
85 Al-Ghazālī (n 1); Ibn Taymiyyah (n 3).
86 Kamali (n 11).
87 Qurʾān 4:58.
88 Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Islamic Texts Society 2002).
89 Abdullahi Ahmed An-Naim, *Decolonizing Human Rights* (CUP 2021).
90 Yusuff Jelili Amuda, 'Enhancing National Progress and Sustainable Economic Development among *Al-Majiri* Children in Northern Nigeria' (2021) 7(9) Heliyon 2-5, doi:10.1016/j.heliyon.2021.e08066.
91 Baderin (n 46).
92 Source: Al-Ghazālī (n 1); El-Gamal (n 59); Esposito and Voll (n 70); Fadel (n 4); Kamali (n 11); Zaman (n 51).

***Table* 2. Elements and Explanations of Legitimacy and Legitimation**

Elements	Explanation
Sovereignty of Allah	Only Allah is the true lawgiver; legitimacy comes from divine law
Conformity with Shariah	Actions or institutions must align with Qur'an, Sunnah, Ijma, Qiyas
Maqasid al-Shariah	Legitimacy judged by how well objectives of Shariah are fulfilled
Public Acceptance (Ijma)	Legitimacy enhanced through scholarly consensus and communal support
Justice and Accountability	Rulers and institutions must be just and accountable to retain legitimacy

3.6. Islamic Approaches to Legitimacy versus Social Justice and their Relevance to International Frameworks

Islamic approaches to legitimacy and social justice are rooted in theological, moral, and legal traditions that prioritise divine justice, human dignity, and communal welfare. These principles derive authority from the Qurʾān, Sunnah, and the juristic framework of *maqāṣid al-sharīʿah* (the higher objectives of Islamic law). Within this paradigm, legitimacy (*sharʿī legitimacy*) and social justice are inseparable: authority is considered legitimate only when it upholds justice, equity, and the rights of individuals in accordance with divine mandates. The Qurʾān commands believers to "render trusts to whom they are due and judge with justice,"[93] emphasising accountability and moral responsibility as the foundations of governance. Classical scholars such as Al-Ghazālī and Al-Shāṭibī identified justice as a central purpose of the law, with the *maqāṣid*—the preservation of religion, life, intellect, progeny, and property—constituting its core objectives.[94] This framework reflects a comprehensive vision of legitimacy that extends beyond procedural legality to encompass moral integrity and social welfare.

Contemporary Muslim jurists and reformist scholars increasingly argue that these foundational principles are compatible with universal human rights norms when interpreted through contextual and purposive methodologies. Abdullahi An-Naʿīm contends that Islamic norms, when approached dynamically, can support democratic governance, human dignity, and social inclusion without abandoning their religious

93 Qurʾān 4:58.

94 Al-Ghazālī (n 1); Abū Isḥāq Al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharīʿah* (Dar al-Kutub al-ʿIlmiyyah 2004).

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foundations.[95] In this sense, legitimacy in Islamic jurisprudence is both spiritually anchored in divine authority and social validated through justice, public welfare, and the well-being of the governed community.

In comparison, the European Convention on Human Rights (ECHR) and the Council of Europe's legal framework are secular in origin but share commitments to justice, equality, and institutional integrity. Adopted in 1950, the ECHR enshrines civil and political rights, including the right to life (Article 2), the prohibition of torture (Article 3), the right to a fair trial (Article 6), and respect for private and family life (Article 8).[96] These rights are enforceable through the European Court of Human Rights, providing individuals with direct remedies against state violations. Complementary instruments, including the European Social Charter (1961) and Council of Europe recommendations, promote democratic governance, social protection, and equality before the law.[97] These frameworks articulate a model of legitimacy grounded in the rule of law, procedural fairness, and the protection of rights.

The United Nations Sustainable Development Goal 16 (SDG 16) introduces a developmental perspective by linking peace, justice, and strong institutions to sustainable development. As part of the 2030 Agenda, SDG 16 promotes inclusive societies, access to justice, transparency, and accountable institutions.[98] Unlike Islamic law's divine grounding or the ECHR's judicial enforcement, SDG 16 functions as a policy-oriented framework, encouraging governance reforms and institutional capacity-building. It situates legitimacy within a broader socio-economic context, recognising that justice depends on legal norms and participation, inclusion, and development.

Despite differences in origin and structure, significant convergence exists between Islamic law and these international frameworks. Both emphasise justice, dignity, and public welfare as foundational values. The *maqāṣid al-sharīʿah*'s focus on preserving life, intellect, and property parallels the ECHR's protection of fundamental rights and SDG 16's emphasis on safety and access to justice.[99] Islamic procedural safeguards—such as evidentiary standards, judicial ethics, and due process—share conceptual similarities with fair trial guarantees under the ECHR. Likewise, the Qurʾānic principle of *amānah* (trust and accountability) closely aligns with SDG 16's focus on transparency, anti-corruption, and institutional integrity.[100] These shared values provide a basis for cross-normative dialogue and mutual reinforcement. Nevertheless, areas of tension remain. A principal divergence concerns the

95 An-Naʿīm, *Islam and the Secular State* (n 74).
96 Council of Europe, *ECHR* (n 7).
97 Statute of the Council of Europe (adopted 5 May 1949) ETS 1; European Social Charter (adopted 18 October 1961) ETS 35.
98 Transforming Our World (n 9) goal 16.
99 Yusuf Al-Qaradawi, *Fiqh al-Maqāṣid: Understanding the Objectives of the Sharia* (Dar al-Shuruq 2008) [in Arabic].
100 Kamali (n 11) 456-9.

source of rights: international human rights law is secular and universalist, whereas Islamic legitimacy is grounded in divine revelation and juristic interpretation.[101] Conflicts may arise where literalist readings of Sharīʿah appear inconsistent with certain ECHR standards, particularly regarding gender equality, corporal punishment, or personal freedoms. Reformist scholars such as Khaled Abou El Fadl advocate ethical and contextual interpretations that reaffirm the compatibility of Sharīʿah with universal human rights norms.[102] Another challenge lies in universality versus contextualism: while international frameworks emphasise uniform standards, Islamic jurisprudence allows culturally contingent applications of justice, arguing that universality should accommodate diversity in form and implementation.[103] Institutional enforcement further distinguishes these frameworks. The ECHR operates through a supranational judicial mechanism with binding authority, whereas Islamic legal systems and SDG-based approaches rely primarily on domestic institutions, moral persuasion, and social consensus.[104] This structural difference highlights challenges in ensuring consistent protection of rights and due process.

To bridge these gaps, several strategies have been proposed. First, *maqāṣid*-based reasoning offers a robust interpretive tool for harmonising Islamic law with international justice frameworks by emphasising ethical purpose and public welfare (*maṣlaḥah*).[105] Second, a relational conception of rights—integrating individual and communal dimensions—can contextualise universal norms within Islamic social ethics. Third, engagement with SDG 16's governance agenda provides practical pathways for reform, including strengthening judicial independence, improving access to justice, and enhancing accountability, all of which resonate with Islamic principles of *ʿadl* (justice) and *amānah* (trust).[106]

Accordingly, Islamic law, the ECHR, the Council of Europe's principles, and SDG 16 represent distinct yet convergent approaches to legitimacy and social justice. While their philosophical foundations differ—divine command, secular rationalism, and developmental pragmatism—all seek to uphold human dignity, fairness, and accountability. A purposive, *maqāṣid*-oriented interpretation of Islamic law, combined with the procedural and institutional strengths of international frameworks, offers a compelling model for legitimate, just, and sustainable governance in an interconnected world.[107]

101 Wael Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005).

102 Abou El Fadl (n 80).

103 Abdullahi An-Naʿīm, 'Human Rights in the Muslim World: Socio-Political Conditions and Theoretical Considerations' (1990) 3 Harvard Human Rights Journal 13.

104 Guidelines of the Committee of Ministers of the Council of Europe on Public Ethics (adopted 11 March 2020) <https://rm.coe.int/16809a59e7> accessed 10 September 2025.

105 An-Naʿīm, *Islam and the Secular State* (n 74) 87-92.

106 Transforming our World (n 9).

107 ibid

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3.7. Legitimacy in Influencing Global/ Transnational Legal Discussions

The concept of legitimacy in Islamic law provides a rich moral and jurisprudential framework that can influence global and transnational legal discourse, particularly in governance, human rights, peacebuilding, and institutional ethics. Islamic legitimacy (*sharʿī mashrūʿiyyah*) integrates moral, legal, and social dimensions, viewing authority as a trust (*amānah*) accountable to both God and society. This approach extends legitimacy beyond procedural legality to encompass ethical responsibility, thereby enriching debates on the rule of law and the moral foundations of legal systems.

Central to Islamic legitimacy are justice (*ʿadl*) and public welfare (*maṣlaḥah*). Authority is legitimate only as far as it serves these objectives, reflecting the Qurʾānic command to "enjoin what is right and forbid what is wrong."[108] This conception emphasises that legality without justice lacks moral authority, a perspective that can inform international debates on governance, humanitarian intervention, and peace agreements.[109] Islamic law thus encourages a value-based understanding of power, accountability, and compliance.

The *maqāṣid al-sharīʿah* further provides a purposive framework aligned with contemporary global legal theory's emphasis on teleological reasoning. By prioritising the protection of life, religion, intellect, lineage, and property,[110] the *maqāṣid* resonate with universal human rights principles, the Sustainable Development Goals,[111] and humanitarian norms. In transnational policymaking—such as economic justice, environmental ethics, and post-conflict reconstruction—*maqāṣid* reasoning offers a moral vocabulary that bridges cultural and legal divides.

Institutionally, Islamic jurisprudence emphasises consultation (*shūrā*), accountability (*muḥāsabah*), and stewardship (*khilāfah*).[112] These principles support participatory governance and ethical restraint on authority, informing global discussions on institutional accountability and reform. The concept of *khilāfah*, understood as stewardship rather than domination, also contributes to global discourses on environmental responsibility and sustainable governance.

Islamic legitimacy further underscores the intrinsic link between justice and peace (*salām*), a theme echoed in international instruments such as the European Social Charter and SDG 16. Peace, in Islamic thought, is contingent upon fairness, reconciliation, and the protection of rights.[113] This relational understanding of

108 Qurʾān 3:110.
109 Kamali (n 11) 389-95.
110 Al-Shāṭibī (n 94); Auda (n 33).
111 Fayez Alanazi and Mamdouh Alenezi, 'Driving the Future: Leveraging Digital Transformation for Sustainable Transportation' (2024) 8(3) Journal of Infrastructure, Policy and Development 3085, doi:10.24294/jipd.v8i3.3085.
112 Hallaq, *The Impossible State* (n 6) 55-61.
113 European Social Charter (n 97); Transforming Our World (n 9) goal 16.

legitimacy can enhance transitional justice and peacebuilding frameworks by emphasising moral restoration alongside institutional recognition.

Moreover, Islamic legal theory's historical engagement with pluralism (*taʿaddudiyyah*)—through concepts such as *ʿurf* (custom) and legal accommodation—demonstrates that legitimacy can be plural and dialogical without moral relativism.[114] This insight is valuable in transnational legal pluralism, where multiple normative orders coexist. In contexts where international law is criticised as Eurocentric or detached from local moral frameworks, Islamic legitimacy can enhance normative inclusivity by grounding legality in justice and ethical accountability rather than power or procedure alone.[115] Consequently, Islamic legal thought offers a constructive contribution to reforming global governance toward a more participatory, ethical, and culturally resonant legal order.

In sum, Islamic concepts of legitimacy—centred on justice, accountability, consultation, and public welfare—can meaningfully enrich global legal discourse. Rather than imposing religious norms, they provide ethical insights that complement secular frameworks, helping to shape a more just, legitimate, and humane transnational legal system.

4 RESULTS AND DISCUSSION OF THE FINDINGS

The findings of this study demonstrate that legitimacy (*mashrūʿiyyah*) in Islamic law is not merely a sociopolitical or procedural construct, but a profoundly theological and normative concept grounded in divine sovereignty (*ḥākimiyyah*). The Qur'an unequivocally affirms that ultimate authority belongs exclusively to God— *"the command belongs to none but Allah"* (Qur'an 12:40)—and prescribes obedience to those in authority as far as such authority conforms to divine commands (Qur'an 4:59). Consequently, legitimacy in Islam originates from Sharīʿah and remains perpetually conditional upon compliance with its ethical and legal imperatives. This foundational premise fundamentally distinguishes Islamic legitimacy from secular models, which derive authority from social contract theory, democratic consent, or positivist conceptions of state sovereignty.[116]

In Western legal thought, as articulated by scholars like Max Weber and Hans Kelsen, legitimacy is often grounded in formal legality, institutional authority, or popular consent. By contrast, Islamic jurisprudence conditions legitimacy on conformity with Sharīʿah and moral accountability before God. Classical jurists such as al-Ghazālī and Ibn Taymiyyah conceptualised governance as a divinely mandated trust (*amānah*), whose preservation depends upon justice (*ʿadl*) and the realisation of the *maqāṣid al-sharīʿah*—namely, the protection of religion, life, intellect, progeny, and property. Al-Ghazālī emphasised that the

114 An-Naʿīm, *Islam and the Secular State* (n 74) 113-5.
115 Feldman (n 71) 34-40.
116 Ibn Taymiyyah (n 3).

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ruler's foremost obligation is the attainment of public welfare (*maṣlaḥah*) and the prevention of corruption (*mafsadah*), while Ibn Taymiyyah asserted that political authority is indispensable for enforcing justice and restraining oppression. His oft-cited dictum—that "God upholds the just state even if it is unbelieving and does not uphold the unjust state even if it is Muslim"—encapsulates the ethical primacy of justice over mere confessional identity.

This moral orientation transforms legitimacy from procedural to ethical, binding rulers to divine accountability beyond human consent. As Kamali further observes, legitimacy in Islam is inseparable from justice, accountability, and public welfare, rendering Sharīʿah compliance both a legal criterion and a moral test of governance[117]. Accordingly, legitimacy in Islamic thought is neither absolute nor self-perpetuating; it is conditional and revocable. Tyranny, corruption, or systematic violations of human dignity signify a breakdown of legitimate authority.[118] Ibn Khaldūn's analysis of political decay reinforces this conclusion, identifying moral failure and the erosion of social cohesion (*ʿaṣabiyyah*) as primary causes of dynastic decline.[119] Thus, legitimacy in Islam performs a dual theological and sociological function: it anchors authority in divine law while preserving moral coherence within the polity.

In contrast, *legitimation* (*tašrīʿiyyah*) emerges as a socio-legal process through which theoretical authority acquires practical recognition. While legitimacy is derived from divine law, legitimation is mediated through human agency, manifesting in mechanisms such as *bayʿah* (oath of allegiance), *ijmāʿ* (consensus), *ijtihād* (independent reasoning), and *fatwā* (juridical opinion). These instruments institutionalise the relationship between ruler and ruled, ensuring that authority remains responsive to communal needs and contextual realities. Historically, even rulers claiming divine legitimacy depended upon the endorsement of the *ʿulamāʾ* and public acceptance. The *bayʿah* accorded to the Rightly Guided Caliphs exemplifies the centrality of communal recognition in legitimating authority.[120]

In contemporary governance, legitimation operates through institutional mechanisms such as Sharīʿah advisory boards, constitutional references to Islam, and the consultative roles of national and transnational fiqh academies.[121] These structures help sustain public trust while facilitating legal adaptation to modern contexts. The relationship between legitimacy and legitimation thus reflects a dynamic equilibrium: legitimacy provides the normative foundation, while legitimation ensures functionality and continuity. This dual framework reconciles divine authority with social agency, safeguarding moral order while enabling inclusivity and adaptability. Jurisprudentially, it reflects a *maqāṣidī* vision of law—stable in principles yet flexible in application.[122]

117 Kamali, *The Dignity of Man* (n 88) 82-4.
118 Ibn Taymiyyah (n 3).
119 Ibn Khaldūn, *The Muqaddimah: An Introduction to History* (Princeton UP 1989) 123-5.
120 Hallaq, *The Impossible State* (n 6) 96-8.
121 El-Gamal (n 59) 57-9.
122 Auda (n 33) 91-5.

When examined through the prism of the Sustainable Development Goals (SDGs), Islamic legitimacy strongly reinforces SDG 16, which emphasises peace, justice, and strong institutions. By grounding authority in justice, accountability, and ethical governance, Islamic legitimacy aligns substantively with international standards of good governance.[123] Legitimation mechanisms further complement SDG 5 (gender equality) and SDG 10 (Reduced Inequalities) by promoting consultation (*shūrā*), participatory decision-making, and ethical inclusion, consistent with the Qur'anic principle of mutual consultation (Qur'an 42:38). In this convergence, Islamic jurisprudence and the SDG agenda reveal shared commitments to fairness, accountability, and social inclusion.

Conversely, failures in legitimacy or legitimation often precipitate governance crises in Muslim-majority societies. Violations of Sharīʿah norms undermine moral authority, while the erosion of participatory processes weakens public trust. This dual failure fosters political instability, social alienation, and institutional decay, particularly in contexts marked by authoritarianism, corruption, or the instrumentalisation of religion.[124] Reintegrating legitimacy and legitimation within an Islamic ethical framework thus offers a corrective pathway toward sustainable governance reform.

In sum, the findings confirm that legitimacy and legitimation in Islamic law are complementary rather than interchangeable. Legitimacy provides the divine and moral foundation of authority, while legitimation secures its social recognition and operational viability. Together, they establish a principled yet participatory model of governance that harmonises Sharīʿah ethics with global aspirations for justice and sustainable development. As Fayez Alanazi observes, integrating Islamic jurisprudential principles with SDG priorities enhances institutional accountability and reinforces Islam's relevance within global legal and governance discourses.[125]

5 IMPLICATIONS OF THE STUDY, POLICY RELEVANCE AND PRACTICAL IMPACT

The study yields significant theoretical implications for Islamic legal scholarship by clarifying the conceptual distinction and functional interdependence between legitimacy and legitimation. Recognising legitimacy as a Sharīʿah-based normative foundation and legitimation as a socio-political process enriches analytical approaches to governance, authority, and social order in Muslim societies.

From a social justice perspective, the findings demonstrate that legitimacy promotes equity, accountability, and ethical restraint, while legitimation enhances inclusivity, participation, and public trust. Integrating justice (*ʿadl*) and public welfare (*maṣlaḥah*)

123 Transforming Our World (n 9).

124 An-Na'im, *Islam and the Secular State* (n 74) 115-8.

125 Fayez Alanazi, 'Islamic Jurisprudence, Sustainable Development Goals and Institutional Accountability' (2022) Journal of Islamic Governance 45.

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with participatory mechanisms strengthens both the moral grounding and societal acceptance of governance structures, thereby addressing systemic injustices and empowering marginalised communities.

In relation to the SDGs, the study confirms strong convergence between Islamic jurisprudential principles and global development objectives, particularly SDG 16. Legitimation mechanisms further advance SDG 5 and SDG 10 by fostering inclusive consultation and ethical participation. These findings position Islamic law as a credible faith-based partner in sustainable development, capable of lending moral legitimacy to governance reforms.

At the policy level, the study suggests that governments in Muslim societies should avoid reliance on coercive authority or political expediency. Instead, governance must be anchored in Sharīʿah-compliant principles and sustained through transparent, participatory, and accountable processes. In practice, the findings encourage structured collaboration among Islamic scholars, policymakers, and development practitioners to ensure that reforms are both religiously authentic and socially responsive.

Building on the theme of *Legitimacy and Legitimation under Islamic Law*, the study explicitly demonstrates that grounding governance reforms in Sharīʿah-based legitimacy—while operationalising legitimation through inclusive, transparent, and accountable institutional processes—can enhance public trust and social compliance in Muslim-majority and plural legal systems. By linking normative Islamic principles such as justice (*ʿadl*), public interest (*maṣlaḥah*), and human dignity (*karāmah*) with participatory governance mechanisms, the findings offer policymakers a coherent framework for designing reforms that are both morally authoritative and socially responsive.

Beyond its theoretical contributions, this research holds clear policy relevance for governance, legal reform, and development practice in Muslim-majority and plural legal systems. By distinguishing legitimacy as a Sharīʿah-based moral foundation from legitimation as a participatory and institutional process, the study provides policymakers with a structured framework for designing governance reforms that are both ethically grounded and socially credible. This framework offers practical guidance for strengthening institutional trust, particularly in contexts where formal legality exists, but public confidence in authority remains weak.

For legislators and judicial actors, the findings underscore the importance of embedding Sharīʿah objectives (*maqāṣid al-sharīʿah*)—such as justice, welfare, and accountability—into constitutional design, statutory interpretation, and judicial reasoning. This can enhance the substantive legitimacy of legal systems while ensuring compatibility with international human rights standards and SDG 16 commitments. For executive institutions, the study highlights the policy value of institutionalising consultative mechanisms (*shūrā*), transparency, and ethical oversight to sustain legitimation and prevent governance breakdown.

In the development and international policy sphere, the research provides a faith-sensitive pathway for integrating Islamic legal and moral principles into the implementation of the Sustainable Development Goals. Instruments such as *zakāt*, *waqf*, and Sharīʿah-compliant governance structures can be operationalised as legitimate policy tools for poverty reduction, social protection, gender equity, and access to justice, thereby enhancing local ownership and policy effectiveness. More broadly, the study contributes to global governance debates by offering an Islamic jurisprudential model that complements secular frameworks, promotes legal pluralism, and supports culturally resonant approaches to justice, accountability, and sustainable development.

Overall, the study affirms that Islamic legal thought—through its integrated conception of legitimacy and legitimation—offers a robust ethical framework capable of contributing meaningfully to contemporary debates on governance, justice, and sustainable development at both national and global levels. Finally, integrating Islamic legitimacy with international frameworks enhances global policy coherence. Aligning *maqāṣid al-sharīʿah* with SDG targets enables the deployment of Islamic instruments—such as *zakāt*, *waqf*, and *qard ḥasan*—as sustainable mechanisms for poverty alleviation, education, gender equity, and environmental stewardship, while preserving community trust and religious authenticity.

6 CONCLUSIONS

This study establishes that legitimacy and legitimation in Islamic law constitute an integrated framework for ethical governance and social justice. Rooted in divine sovereignty, legitimacy anchors authority in Sharīʿah compliance and moral accountability, while legitimation translates these norms into socially responsive and participatory institutions. Together, they reconcile normative permanence with contextual adaptability, offering a holistic governance model that is both principled and inclusive. Comparatively, Islamic legitimacy is substantive and moral, grounded in justice and *maqāṣid al-sharīʿah*, whereas European frameworks emphasise procedural legality, democracy, and consent. Islamic legitimation relies on *ijtihād*, *bayʿah*, and *shūrā*, in contrast to electoral and constitutional mechanisms in European systems. Within the SDG framework, Islamic interpretations increasingly regard development goals as extensions of *maṣlaḥah*, integrating them through Sharīʿah governance and participatory institutions. Practically, the study informs legal and institutional design by showing how Islamic legal concepts can be aligned with the Sustainable Development Goals, particularly those related to justice, strong institutions, reduced inequalities, and inclusive development. It provides guidance for lawmakers, regulators, and development practitioners on integrating Islamic legitimacy norms into policy formulation, dispute resolution, and institutional accountability, thereby enabling context-sensitive implementation of the SDGs. In doing so, the research strengthens applied decision-making by demonstrating how Islamic law can function not

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merely as a source of ethical theory but as a viable framework for advancing social justice and sustainable development in contemporary governance settings.

To strengthen the role of Islamic legitimacy and legitimation in advancing social justice and the Sustainable Development Goals, the study suggests a set of mutually reinforcing measures. First, it calls for a dynamic maqāṣid-based interpretation by qualified scholars capable of addressing contemporary governance challenges in a manner consistent with SDG 16 and evolving international human rights standards. Second, it emphasises the need for transparent and accountable decision-making in fatwas, judicial rulings, and governance processes to enhance public trust and institutional integrity. Third, the study highlights the importance of inter-madhhab dialogue and scholarly pluralism to broaden consensus and reinforce inclusive moral authority. Fourth, it underscores the need for legal codification and reform of Sharīʿah-based systems to ensure clarity, accessibility, and justice, in line with SDG 16.3. Fifth, the institutionalisation of shūrā is proposed as a participatory governance mechanism compatible with SDG 16.7. Finally, the study underlines the role of public education and media engagement in promoting awareness of the ethical foundations and flexibility of Islamic law, thereby supporting access to information and civic participation.

REFERENCES

1. Abou El Fadl K, *The Authoritative and Authoritarian in Islamic Discourses* (Dar Taiba 2004)
2. Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (HarperCollins 2005)
3. Alanazi F, 'Islamic Jurisprudence, Sustainable Development Goals and Institutional Accountability' (2022) Journal of Islamic Governance 45
4. Alanazi F and Alenezi M, 'Driving the Future: Leveraging Digital Transformation for Sustainable Transportation' (2024) 8(3) Journal of Infrastructure, Policy and Development 3085, doi:10.24294/jipd.v8i3.3085
5. Al-Ghazālī AḤ, *Al-Mustaṣfā min ʿIlm al-Uṣūl* (Dar al-Kutub al-ʿIlmiyyah 1997) [in Arabic]
6. Al-Juwaynī AAM, *Al-Ghiyāthī* (Dar al-Minhaj 2011) [in Arabic]
7. Al-Māwardī AAḤ, *Al-Ahkam As-Sultaniyyah: The laws of Islamic Governance* (Dar Ul Thaqafah 2018)
8. Al-Qaradawi Y, *Fiqh al-Maqāṣid: Understanding the Objectives of the Sharia* (Dar al-Shuruq 2008) [in Arabic]
9. Al-Rasheed M, *Muted Modernists: The Struggle over Divine Politics in Saudi Arabia* (Hurst 2015)
10. Al-Shatibi AI, *Al-Muwāfaqāt fī Uṣūl al-Sharīʿah* (Dar al-Kutub al-ʿIlmiyyah 2004)

11. Amuda YJ, 'Enhancing National Progress and Sustainable Economic Development among *Al-Majiri* Children in Northern Nigeria' (2021) 7(9) Heliyon e08066, doi:10.1016/j.heliyon.2021.e08066

12. An-Naʿim AA, *Decolonizing Human Rights* (CUP 2021)

13. An-Naʿīm AA, 'Human Rights in the Muslim World: Socio-Political Conditions and Theoretical Considerations' (1990) 3 Harvard Human Rights Journal 13

14. An-Naʿim AA, *Islam and the Secular State: Negotiating the Future of Shariʿa* (Harvard UP 2008)

15. Auda J, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought 2008) doi:10.2307/j.ctvkc67tg

16. Baderin MA, *International Human Rights and Islamic Law* (OUP 2003)

17. Bassiouni MC, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace* (CUP 2014)

18. Dabashi H, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (Transaction Publishers 2006)

19. El-Gamal MA, *Islamic Finance: Law, Economics, and Practice* (CUP 2006)

20. Esposito JL and Voll JO, *Islam and Democracy* (OUP 2001)

21. Fadel M, 'Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought' (2018) 2(1) Journal of Islamic Ethics 59, doi:10.1163/24685542-12340015

22. Fadel M, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' (2007) 8(1) Chicago Journal of International Law 7

23. Feldman N, *The Fall and Rise of the Islamic State* (Princeton UP 2008).

24. Ghannouchi R, *Public Freedoms in the Islamic State* (Yale UP 2022)

25. Hallaq W, *An Introduction to Islamic Law* (CUP 2009)

26. Hallaq W, *Authority, Continuity, and Change in Islamic Law* (CUP 2001)

27. Hallaq W, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia UP 2013).

28. Hallaq W, *The Origins and Evolution of Islamic Law* (CUP 2005).

29. Hennink M, Hutter I, and Bailey A, Qualitative Research Methods (SAGE Publications Ltd 2020)

30. Ibn Taymiyyah A, *Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa al-Raʿiyyah: The Political Shariyah on Reforming the Ruler and the Ruled* (Dar Ul Fiqh 2005)

31. Kamali MH, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991)

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32. Kamali MH, *Principles of Islamic Jurisprudence* (3rd edn, Islamic Texts Society 2003)
33. Kamali MH, *The Dignity of Man: An Islamic Perspective* (Islamic Texts Society 2002)
34. Khaldūn I, *The Muqaddimah: An Introduction to History* (Princeton UP 1989)
35. Krippendorff K, *Content Analysis: An Introduction to Its Methodology* (Sage 2013)
36. March AF, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (OUP 2011)
37. Maududi SAA, *The Islamic Law and Constitution* (Islamic Publications Ltd 1990)
38. Mohd A and others, 'Child Labour under Islamic Law (the Shari'ah): An Overview' (2018) 23(2) Al-Shajarah 295
39. Muhammad H, *The First Written Constitution in the World: An Important Document of the Time of the Holy Prophet* (Sh Muhammad Ashraf 1981)
40. Nasr SH, *Islam in the Modern World: Challenged by the West, Threatened by Fundamentalism, Keeping Faith with Tradition* (HarperOne 2012)
41. Pinto L, 'A Qualitative Analysis of Corporate Social Responsibility in Saudi Arabia's Service Sector: Practices and Company Performance' (2023) 15(12) Sustainability 9284, doi:10.3390/su15129284
42. Qutb S, *Milestones* (Islamic Book Service 2006)
43. Ramadan T, *Radical Reform: Islamic Ethics and Liberation* (OUP 2009)
44. Schreier M, *Qualitative Content Analysis in Practice* (Sage 2012)
45. Shaban MA, *Islamic History: A New Interpretation* (CUP 1971)
46. Zaman MQ, *The Ulama in Contemporary Islam* (Princeton UP 2002)

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЛЕГІТИМНІСТЬ ТА ЛЕГІТИМАЦІЯ: ПОРІВНЯЛЬНИЙ АНАЛІЗ ІСЛАМСЬКОГО ПРАВА ТА ЄВРОПЕЙСЬКИХ СТАНДАРТІВ КРІЗЬ ПРИЗМУ ЦСР 16

Закі Махмед Омар Чаннак* та Юсуфф Джелілі Амуда

АНОТАЦІЯ

Вступ. *Це дослідження розглядає легітимність та легітимацію згідно з ісламським правом (шаріатом) та їх зв'язок із соціальною справедливістю та Цілями сталого*

розвитку (ЦСР). В ісламській юриспруденції легітимність випливає з божественного суверенітету, вираженого через Коран, Сунну та науковий консенсус (іджма), що охоплює юридичну чинність, моральний авторитет та духовну відповідальність. Легітимація, навпаки, є соціально-правовим процесом. Влада та інституції отримують суспільне визнання через іджтихад, фетви та соціальні практики. Розуміння цього взаємозв'язку є надзвичайно важливим. Воно допомагає пояснити, як ісламське право забезпечує доступ до правосуддя, сприяє підзвітності та підтримує інституційну легітимність у мінливих соціально-політичних контекстах. З огляду на цю концептуальну основу, у дослідженні було застосовано методологію системного підходу для детальнішого вивчення цих динамічних процесів.

Методи. *У дослідженні використовується якісна, доктринальна та порівняльно-правова методологія дослідження. Первинні ісламські джерела – Коран, хадиси та класичні посібники з фікху – аналізуються разом із сучасними конституціями, міжнародно-правовими межами та інституційними звітами. В основу аналізу покладено концепцію макасід аш-шаріат (вищі цілі ісламського права), що наголошує на справедливості, гідності та соціальному благополуччі. Порівняльні перспективи взяті з Європейської конвенції з прав людини (ЄКПЛ), принципів Ради Європи та Цілей сталого розвитку Організації Об'єднаних Націй 16 (Мир, справедливість та сильні інституції) для визначення подібності, розбіжності та взаємного підсилення. Цей комплексний підхід дозволяє дослідженню отримати висновки, що стосуються як ісламських, так і міжнародно-правових меж, як детально описано в результатах та висновках.*

Результати та висновки. *Результати дослідження показують, що легітимність в ісламському праві забезпечує трансцендентальну та нормативну базу, засновану на божественному велінні та моральній відповідальності, тоді як легітимація функціонує як її операційний вимір через спільне підтвердження та інтерпретаційну гнучкість. Ця дуалістичність дозволяє ісламському праву зберігати доктринальну узгодженість, водночас враховуючи мінливі соціальні реалії. Інтерпретовані за допомогою макасід аш-шаріат, ісламські поняття легітимності та справедливості тісно узгоджуються з Цілями сталого розвитку 5 (Гендерна рівність), 10 (Скорочення нерівності) та 16, демонструючи закладене в ісламі прагнення до справедливості, інституційній цілісності та соціальній інтеграції. У дослідженні було зроблено висновок, що розмежування між текстовою легітимністю та контекстуальною легітимацією підвищує узгодженість та адаптивність ісламських правових процесів. Інтеграція міркування, заснованого на макасідах, у глобальні системи правосуддя та управління доповнює міжнародні норми підзвітності, прозорості та партисипативного управління. Цей синтез підсилює незмінну актуальність ісламу для сучасного правового та етичного дискурсу, пропонуючи модель легітимності, яка є одночасно божественно обґрунтованою та зорієнтованою на суспільні потреби.*

Ключові слова. *Легітимність, легітимація, ісламське право (шаріат), ісламська юриспруденція (фікх), юридична влада.*

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ABSTRACT IN ARABIC

مقال بحثي

الشرعية وإضفاء الشرعية: تحليل مقارن بين الشريعة الإسلامية والمعايير الأوروبية من منظور الهدف السادس عشر من أهداف التنمية المستدامة

زكي محمد عمر شناق* ويوسف جليلي أمودا

الملخص

الخلفية: تبحث هذه الدراسة في مفهومي الشرعية وإضفاء الشرعية في ظل الشريعة الإسلامية، وعلاقتهما بالعدالة الاجتماعية وأهداف التنمية المستدامة. ففي الفقه الإسلامي هناك إجماع فقهي على أن الإرادة الإلهية هي مصدر الشرعية في الإسلام، كما دَلَّ عليها كل من القرآن والسنة، وهي تشمل الصلاحية القانونية والتوافق الأخلاقي والروحي مع الإرادة الإلهية. في المقابل، إضفاء الشرعية هي عملية قانونية واجتماعية تكتسب بموجبها السلطة والمؤسسات الاعتراف والقبول داخل المجتمع الإسلامي عبر الاجتهاد والفتاوى والممارسات الاجتماعية. ووفقاً لهذه المفاهيم (الشرعية وإضفاء الشرعية)، يعد فهم العلاقة بينها أمراً بالغ الأهمية، فهو يساعد في توضيح دور الشريعة الإسلامية في تكريس العدالة، وتعزيز المساءلة، واستدامة الشرعية المؤسسية في كافة الظروف الاجتماعية والسياسية المتغيرة.

المنهجية: تستخدم الدراسة منهجية بحثية قانونية نوعية وصفية ومقارنة، حيث يتم تحليل المصادر الإسلامية الأساسية - القرآن والحديث والكتب الفقهية الكلاسيكية - جنبًا إلى جنب مع الدساتير الحديثة والأطر القانونية الدولية والتقارير المؤسسية. وتجدر الإشارة إلى أن هذا التحليل يلتزم بمقاصد الشريعة (الأهداف العليا للشريعة الإسلامية)، مع التركيز على العدالة والكرامة والرفاه الاجتماعي. أما جوانب المقارنة، فهي تركز على الاتفاقية الأوروبية لحقوق الإنسان (ECHR)، ومبادئ المجلس الأوروبي وهدف التنمية المستدامة رقم 16 للأمم المتحدة (السلام والعدالة والمؤسسات القوية) لتحديد أوجه الشبه وأوجه الاختلاف وتعزيز الفائدة المتبادلة للدراسة المقارنة.

النتائج والاستنتاجات: تظهر النتائج أن الشريعة في الشريعة الإسلامية توفر مبدأ ساميًا ومعياريًا الشرعية -كبعد تشغيلي لها- من متجذرًا في الأمر الإلهي والمساءلة الأخلاقية، بينما تعمل إضفاء من الإسلامي القانون تُمكن الازدواجية خلال المصادقة المجتمعية عليها والمرونة في التفسير. وهذه الاجتماعية. وفي ضوء مقاصد التطورات مراعات (الفكري) مع العقائدي الانسجام الحفاظ على الشريعة، نجد بأن المفاهيم الإسلامية للشرعية والعدالة تتوافق بشكل وثيق مع أهداف التنمية المستدامة (5) (المساواة بين الجنسين) و (10) (الحد من أوجه عدم المساوات) و (16)، مما يدل على التزام الإسلام الجوهري بالإنصاف والنزاهة المؤسسية والاندماج الاجتماعي. وتخلص الدراسة إلى أن التمييز بين الشرعية النصية والشرعية الإجرائية يعزز من تماسك العمليات القانونية الإسلامية وقدرتها على التكيف. كما أن دمج التفكير القائم على مقاصد الشريعة في أطر العدالة والحوكمة العالمية يكمل المعايير الدولية للمساءلة والشفافية والحوكمة التشاركية. وفي نهاية المطاف، إن هذا المزيج يعزز من أهمية الإسلام المستمرة في الخطاب القانوني والأخلاقي المعاصر، ويقدم نموذجًا للشرعية قائمًا على أسس إلهية وملبياً لاحتياجات للمجتمع في الوقت نفسه.

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Research Article

THE ENFORCEABILITY OF INVESTOR EXIT RIGHTS IN SAUDI LAW: BALANCING CONTRACTUAL AUTONOMY AND MINORITY PROTECTION IN A COMPARATIVE CONTEXT

Ahmed Mansour

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ABSTRACT

Background: *Shareholders' covenants in articles of association or agreements are essential for governing private companies with specific investments. Regulating protective arrangements for smoother share disposal at the investment lifecycle's final stage. Share restrictions in Saudi Arabia are recognised in both regulatory and judicial frameworks, aligning with international corporate law practices and boosting local and foreign direct investment under Vision 2030. This article examines exceptional shareholders' covenants such as drag-along rights and the right of first refusal, which facilitate shareholder exits and enhance a company's appeal to potential purchasers.*

Method: *This study utilises a qualitative, doctrinal, and comparative legal analysis. It critically examines the provisions of the Saudi New Companies Law (2022) alongside a prominent Saudi case and recent legal precedents from the U.K and France. Specifically, the research examines the*

landmark cases of Kulkarni v. Gwent Holdings Ltd, Cunningham v. Resourceful Land Ltd, the ruling from the French Supreme Court (Cour de cassation) in case number 23-10.385 (2024), and the Saudi case number 439245241 (2022) to assess the enforceability of exit rights.

Results and Conclusions: *The research argues that while the Saudi Companies Law offers a solid foundation for exit rights, uncertainties persist. Key among them is the need for regulatory changes to provide immediate remedies, beyond litigation, in cases of non-compliance by uncooperative shareholders. Additionally, in the event of any contest, Saudi courts strictly enforce exit rights, respecting their specific meanings in the context of contract law. Comparative analysis shows that UK and French courts uphold such restrictions when the terms are clear, precise, and negotiated at arm's length. However, the French precedent underscores that a 'promise of sale' (drag-along) must contain a determinable price to be valid. The study concludes that the Saudi legal framework is successfully evolving toward international best practices. To ensure enforceability and enhance access to justice, the article recommends that Saudi companies explicitly incorporate detailed exit clauses, including price valuation methods and the power of majority shareholders to sign transfer forms on behalf of dissenting minorities, directly into their Articles of Association. Such measures are essential for maintaining legal certainty and protecting the interests of both domestic and foreign investors in the Saudi market.*

1 INTRODUCTION

Courts' decisions from Europe, particularly in the U.K. and France, establish authoritative judicial precedents on the practical testing of shareholders' autonomy to agree on exit rights to limit their ability to sell their shareholding openly. In a different context, they may offer a roadmap for interpreting key challenges arising from corporate restrictions on shareholdings after they receive regulatory coverage under the new Companies Law of the Kingdom of Saudi Arabia. On June 28, 2022, the Saudi Council of Ministers set a transformative new Companies Law, marked with the royal decree (A/132)[1] for realising several ambitious goals of the Kingdom's Vision 2030.[2] It endorses the right of shareholders to incorporate co-sale obligations, including 'drag-along' rights, 'tag-along' rights, and the right of first refusal (hereinafter, ROFR) into the articles of association, when establishing joint stock companies (JSCs) and limited liability companies (LLCs), safeguarding the interests of all stakeholders involved. This ensures that shareholders' interests are protected and prioritised. Additionally, this exceptional regulatory coverage highlights Saudi Arabia's

1 Royal Decree No M/132 of 1/12/1443 AH 'Companies Law' (30 June 2022) <https://gccbdi.org/sites/default/files/content-files/Resources/Governance%20%26%20Director%20Information/KSA/Company%20Law%202022%20-%20(English).pdf> accessed 18 November 2025.

2 Campbell M Steedman et al., 'The New Saudi Companies Law: What Is New?' (*Squire Patton Boggs*, 24 August 2022) <https://www.lexology.com/library/detail.aspx?g=1667610c-c5c2-49d4-8936-df0c37ff31ae> accessed 18 November 2025.

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commitment to progressively improving its business environment progressively in line with international best corporate law practices in relation to exit rights for shareholders, similar to those in the U.K. and other developed countries. Landmark cases such as *Kulkarni v Gwent Holdings Ltd*[3], *Cunningham v Resourceful Land Ltd and others*[4], and the ruling of the French Supreme Court (Cour de cassation) in case number 23-10.385 (2024)[5], along with Saudi case number 439245241 decided in 2022[6], which illustrate these developments.

This study applies a functional comparative method. First, it identifies the regulatory recognition of investor exit rights under Saudi companies' law, critically highlights notable unresolved issues beyond simply describing the law, and proposes an improvement plan. This research questions the legal rules of exit rights in Saudi Arabia's new companies law at face value, put the question why do they exist and what do goals they serve. Second, it selects the U.K and French systems as normative benchmarks due to their historical influence, through which the problems are examined and analysed. Third, it evaluates the transposability of specific mechanisms (e.g., drag-along rights) to the Saudi context. Overall, the research aims to inform judicial decisions, influence policy-making, and improve legal best practices regarding existing rights in Saudi Arabia, and to address the same problems beyond the borders of this country, demonstrating the tangible, real-world relevance and impact of the study.

The U.K. and France were selected as archetypes of both common law and civil law respectively. France is relevant due to the genealogical link between the new Saudi Civil Transactions Law (2023) and the French Civil Code (via the Egyptian Civil Code). The UK serves as the global benchmark for the foreign direct investment (FDI) that Saudi Arabia seeks to attract under Vision 2030, enabling the study to assess whether Saudi law is leaning toward a rigid statutory model (French) or a flexible, equitable model (UK). In support, Saudi Arabia is witnessing an increasing presence of French businesses, as outlined in the Saudi-French Investment Forum, which reported that bilateral trade has exceeded €10 billion, with around €3 billion in French investment inflows in 2023, bringing the total French FDI to approximately €17 billion.[7] Part of this business, including Airbus, which established its new regional headquarters in Riyadh, in which the company is expanding its operations in the country and recently secured a landmark agreement to supply the Saudi

3 *Kulkarni v Gwent Holdings Ltd* [2025] EWCA Civ 1206.

4 *Cunningham v Resourceful Land Limited and others* [2018] EWHC (Ch) 1185.

5 Case No 23-10.385 (Court of Cassation, 27 November 2024) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000050704237> accessed 18 November 2025.

6 Case No 439245241 (Commercial Court in Riyadh, 23 November 2022) <https://laws.moj.gov.sa/ar/JudicialDecisionsList/0/A9KffbR_0DxwcYPnikA2ruATzf-UvicrMPfSNKXY7AN5YWhVU0af1X89QFI8j8Ij> accessed 18 November 2025.

7 'With Improved Bilateral Relations, French Investment in Saudi Arabia has Increased by 180%' (*LPC London Premier Centre*, 26 September 2025) <https://www.lpcentre.com/news/french-investment-in-saudi-arabia-soars> accessed 18 November 2025.

government with 105 confirmed new aircraft.[8] This growth is supported by government initiatives and Vision 2030, with expectations for significant development.[9]

2 RESTRICTIONS ON TRANSACTIONS OF SHARES TRANSFERS

A shareholder agreement (SHA) embodies contractual freedom in corporate law, detailing a project's objectives, board roles, capital contributions, and shareholder proportions. SHAs also include protective covenants that restrict share transfers and facilitate smooth exits, through 'drag-along' and 'tag-along' clauses, and the right of first refusal (ROFR). From a historical perspective, restrictions on the transferability of stocks among shareholders can perhaps be inferred indirectly by examining the concept of the 'quasi-partnership' established by the House of Lord in the U.K. in the case of *Ebrahimi v Westbourne Galleries Ltd*[10]. In this landmark case, Lord Wilberforce ordered that the company in question be wound up, and compellingly introduced the approach to identifying situations of quasi-partnership where 'equitable considerations' may have a life alongside strict rules of law applicable to companies.[11] In essence, a quasi-partnership is a company distinguished by a unique set of circumstances that shape the management of its affairs. These situations give rise to equitable expectations for its members that extend beyond the rigid rights and obligations defined by the Companies Act and the articles of association. This creates a dynamic environment where trust and mutual responsibility prevail, fostering stronger relationships among members. Most importantly, a company that is perceived as a quasi-partnership is usually founded on trustworthy concepts such as 'good faith' and 'mutual confidence', which are built on personal relationships, and which are critical in partnership.[12] As such, the founders of these quasi-partnership companies conventionally place restrictions on the transfer of shareholdings among themselves and outside purchasers. The ultimate goal is ensuring business stability

8 'Commercial Aircraft in the Middle East' (Airbus, 2025) https://www.airbus.com/en/about-us/our-worldwide-presence/airbus-in-africa-and-the-middle-east/airbus-in-the-middle-east accessed 18 November 2025. See also, 'Saudia Group and Airbus Sign the Largest Aircraft Deal in Saudi Aviation' (*Saudia*, 20 May 2024) <https://www.saudia.com/pages/experience/about-us/corporate-communication/press-releases-and-news/press-releases/press-release-20052024?sc_lang=hi> accessed 18 November 2025.

9 Miguel Hadchity Zeina Zbibo, 'Airbus Opens Regional Headquarters in Riyadh' (*Arab News*, 3 December 2024) <https://arab.news/yg67n> accessed 18 November 2025.

10 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. See also, Suhaib Zada, 'Redefining Balance: A Fresh Take on Unfair Prejudice Remedy in UK Corporate Law' (2023) 8(3) Journal of Business 4-5, doi:10.18533/2ndwmz93.

11 Lisa Linklater KC, 'Shareholder Disputes: Unfair Prejudice Petitions' (2022) 165 Solicitors Journal 24; Jack Zhou, 'Dissolution of Trusts in Equity's Inherent Jurisdiction' (2025) 31(9) Trusts & Trustees 500, doi:10.1093/tandt/ttaf072.

12 Mohd Rizal Salim, 'Relevance of Partnership Principles in Company Law-Winding-up on the "Just and Equitable" Ground' (2001) 28 Journal of Malaysian and Comparative Law 170; Ziyuan Li, 'An Assessment of the Effectiveness of the Unfair Prejudice Remedy in UK Company Law: How Can We Guarantee Appropriate Judicial Discretion?' (2022) 7(2) Cambridge Law Review 72.

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and allowing current shareholders to choose future partners while blocking unaffiliated third parties.[13] This is often due to concerns about the integrity or business judgment of those parties or a belief that doing business with them could be uncomfortable or unappreciated. Additionally, shareholders may seek protection against competitors acquiring stakes that could lead to control or access to sensitive information.[14]

In the context of Saudi Arabia's transformative new Companies Law, Zhao Huiqi observed that this is a landmark moment as as the law acknowledges the rights of 'drag-along' and 'tag-along', which had previously posed significant enforcement challenges in Saudi Arabia.[15] However, Zhao did not delve into why these important contractual terms were difficult to uphold in the past. Perhaps, in special circumstances, she considered the perspective that the right of 'drag-along' may primarily prioritise the interests of majority shareholder(s) in a company, often at the expense of minority shareholder(s); accordingly, this disproportionate focus could undermine the protection afforded to minority shareholder(s), rendering these rights unenforceable and compromising their position. This raises the question: what are the current 'share restrictions' available to investors in Saudi Arabia, why do they exist, and how can Saudi companies leverage them in case of disputes?

In a striking coincidence of events with no apparent causal connection, the enforceability of 'exists' rights, restrictions on the sale of shares, is well established in the U.K., supported by judicial reviews that were conducted in 2018 and 2025. This issue was also thoroughly examined under French law by 2024, which recognised the contractual freedom of the parties involved to restrict themselves in the event that they wish to transfer their stockholdings to outside invetors However, this raises an important question: can companies in Saudi Arabia adopt these rights in a similar legal fashion found in the U.K and France? This paper delves into the evolving regulatory and judicial trends regarding the enforceability of clauses that control the transfer of shares in Saudi companies under control, employing a comparative lens. The author argues that both the new Saudi Companies Law, which addresses the rights of 'drag-along' and 'tag-along,' and the right of

13 Kimball L Chapman and others, 'Investor Relations, Engagement, and Shareholder Activism' (2022) 97(1) Accounting Review 77, doi:10.2308/TAR-2018-0361; Weliswa Matekenya and Clement Moyo, 'Foreign Divestment, Economic Growth and Development in South Africa: An Empirical Analysis' (2023) 16(1) *Journal of Chinese Economic and Foreign Trade Studies* 4, doi:10.1108/JCEFTS-01-2022-0006. See also, Benjamin Bathke, 'China's Shopping Spree For German Firms Continues' (*DW*, 7 September 2017) https://www.dw.com/en/chinas-unsatisfied-hunger-for-german-companies/a-39658363 accessed 18 November 2025; 'CID, Germany's Gelita to set up EGP 1 bn Gelatin Factory in Egypt's Roubiki City' (*EnterpriseAM*, 28 January 2020) <https://enterprise.press/stories/2020/01/28/cid-germanys-gelita-to-set-up-egp-1-bn-gelatin-factory-in-egypts-roubiki-city-10646/> accessed 18 November 2025.

14 F Hodge O'Neal, 'Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting' (1952) 65(5) Harvard Law Review 773, doi:10.2307/1337124; J Thomas and Jr Andre, 'Restrictions on the Transfer of Shares: A Search for a Public Policy' (1978) 53(3) Tulane Law Reviev 776.

15 Wang Jihong and Zhao Huiqi, 'Saudi Arabia Promotes Investment with New Companies Law' [2022] China Business Law Journal <https://law.asia/saudi-arabia-new-companies-law/> accessed 18 November 2025.

first refusal (ROFR), as well as relevant case law from the U.K. and France, support the idea that contractual restrictions on mandatory stock transfers are enforceable against shareholders that breach these terms. This perspective emphasises the importance of respecting the contractual autonomy of the parties involved.

2.1. FDI and Its Relationship to Restrictions on Share Transfers in Saudi Arabia

Jean Abboud noted that the regulatory recognition of share sale restrictions enhances the feasibility of both establishing and managing companies in Saudi Arabia. This aims to ease the challenges previously encountered by both domestic and foreign investors in protecting their business interests in the the Saudi financial market . Furthermore, Zhao Huiqi and Wang Jihong urged Chinese investors to adhere to recent changes in case they wish to conduct business in Saudi Arabia.[16] Following this analysis, as announced by the Saudi Capital Market Authority (CMA) the new Companies Law of 2022, including the introduction of these new restrictions, came as a response to achieve Saudi Vision 2030's pillar (a thriving economy) to stimulate business, attract domestic and foreign investments, support entrepreneurship, enhance competitiveness, boost the growth of small and medium enterprises (SMEs), and eventually to become a recognised global trade hub.[17] Therefore, Saudi Arabia significantly enhanced its regulatory frameworks to boost the flow of foreign direct investment (FDI) in the Kingdom and through maintaining workable customary corporate law practices, which are in place globally.[18] Indeed, FDI owns many strategic entry points to establish business relations within a host country and enter new foreign markets, such as Saudi Arabia, in which each offers distinct advantages.[19] For these issues, it common practice for both foreign investors and local governments to enter into joint ventures in the form a new commercial entity, through mergers and acquisitions, to work jointly on a particular project for a specific period, which is advantageous for both the host country and foreign investors, than if entirely held by a foreign company, as observed by both Jill Gauntlett and Megan Skipper.[20]

16 Jean Abboud, 'The New Companies Law in the Kingdom of Saudi Arabia: What to Expect' (*BSA Law*, 7 June 2023) <https://www.bsalaw.com/insight/the-new-companies-law-in-the-kingdom-of-saudi-arabia-what-to-expect/> accessed 18 November 2025.

17 Wang and Zhao (n 15).

18 Cherif Elhilali, 'The General Budget in the Kingdom of Saudi Arabia: Between the Governance Requirements and Financial Sustainability' (2023) 6(Spec) Access to Justice in Eastern Europe 59, doi:10.33327/AJEE-18-6S006. See also, 'Ministry of Commerce and Capital Market Authority Clarify the Mechanism of Implementing the New Companies Law' (*Captial Marked Authority*, 4 January 2023) <https://cma.gov.sa/en/MediaCenter/PR/Pages/-New-Companies-Law.aspx> accessed 18 November 2025.

19 Shahad Al-Qahtani and Mohamad Albakjaji, 'The Role of the Leal Frameworks in Attracting Foreign Investments: The Case of Saudi Arabia' (2023) 6(Spec) Access to Justice in Eastern Europe 85, doi:10.33327/AJEE-18-6S001.

20 Per Botolf Maurseth, Jaan Masso and Rasmus Bøgh Holmen, 'FDI and Trade for Foreign Market Entry: Theory and Evidence from Estonia' (2025) 25(1) Baltic Journal of Economics 39-40, doi:10.1080/1406099X.2025.2463863.

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In this strategic partnership, the host country can access new technological spillovers from contemporary equipment and production machinery introduced by FDI, with a corresponding positive influence on the host country's overall modernisation.[21] Foreign investors perceive significant benefits in establishing joint ventures with local entities within host countries. This approach enables them to form alliances that promote growth, which is essential for meeting the increasing demand for specific products. Additionally, investors can take advantage of competitive fiscal incentives, including reduced tax rates, preferential treatment on export profits, and various financial incentives. These incentives may include subsidised production infrastructure, favourable market conditions, regulatory concessions, and lower land prices.[22]

On the numbers, the General Authority for Statistics in Saudi Arabia has released a report on FDI for the first quarter of 2025, showcasing impressive economic growth. Net FDI inflows soared to SAR 22.2 billion, a 44% increase from the same quarter last year. While this figure represents a slight decline of 7% from the fourth quarter of 2024.[23] The Saudi report stated that inflows of FDI totalled approximately SAR 24.0 billion in Q1 2025, marking a 24% increase from Q1 2024, which were approximately SAR 15.7 billion, as observed by UNCTAD.[24]

Critically, during the first quarter of 2025, total outflows amounted to approximately SAR 1.8 billion. This represents a 54% decrease from the first quarter of 2024, when outflows

21 Jill Gauntlett and Megan Skipper, 'Joint Ventures: An Overview' (*Norton Rose Fulbright*, 2025) https://www.nortonrosefulbright.com/en/knowledge/publications/dbff2f61/joint-ventures-an-overview accessed 20 May 2025. See also, Jongpil Park and Woojin Yoon, 'A Foreign Subsidiary's Largest Shareholder, Entry Mode, and Divestitures: The Moderating Role of Foreign Investment Inducement Policies' (2022) 28(3) European Research on Management and Business Economics 100197, doi:10.1016/j.iedeen.2022.100197'; Hyun-Soo Woo and others, 'How Increased Foreign Competition Motivates Domestic Firms to Do Good: An Examination of Foreign Entry Mode and Domestic CSR Response' (2022) 15(4) Journal of Strategy and Management 538, doi:10.1108/JSMA-05-2021-0118.

22 Tareq Mahbub and others, 'Factors Encouraging Foreign Direct Investment (FDI) in the Wind and Solar Energy Sector in an Emerging Country' (2022) 41 Energy Strategy Reviews 100865, doi:10.1016/j.esr.2022.100865. See also, Alaa Swilam and Yousef Saba, 'Saudi Wealth Fund Sets Up Electric Car Joint Venture With Foxconn' (*Reuters*, 3 November 2022) <https://www.reuters.com/business/autos-transportation/saudi-crown-prince-launches-ceer-first-saudi-electric-vehicle-brand-2022-11-03/> accessed 18 November 2025.

23 Fergus Cass, 'Attracting FDI to Transition Countries: The Use of Incentives and Promotion Agencies' (2007) 16(2) Transnational Corporations 80-1; Alvaro Cuervo-Cazurra, Bernardo Silva-Rêgo and Ariane Figueira, 'Financial and Fiscal Incentives and Inward Foreign Direct Investment: When Quality Institutions Substitute Incentives' (2022) 5 Journal of International Business Policy 417, doi:10.1057/s42214-021-00130-9. See also, 'Joint Ventures in Romania and India: Into the Future With a Global Network for Innovative Software, Solutions by the BMW GROUP' (*BMW Group*, 12 April 2024) https://www.bmwgroup.com/en/news/general/2024/joint-ventures.html accessed 18 November 2025; UNCTAD, *Tax Incentives and Foreign Direct Investment: A Global Survey* (ASIT Advisory Studies no 16, UN 2000).

24 'Net FDI Inflows Amount to SAR 22.2 billion for Q1 of 2025' (*Saudi General Authority for Statistics*, 29 June 2025) <https://stats.gov.sa/en/w/news/57> accessed 5 December 2025.

reached SAR 3.9 billion. However, growth was 7% compared to the fourth quarter of 2024, which recorded outflows of SAR 1.7 billion. The report described FDI outflows as the funds and investments flowing *out of* Saudi companies to other economies, which can happen through actions such as the payment of dividends, repayment of loans, or when a direct foreign investor withdraws their investment (exits rights) with the purpose to invest back into the home country.

25

Figure 1. FDI net inflows of Q1 (2025) (Billion SAR)

Figure 2. FDI outflows in the Kingdom of Q1 (2025) (Billion SAR)

25 UN Trade and Development, 'General Profile: Saudi Arabia' (*UN Trade and Development Data Hub*, 2 December 2025) <https://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/682/index.html> accessed 5 December 2025.

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According to the most recent official Saudi report, FDI is recognised as a strategic investment made by individuals or corporations in one country to establish business ties or acquire assets in the Saudi financial market. This typically occurs when an individual foreign investor or a group of foreign investors owns 10% or more of the voting rights associated with shareholder power. Such foreign shareholding enables them to exert a degree of control over the decision-making processes within the invested entity, aligning those decisions with their own interests. In practice, FDI in Saudi Arabia can be illustrated by the SATORP's joint venture between TotalEnergies, a French multinational integrated energy and petroleum company, and the Saudi Arabian Oil Company, which was concluded in December 2022, with the aim of developing a modern, efficient refining and petrochemicals station.[26] Both partners made their final investment decisions to construct a petrochemical complex integrated with the SATORP refinery, totalling $11 billion. The Amiral project, a joint venture between Saudi Aramco (62.5%) and TotalEnergies (37.5%), involves an $11 billion investment to integrate a petrochemical complex with the SATORP refinery. This initiative aligns with TotalEnergies' strategy to maximize synergies within integrated platforms in growth markets. [27] In refrence to Lord Wilberforce's concept of "quasi-partnership" in *Ebrahimi v Westbourne Galleries Ltd*, "Amiral," in Saudi Arabia, is indeed a true application of the "quasi-partnership" because it is a specific corporate structure or relationship that exhibits characteristics of a traditional, personal partnership between the Saudi Aramco (62.5%) and TotalEnergies (37.5%) that is built on equitable considerations, even though it is legally a separate entity. It is not a formal, defined category of FDI in an international statistical sense, but rather a description which is used in a legal context

This collaborative approach between TotalEnergies and the Saudi Arabian Oil Company, as founding shareholders, will usually create binding joint ventures SHA , with "equitable considerations" according to Lord Wilberforce and, therefore, a desire for maintaining a control over stockholdings by setting up the project "Amiral", with various mandatory restrictions on the transferability of the company's shares, meaning a member cannot easily "take out his stake and go elsewhere" if confidence is lost or they are removed from management, as the investments made are co-specific and attain their highest value when the stakeholders are doing the business jointly, as contended by Isabel Sáez and Nuria Gutiérrez.[28] In joint ventures, partners create binding SHA with governments or local

26 Saudi General Authority for Statistics, 'Foreign Direct Investment, Quarter 1 2025' (*Official government website of the Government of the Kingdom of Saudi Arabia*, 29 June 2025) <https://www.stats.gov.sa/documents/20117/2435267/Foreign+Direct+Investment%2C+Quarter+1+2025++EN.pdf/f70a4db5-540c-98f2-6de5-960742cd0247?t=1751142724127> accessed 5 December 2025.

27 'Aramco and TotalEnergies Award Contracts for $11 billion Amiral Project' (*Aramco*, 24 June 2023) <https://www.aramco.com/en/news-media/news/2023/aramco-and-totalenergies-award-contracts-for-$11-billion-amiral-project> accessed 5 December 2025.

28 Isabel Sáez Lacave and Nuria Bermejo Gutierrez, 'Specific Investments, Opportunism and Corporate Contracts: A Theory of Tag-along and Drag-along Clauses' (2010) 11 European Business Organization Law Review 427, doi:10.1017/S1566752910300061.

companies, outlining the rights and responsibilities of the shareholders involved in the project. They also clarify the governance structure of the commercial entity and establish exit strategies outside of the already-established business framework.[29] Some of these rights are significant for creating a target level of confidence in management for shareholders/partners engaged in the FDI projects. Upholding the identity of shareholders is not just important; it is a cornerstone of the business's success.[30] Attila Pintér contended that investors forming 'the dragging investors' typically retain specific rights regarding the disposal of their shares, for an assurance that the sale of their stockholdings is more attractive to potential future buyers of the venture capital transactions.[31] These buyers often prefer to acquire nearly 100% of the shares in the target company to gain complete control or to facilitate a smooth exit for FDI, especially when the investors are minority shareholders 'tagging investors', with a limited number of shares. This trend has led legal jurisdictions to interpret clauses that restrict share sales, raising questions about their enforceability, forming a complex issue that has been convincingly articulated by Bohuslava Horáková, highlighting the nuanced interplay between legal frameworks and financial dealings.[32]

2.2. Drag-along and Tag-along Rights

In this context, structural corporate changes broadly refer to major business activities of changes to a company's legal structure, ownership, assets, or financial strategy. The Saudi corporate law utilises three types of rights that entitle one stockholder to participate compulsorily in another's sale to outside investors, addressing the diverse needs of both majority and minority shareholder(s).[33] One strategic right is referred to as 'drag-along'.[34] This particular right requires each shareholder to agree to grant the majority shareholder(s) a right to request a compulsory co-sell and transfer all of their shares in the target company to a proposed buyer who wishes to purchase all of the shares in the company pursuant to a bona fide purchase offer ('drag-along event'). This right is granted in the event that the majority shareholder(s) wish to transfer all of its shares in the company ('drag along shares')

29 *Goode v Ryan* 489 NE 2d 1001, 1004 (Mass 1986). See also, Tom Matthews, 'Drag Along and Tag Along—Fundamentals' (*LexisNexis*, 5 June 2025) <https://www.lexisnexis.co.uk/legal/guidance/drag-along-tag-along-fundamentals> accessed 5 December 2025.

30 Kimball L Chapman and others, 'Investor Relations, Engagement, and Shareholder Activism' (2022) 97(1) Accounting Review 77, doi:10.2308/TAR-2018-0361.

31 Attila Pintér, 'Drag Along Right in Hungarian Venture Capital Contracts' (2020) ELTE Law Journal 190.

32 Bohuslava Horáková, 'Drag-along and Tag-along Clauses in Shareholder Agreements - Czech Law Perspective' in Nicole Grmelová (ed), *Perspectives of Law in Business and Finance* (ADJURIS 2023) 29.

33 US Securities and Exchange Commission, 'Stockholders' Agreement Among Dave & Buster's Parent, Inc and the Stockholders Party Hereto' (1 June 2010) s 4.01 Tag-Along Rights <https://www.sec.gov/Archives/edgar/data/1525769/000119312511189452/dex46.htm> accessed 5 December 2025.

34 Carsten Bienz and Uwe Walz, 'Venture Capital Exit Rights' (2010) 19(4) Journal of Economics & Management Strategy 1071, doi:10.1111/j.1530-9134.2010.00278.x.

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in one or a series of related transactions.[35] A valid claim for 'drag-along' occurs when the majority shareholder(s) already accept to sell their shares, whereas the minority shareholder(s) oppose the bid, and do not want to sell their shares, then the majority shareholder(s) by the virtue of 'drag-along' can force all other shareholders in the company to sell their shares at the same price.

Therefore, the right of 'drag-along' inherently eliminates the need to initiate separate conversations with each stakeholder in the target company regarding the sale of their shareholding. Furthermore, this exceptional right effectively shifts decision-making authority away from the board, safeguarding the target 'sale' from potential conflicts of interest that directors may have. In this way, the right of 'drag-along' not only enhances transactions efficiency but also ensures that the interests of the majority shareholder(s) prevail in pivotal moments for the company.

However, 'drag-along' may jeopardize the rights of minority shareholder(s). To protect against this, they are typically granted another critical right: the right to participate, or 'tag-along', in the bid for shares by the other controlling shareholder(s). A typical 'tag-along' right requires that if a majority shareholder(s) elects to transfer its shares to a third party with or without exercising the right of 'drag-along', they grant to each of the other shareholder(s) a right to co-sell their shares in the company together with the majority to such a prospective buyer, on the condition that the deal is subject to the same consideration per-share and otherwise on the same terms and conditions as applicable to the selling majority shareholder(s) upon the occurrence of a 'tag-along' event.[36] This arrangement not only safeguards their interests but also grants minority shareholder(s) a valuable opportunity to participate in control premiums that might otherwise be reserved exclusively for the controlling majority shareholder(s).

Both rights, i.e., 'drag-along' and 'tag-along', are included in the new Saudi Companies Law. Articles 113 & 181 outline both rights under the heading 'Obligation to Sell' for both joint stock companies (JSCs) and limited liability companies (LLCs) in 2022. More particularly, Article 113 states that the company's articles of incorporation may allow majority shareholders, based on the consent of shareholder(s) who hold at least 90% of the company's voting shares, to request minority shareholder(s) to sell their minority shares, directed toward a bona fide purchaser, who is willing to acquire all of the company's shares on the condition that the target sale is executed at the same price and under the same terms agreed

35 US Securities and Exchange Commission, 'Second Amended and Restated Shareholders' Agreement between Northshore Holdings Limited and the Shareholders Named Herein' (23 December 2015) s 3.03 Drag-along Rights <https://www.sec.gov/Archives/edgar/data/1363829/000119312515417672/d115754dex102.htm> accessed 5 December 2025.

36 US Securities and Exchange Commission, 'Shareholders Agreement by and Among Offshore Group Investment Limited and the Shareholders (As Defined Herein)' (10 February 2016) s 4.5 Provisions Applicable to Tag-Along and Drag-Along Sales <https://www.sec.gov/Archives/edgar/data/1465872/000119312516467281/d136951dex101.htm> accessed 5 December 2025.

upon for purchasing the majority shareholdings.[37] Under Article 113, minority shareholder(s) are granted the right to request the majority shareholder(s) to sell shareholdings of the minority shareholder(s) to the new buyer at the same price and terms proposed to the majority shareholder(s). This fair-game safeguard protects against being saddled with new owners or being left behind if a majority stake is sold, ensuring fairness in business transactions. Still, it is critical to note that if the 'tag-along' right is not exercised within a designated period of time, the majority shareholder(s) are deemed to have the liberty to transfer the relevant shares to the proposed acquirer, adhering to the terms outlined in the notice of tag-along provided to the other shareholder(s). In practice, the governance of the Saudi Electricity Company (SEC) under Article 16 of its articles of association, which outlines 'Share Capital and Shares,' explicitly grants 'drag-along' and 'tag-along' rights to both classes of shareholders. It also establishes the necessary guidelines for processing transactions when these rights are invoked.[38] The major shareholder(s) of the SEC include the Saudi Arabian Public Investment Fund (PIF), which owns 74.3% of the shares, and Saudi Aramco, holding 6.9%. In addition, foreign investors own 7.4% of the company, showcasing a diverse ownership structure, yet showing another true application of the "quasi-partnership" in the Saudi financial market.[39] A careful reading of Article 16 of this strategic partnership and the diverse composition of the founding shareholders, it appears that it is the minority foreign shareholders who are authorised to exercise the tag-along rights should a triggering event occur. This would permit them to participate in any sale if the majority shareholders, particularly the governmental entities, decide to sell their stakes in the SEC, effectively transferring the entire business to a new owner. This closely-knit partnership reinforces the concept of business specificity, which drives the inclusion of 'sale transfer restrictions' among the shareholders involved.

37 Royal Decree No M/132 of 1/12/1443 AH (n 1) arts 113, 181. See for example, 'Article 113: Drag-along and Tag-along Rights : Without prejudice to the Capital Market Law, the company's articles of association may, upon the approval of shareholders representing at least 90% of the company's voting shares, provide for the following: a) A. That the majority shareholders shall have the right to compel the minority shareholders to accept an offer from a bona fide buyer for purchasing all of the Company's shares at the same price and under the same terms and conditions of purchasing the majority shareholders' shares.'

38 Saudi Electricity Company (SEC), 'Articles of Association' (2022) <https://www.se.com.sa/en/Whoweare/Column3/About-Company/Bylaws> accessed 20 June 2025. 'Article (16) Drag-along and Tag-along Rights: 1. Majority shareholders shall have the right to obligate minority shareholders to accept an offer from a bona fide buyer to purchase the entire shares of the Company for the same price and under the same terms and conditions applicable to the purchase of majority shares; 2. In cases where the majority sell their shares, minority shareholders shall have the right to obligate majority shareholders to guarantee the sale of minority shares for the same price and under the same terms and conditions applicable to the sale of majority shares.'

39 Saudi Electricity Company (SEC), 'Shareholder Structure' (last updated 17 December 2025) <https://www.se.com.sa/en/Investors/Column1/Share-and-Financial-Information/Shareholder-Structure> accessed 20 December 2025.

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Several key uncertainties warrant further research. The new Companies Law in Saudi Arabia does not specify which types of share sales can trigger 'drag-along' rights. This lack of clarity creates a potentially unrestricted situation. Majority shareholders may activate a 'drag-along' provision during transactions such as mergers, significant asset sales, or acquisitions. These situations often involve a 'change of control' or a major disposition, like an exclusive license.

Secondly, the new Saudi Companies Law leaves open the question: what is the minimum percentage of ownership in the company that must be sold to trigger the right of 'drag-along'? Robert B. Little and others argue that selling at least 50% of a company is common from their perspective. However, the exact percentage may vary depending on the ownership structure of the company's shares and the relative negotiating powers of the shareholder(s).[40] Still, Saudi law stipulates a minimum ownership percentage required to initiate a right of 'drag-along'. Specifically, Article 113 states that, without prejudice to the Capital Market Law, the company's articles of association may allow a right of 'drag-along' with the approval of shareholders representing at least 90% of the company's voting shares. Therefore, a shareholder who holds a slight majority, such as 51% of the target company shares, cannot typically force fellow minority shareholder(s) to sell their shares to a new buyer, which gives significant power to the larger shareholder(s). The requirement in Saudi law to hold 90% of a company's voting shares for a drag-along provision aims to ensure that transactions are fair to both majority and minority shareholders. This is because what is considered a fair price, the market value of the company, and a favourable bid for the majority shareholders, who own nearly 90% of the company's shares, will inherently also benefit the minority shareholders, making it a best-suited deal for everyone involved. This argument is further supported by James J. Greenberger's presumption that a balanced SHA should ensure that the economic interests of majority shareholders are typically aligned with those of minority shareholders.[41] In his perspective, astute minority shareholders should leverage their negotiating power to draft a more favourable SHA.

Surprisingly, the offer made by RCBC BidCo Pty Ltd ('BidCo') is a significant example of the sale process of an entire company, using a similar right to 'drag-along' referred to as 'compulsory acquisition', triggered by majority shareholders representing at least 90% of the company's voting shares, and is similar to Saudi law. In its letter, 'BidCo' submitted an offer in late 2024 or early 2025 to acquire Parnell Pharmaceuticals Holdings Ltd, at U.S. $0.4628 per Parnell share. BidCo is an Australian company owned by two funds managed and advised by DW Healthcare Partners, which offered to purchase all ordinary

40 Robert B Little and Joseph A Orien, 'Issues and Best Practices in Drafting Drag-Along Provisions' (*Harvard Law School Forum on Corporate Governance*, *14 December 2016*) <https://corpgov.law.harvard.edu/2016/12/14/issues-and-best-practices-in-drafting-drag-along-provisions/> accessed 5 December 2025.

41 James J Greenberger, 'Minority Investor Rights in Private Equity Transactions' (2001) 4(2) The Journal of Private Equity 47.

shares in Parnell Pharmaceuticals Holdings Ltd at the same price of U.S. $0.4628 per share (the 'cash consideration').[42] This offer is referenced as the compulsory acquisition governing Parnell, which states that if the offer for the sale of the whole company is accepted by shareholders holding at least 90% of the issued shares of Parnell to a third-party purchaser, any remaining shareholders may be required to sell their shares under the same terms. It is worth noting that BidCo mentioned in its booklet to Parnell's shareholders that: 'BidCo intends to compulsorily acquire all the outstanding shares of Parnell's shareholders that have not accepted the Offer. If BidCo is entitled to acquire the remaining Parnell shares under this regime compulsorily, the Parnell shareholders who have not accepted the offer will receive the cash consideration as consideration for the acquisition of their Parnell Shares'.[43] By achieving full ownership, BidCo will regain the authority to steer the business within Parnell, without the complications posed by holdout investors, enabling a seamless transition out of the enterprise for all original shareholders of Parnell Pharmaceuticals Holdings Ltd.

Furthermore, under Saudi law, it is essential that the right of 'drag-along' be explicitly included in the articles of association (AOA) rather than merely referenced in a lower-tier shareholder document, such as a SHA. In this regard, the AOA holds significant value within the intricate framework of corporate law, as prescribed by Article 113 of the new Saudi Companies Law. In this regard, a company is fundamentally guided by three essential types of documents: 1. national or regional laws, which establish the legal framework. 2. The memorandum of association (MoA) and the AoA outline the company's mission and operational guidelines. 3. Several agreements and contracts, including SHAs. Saudi Arabia Companies Law specifically requires that any changes with regards to the 'co-sale obligations' should be set into the articles of association rather than in the shareholders' agreement. This is likely because the enforcement of such agreements is generally presumed to be weaker than that of clauses incorporated in the AoA.[44] In principle, if one party fails to fulfil their obligations, it is less relevant to the company itself, which means that shareholders' interests may not be adequately protected.

A negative view of SHA can be described as follows: if one party violates a 'drag-along' provision stipulated in the SHA, the affected shareholder cannot compel the company to refuse to acknowledge the transfer. The sale contradicts an agreement the company is not bound by (under the principle of privity of contract). In this case, the aggrieved shareholder(s) can at most recover monetary compensation for the injury caused by the sale. Similarly, if a right of 'drag-along' exists in a SHA, a shareholder may choose to

42 Morgan Stanley, 'Offer for Your Shares in Parnell Pharmaceuticals Holdings Ltd' (29 November 2024) <https://www.morganstanley.com/content/dam/msdotcom/en/assets/pdfs/Parnell_Pharmaceuticals_Holdings.pdf> accessed 5 December 2025.

43 ibid 21.

44 Sunidhi Agrahari, 'Share Transfer Restrictions: Enforceability of the Provisions of a Shareholder Agreement vis-à-vis the Articles of Association' (2022) 5(1) International Journal of Law Management & Humanities 2174, doi:10.10000/IJLMH.112765.

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disregard their commitment and refuse to sell their stake. Since such a breach falls outside typical corporate activities no corporate remedy, such as the excluding the non-performing shareholder, would be available. The aggrieved shareholder's only options would be to demand specific performance of the agreement or, more likely, to seek monetary compensation for the damage incurred. By this point, the opportunity to sell the company would have disappeared. To effectively address the enforceability shortcomings often associated with SHAs, the new Saudi Companies Law proposes elevating these agreements to the status of bylaws. While shareholders can outline exit restrictions in a SHA, it is crucial to incorporate these terms into the company's bylaws (articles of association) and officially register them with the relevant government registry.[45] By doing so, the inclusion of a 'drag-along' clause transforms them into foundational elements of the company's organisational architecture.

Moreover, once registered, these provisions are recognised as legitimate and can be confidently enforced against third parties. This elevation to bylaw status not only bestows credibility on these agreements as key corporate tools but also provides an authoritative framework for their enforcement.

The question arises: why does the right of 'drag-along ' receive regulatory approval in Saudi Arabia, amid growing concerns that it could coerce minority shareholders and undermine their rights within the company? At its core, the 'drag-along right' empowers majority shareholder(s) to compel minority shareholders to sell their shares during a company sale, effectively eliminating the possibility of minority holdouts. While this power might evoke feelings of coercion, it is essential to establish robust safeguards, such as minimum price guarantees, fair valuations, and supermajority triggers, to protect minority shareholders from unjust treatment. These safeguards ensure that minority stakeholders receive the same equitable terms as the majority, striking a delicate balance between majority control and minority rights. In response to this regulatory apprehension, Article 113 clarifies that requests for a right of 'drag-along' must be directed toward a 'bona fide purchaser(s)' who is willing to acquire all of the company's shares at the same price and under the same terms as those negotiated for the majority shares. Thus, in this framework, majority shareholder(s) can 'drag' minority shareholder(s) into the deal on the same favourable conditions, thereby harmonising the interests of all parties involved. For minority shareholder(s), the responsibility of negotiating the terms of the sale transaction typically falls on the selling majority shareholder(s). Minority shareholder(s) may not have the same bargaining power as their larger counterparts, which can limit their ability to influence the negotiations significantly. However, this raises an important question: what are the potential consequences if the right under the 'drag-along' clause fails to specify a price determination in the articles of association, as mandated by Article 113 of the new Saudi

45 Jidesh Kumar and Richa Mehra, 'Beware Rights of Shareholders' (2006) 25(10) International Financial Law Review 40.

Companies Law? Understanding this could be crucial for ensuring compliance and protecting stakeholder(s)' interests, for the acquisition of shares in a company against the wishes of the shareholder(s) is often a controversial topic for obvious reasons. Shares are considered property belonging to the shareholder(s), and a fundamental principle of property law stipulates that any non-consensual interference with an owner's rights must be justified by clear legal authority. Typically, an explicit statutory power to acquire shares is required, as seen in the mandatory 'squeeze-out' provisions in the company laws of many countries. To prevent misuse of these provisions, statutory procedures are usually applicable only in narrowly defined circumstances and must be strictly followed. Thus, a 'drag-along' clause in the articles of association shall be deemed invalid if the price is not specified.

2.2.1. Testing the enforceability of the 'drag-along' right in the English and French courts

The exploration of various legal systems has revealed a fascinating area of research, especially concerning shareholders' autonomy to include a 'drag-along' right in their SHA. This aspect may be beneficial for judges in Saudi courts, as it offers valuable insights into interpreting the legal issues related to exercising this shareholders' power. On November 27, 2024, the French Supreme Court (Cour de Cassation) issued a significant ruling in case number 23-10.385 regarding a claimed 'drag-along' clause in SHA. The court determined that when this clause was explicitly labelled as a 'promise of sale', it became invalid for the lack of any provision establishing a price determination in this event.[46] This decision underscores the necessity for clarity and precision in contractual obligations, reaffirming the significance of specifying terms to ensure enforceability. An interesting and concerning ruling has emerged for those who draft agreements. This decision is especially relevant for individuals involved in drafting partnership and SHAs, as it may raise concerns regarding the enforceability of the 'drag-along' clause. In practice, referring to the price offered by the third-party buyer (as is commonly done) should minimise the risk of lacking a specified or ascertainable price. Now, according to the contested judgment issued in the Paris Court of Appeal (Division 5, Chamber 9) and amended on July 9, 2020, a SHA was established between Messrs. [A] and [B] and Ms. [J], who were partners in a simplified joint stock company, Cadres et Dirigeants Interactive (referred to as the CDI company). Article 6 of the SHA in question stated that if there is a firm offer to acquire all of the company's shares, whether from a partner or a third party, the other partners are obligated to sell their shares to the buyer, and each of the shareholders acknowledges that this obligation constitutes 'a promise to sell their shares'.[47] Subsequently, on May 3, 2013, Mr. [B] offered to buy all of

46 Case No 23-10.385 (n 5).

47 Article (6) of the SHA provided that *'In the event of a firm offer to acquire no less than all of the company's shares representing 100% of the company's share capital and voting rights addressed by a third party (or third parties) and/or a shareholder (or shareholders) (…) all the parties to this agreement irrevocably undertake to transfer all their shares to the purchaser (...) Each of the shareholders acknowledges that the foregoing provisions constitute a promise to sell their shares'.*

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Mr. [] and Ms. [J]'s shares for €2,000 each. Following Mr. [A]'s refusal, Mr. [B] invoked the clause stipulated in Article 6 of the SHA. Mr. [A] filed a lawsuit against CDI, Mr. [B], and Ms. [J], seeking a declaration that the forced sale of his shares was null and void. He argued that the SHA of CDI did not specify the determination process of the 'sale price' in the event of a forced sale of his shares. Mr. [A] contended that Article 6 merely represented a commitment to sell rather than mandating a compulsory sale of his stockholdings. Afterwards, both the trial judges and the Paris Court of Appeal rejected the plaintiff's claims regarding the nullity of the share transfer and his subsequent requests, considering that the disputed Article 6 did not constitute 'a promise to sell', but simply was practically an 'obligation to sell at the price described in the offer'.

Interestingly, the contested judgment noted that: ' in a promise of sale, the price must be either determined or determinable'; therefore, precisely the absence of a specific provision regarding the determination of price did not affect the validity of the whole clause. However, the Court of Appeal misinterpreted this agreement, concluding that it did not constitute 'a promise to sell 'but rather an obligation to transfer the shares at the price set by the offer, and most importantly, the lack of a determined price did not affect the validity of the sale contract in question. In its ruling, the French Supreme Court (*Cour de cassation*) found that the Court of Appeal expressly misinterpreted the clear and precise wordings of Article 6 of the SHA, determining that the Article in question did indeed constitute 'a promise to sell', whereas to be considered a 'drag-along clause', it had to contain the essential elements of a contract of sale under the common law, which is a provision showing 'a fixed or determinable sale price mechanism, and consequently, the absence of a price determination impacted its validity, violating Article 6 as being a classical 'drag-along' clause.[48] This ruling is significant for the first judicial experience with drag-along provisions in France, for several reasons. The Supreme Court reversed the decision issued by the Court of Appeal, emphasising that shareholders should exercise caution when drafting drag-along provisions, that French courts should adopt a strict interpretation of the SHA, and that they should not amend or re-draft defective clauses within the SHA, giving them new unwritten outlines that are not specifically included in the contract, such as how shareholders should evaluate the sale price in a drag-along event. Most importantly, the French Supreme Court did not reject upholding a clause that allows a party to a SHA to 'step into' the rights of a third party, making an offer to acquire the shares directly or forcing existing shareholders to sell their shares to an outsider bidder.

What would the Saudi courts' judgment be under the new Companies Law, particularly Article 113, considering the arguments in case number 23-10.385? Considering the mandatory nature of every prerequisite outlined in Article 113, Article 6 of the SHA lacked

48 Karine Khau Castelle, 'La Promesse De Vente Dans Les Clauses De Drag Along (Cass Com, 27 Novembre 2024)' (*Alerion Avocats*, 31 March 2025) <https://Www.Alerionavocats.Com/La-Promesse-De-Vente-Dans-Les-Clauses-De-Drag-Along-Cass-Com-27-Novembre-2024-N23-10-385/> accessed 5 December 2025.

a key pricing mechanism; however, the lack of a pricing mechanism will not invalidate the whole drag-along right, as the result is uncertain. Nevertheless, the literal strict interpretation of the 'a promise to sell their shares' is a mere promise that is considered a moral obligation, but it is not always a legal obligation or strictly obligatory in all circumstances. The binding nature of a promise depends heavily on the context, such as legal considerations. In other words, 'a promise to sell their shares' does not amount to an official right for compulsory transfer based on the classical right of 'drag-along' by virtue of Article 113 of the Saudi New Companies Law.

From the UK's perspective, in 2018 the English *High Court of Justice* in *Cunningham v Resourceful Land Ltd and others,* established a legal precedent that illuminated the intricacies of the right of 'drag-along' and the proper interpretation of a 'bona fide purchaser(s)' who wanted to purchase all the shares in the disputed company in question, in which it compellingly underscores the necessity for shareholders to strictly adhere to the defined terms for invoking the 'drag-along' right. This significant decision is a one - of - the kind by the U.K. High Court, which affirmed that a meticulously crafted right of a 'drag-along' in SHA is enforceableConsequently, majority shareholder(s) legally possess the contractual statutory power to compel minority shareholders to divest their shares to an arm's-length buyer, regardless of any dissent from the minority. In *Cunningham v Resourceful Land Limited and others,* the English court was asked by the claimants to decide whether a minority shareholder could abstain from acting under an agreed 'drag-along' clause, because the minority shareholders believed the clause had 'uncertain' terms. In April 2013, five individuals founded Resourceful Land Ltd (RLL) with a shareholder agreement that included a 'drag-along' clause, allowing majority shareholders to compel minority shareholders to sell their shares and to sign share transfer forms on their behalf if necessary. In a remarkable turn of events, A lender to RLL, Privilege Project Finance Limited, expressed interest in purchasing all the shares in RLL by activating the 'drag-along' clause. However, Privilege proposed exchanging the shares for new shares in its subsidiary rather than offering cash. Only three RLL shareholders agreed to sell their shares under Privilege's plan, while two minority shareholders opposed it. The selling shareholders issued a notice compelling the minority shareholders to sell their shares, and the transaction with Privilege was completed in October 2017 in accordance with the 'drag-along' clause. The minority shareholders who were forced to sell challenged the 'drag-along' provision for several reasons. Firstly, the term 'sale' in the drag-along clause of the SHA refers specifically to a cash sale. Since the Privilege's purchase was made in shares instead of cash, the drag-along provision did not apply. Secondly, the sale cannot be deemed 'in good faith' due to the need for further funding and the 'collateral benefit' gained by selling shareholders. Additionally, a minority shareholder argued that selling the company to a new entity, where majority shareholders retained shares, breached the duty of 'good faith' as it was not conducted at 'arm's length.'

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The English High Court held that the majority shareholders properly exercised their rights under the agreement, allowing them to sign transfer forms for the refusing minority shareholders, and to enforce the drag-along provision.[49] Overwhelmingly, the court rejected all the claimant's arguments, ruling that 'sale' includes both cash and non-cash sale prices, as stated in the 'drag-along' clause, as it reads: 'or any other consideration' in exchange for completing the sale transaction, and thus was deliberately wide to include any return as a sale price.[50]

Furthermore, the High Court determined that the share transaction was executed in good faith, despite the absence of an explicit duty of 'good faith' from shareholders. Privilege was deemed a bona fide purchaser intending to buy all the shares from RLL's shareholders under the same 'drag-along' terms, treating both minority and majority shareholders equally. The transaction was conducted at arm's length, with no prior connection between the new bidder and the selling shareholders. Overall, the High Court embraced the principle of shareholder autonomy, affirming their right to establish 'drag-along' provisions as a meaningful restriction on the open transfer of shares, underscoring the importance of collective agreements in shaping ownership dynamics. Furthermore, the court adopted a traditional approach by interpreting the parties' intentions in relation to the share-for-share exchange, which constituted a valid transfer under the broad wording of the clause, which included 'any other consideration'. Thus, the court aimed to uphold the spirit of the agreement fairly by considering what a reasonable person, armed with full background knowledge, would glean from 'any other consideration' found in SHA, as claimed by both John Dodsworth and Dominic Sedghi.[51]

In a different context and perhaps the most practically problematic issue, this English legal decision is crucial for the new Saudi Companies Law and possibly beyond the borders of this country, because the Saudi law does not adequately addresses remedies outside of litigation for situations where majority or minority shareholders refuse to sell their shares despite the valid application of the 'drag-along' or 'tag-along' rights in the event of a favourable bid made by a third person. Compensation for harm or contractual penalties cannot compel obligated shareholders to sell their shares to a bona fide purchaser alongside the majority shareholders. If the 'drag-along' clause is viewed as an innominate contract, the primary remedy for a breach by minority shareholders is for majority shareholders to seek

49 John Dodsworth and Dominic Sedghi, 'Court Upholds Drag-along Provision' (*Lexology*, 10 August 2018) <https://www.lexology.com/library/detail.aspx?g=b46dbdd8-ecbc-44b1-8ecc-3e973d879fd8> accessed 5 December 2025.

50 *Cunningham v Resourceful Land Ltd and others* (n 4). See, Clause 8.6 of the shareholder agreement provided that 'if the Called Shareholders fail to execute the transfers, then upon the Company receiving the purchase monies or any other consideration payable for the shares the Syndicate Shareholders may execute the transfers on their behalf. An objective reading of the Shareholder Agreement leads to the conclusion that the Syndicate Shareholders through clauses 3 and 8 would have control of RLL's direction and ultimate sale or transfer'.

51 Dodsworth and Sedghi (n 49).

damages. However, quantifying damage from a failure to fulfil 'drag-along' or 'tag-along' obligations is challenging. This raises the question: how can majority shareholders manage uncooperative minority shareholders during 'drag-sale' procedures?

Some SHAs incorporate an obligation to 'consummation' requesting all parties to fully perform their agreed-upon obligation, in which the other shareholders shall cooperate fully with relevant selling shareholders and the acquirer, and shall undertake all actions as may be necessary or desirable to give full legal effect to and consummate the underlying agreement between selling shareholders and the proposed acquirer, and shall cause the company to procure all corporate approvals necessary to that effect in due time.[52] However, the obligation to consummate complicates assessing quality and timeliness, often depending on how well the sales process is managed and the performance and flexibility of the transaction. If expectations are not met, the affected party may feel entitled to a reduced outcome. Additionally, the 'consummation' is another covenant among shareholders, and if breached, the affected party can only seek damages under contract law principles. Most seriously, the prospective third-party purchaser may withdraw from the transaction if the process becomes too time-consuming.

In support, Robert Little and others have proposed a controversial solution to address the challenges posed by uncooperative minority shareholders. They suggest that the majority shareholders should request an irrevocable proxy from the minority shareholder. This proxy is expected to allow the majority shareholder to exercise drag rights on behalf of the minority shareholder, enabling the majority shareholder to vote by written consent or to implement other necessary legal procedures, including signing documents, to enforce the drag transaction. Negotiating with minority shareholders for an irrevocable proxy can be challenging if they want to retain the right to review documents and participate in the drag-along sale process. Exceptionally, the drafters of the SHA for RLL in *Cunningham v. Resourceful Land Limited* provided a potential quick remedy for the majority against minority shareholders who opposed complying with the 'drag-along' clause by including a provision for the wholesale sale of the company in the SHA. Specifically, the agreement stated that: '…….they could require the other shareholders to sell their shares too and could sign transfers on their behalf if they refused to do so' which essentially is the same solution presented by Robert Little and others in 2016, but not through a direct proxy as in the original proposal. Furthermore, Saudi law may require shareholders to resort to higher authorities to enforce the transfer of the sold shares to the new seller.

Regardless of the remedies outlined in the SHA, careful drafting can help mitigate several critical uncertainties that arise when dealing with uncooperative minority shareholder(s). By using precise language, the agreement can facilitate the necessary actions to execute the drag transaction effectively.

52 See the obligation placed by North Bay on other shareholders in the company, US Securities and Exchange Commission, 'Second Amended and Restated (n 35) s 3.03 (f).

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Currently, to what extent the obligation of 'drag-along' is expected to be perceived in the context of *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd*[53], which was an earlier case that clarified the scope and interpretation of an express duty of 'good faith' contained in a SHA, in the context of an unfair prejudice petition. While distinct cases, both *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* and *Cunningham v. Resourceful Land Limited* deal with related principles of contract and company law. In *Re Compound Photonics Group Ltd,* the court enforced a contract that contained precise, unambiguous, and detailed terms, obligations, and performance standards aimed at eliminating ambiguity, reducing disputes, and ensuring enforceability. The Court of Appeal took a narrow interpretation of 'good faith', historically stating that the parties must interact 'fairly and openly'. In relation to the specific facts of the case, the court determined that the majority shareholders did not have any procedural obligations regarding the removal of directors beyond those outlined in Sections 168 and 169 of the Companies Act 2006.[54]

There are several key issues here. Snowden LJ, in the Court of Appeal, embraced a refined interpretation of 'good faith', emphasising that the parties must remain 'faithful to their mutually agreed common purpose'. It concluded that **no automatic standards**, such as duties of 'open and fair dealing' or taking into account the interests of other parties, shall be included in a 'good faith' clause, unless a shareholders' agreement expressly states otherwise.[55] In application, the court ruled that the majority shareholders were not required by a duty of 'good faith' to prioritise the interests of the minority shareholders in any unspecified manner, beyond the obligations that all shareholders have to consider the interests of the company. In other words, the duty of 'good faith' embodies a spectrum of important principles: acting with honesty and integrity, committing to cooperation and transparent communication, restraining a party from taking particular actions, and sometimes asking one party to set aside its commercial interests for the benefit of the other. If all shareholders wish to cultivate a relationship characterised by openness and fairness, it would be wise to include a clear stipulation requiring consultation with one party before critical decisions are made.

Why is this important? *Re Compound Photonics Group Ltd* represents a significant change in the court's approach to clauses of 'good faith', and to other provisions in shareholders' agreements. The Court of Appeal in the U.K is now less reliant on a fixed presumed formula and places more emphasis on interpreting these clauses based on the commercial context

53 *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371.

54 Practical Law Corporate, 'Unfair Prejudice: Express Contractual Duty of Good Faith (Court of Appeal)' (*UK Practical Law*, 21 December 2022), <https://uk.practicallaw.thomsonreuters.com/w-037-7474?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 5 December 2025.

55 Tamar Mepharishvili, 'The Principle of Good Faith in Contractual Relations' (2025) 21(39) European Scientific Journal 168, doi:10.19044/esj.2025.v21n39p162.

and specific facts of each dispute.[56] As a result, shareholders who wish to invoke a 'good-faith' clause must clearly articulate their intentions. For instance, in this case, the parties needed to explicitly outline in the SHA that they would not vote to remove the directors. As such, it is best to include specific, standalone obligations that reflect the commercial agreement, as this eliminates the uncertainty associated with good-faith duties or other duties, such as a compulsory transfer mechanism, such as a 'drag-along' or 'buy-out'.

The SHA in *Cunningham v. Resourceful Land Limited* did not include an explicit duty of good faith (unlike other cases where such a clause was present). However, the claimant argued that an implied duty of 'good faith' had been breached. The central issue was whether the buyer qualified as a 'bona fide arm's length purchaser'. The Court determined that the transaction satisfied this standard, and the whole proposal was offered in 'good faith'. All shareholders received a pro-rata shareholding in the new buyer company, indicating equal treatment for both minority and majority shareholders. This equal allocation was a strong sign of good faith and the absence of any bad faith. Furthermore, the court focused on the subjective mental state of the party exercising the power; they acted honestly for a legitimate commercial purpose rather than to unfairly prejudice the minority. The court's conclusion in *Cunningham v. Resourceful Land Limited* aligns with the philosophy adopted by the Court of Appeal in *Re Compound Photonics Group Ltd*. The latter emphasised a more refined interpretation of 'good faith', stressing the importance of the parties adhering to their mutually agreed common purpose, which may also serve as the basis for triggering a valid procedure for a 'drag-along' obligation, which was formally agreed in the SHA. *Cunningham v Resourceful Land Ltd* (2018) and *Re Compound Photonics Group Ltd* (2022) are significant cases concerning the scope of 'good faith' obligations in SHAs, indicting that parties must avoid actions that reasonable, honest people consider 'commercially unacceptable' and must not undermine the agreement or the substance of the contractual benefits derived from it. Both rulings emphasise that the meaning of good faith is highly context-dependent and generally centres on honesty and a lack of bad faith.

These legal precedents illustrate how the adjudication, as well as shareholders' inclusion of compulsory restrictions on the sale of shares, demonstrate a valid application of the fundamental principle of access to justice. According the perception of the UN, access to justice is a fundamental principle of the rule of law, in which, people should be able to have their claims as well as arguments being heard, exercise their rights, challenge discrimination or hold decision-makers accountable, challenge discrimination, or hold decision-makers accountable, in pursuit of seeking fair remedies.[57] Furthermore, the

56 Neil Brown and Clare Rooney, 'Meaning of Contractual Duty of Good Faith (*Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd*)' (*LexisNexis*, 1 November 2022) <https://www.lexisnexis.co.uk/legal/news/meaning-of-contractual-duty-of-good-faith-re-compound-photonics-group-ltd-faulkner-v-vollin-holdings> accessed 5 December 2025.

57 'Access to Justice' (*United Nation and the Rule of Law*, 2025) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed 30 June 2025.

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OECD argues that access to justice ensures an appreciation of democratic values and encourages an inclusive recovery of the rights that were subject to breaches.[58] In this context, exit rights are fundamental rights of shareholders that ensure their ability to transfer ownership of shares. These rights provide means for shareholders to realize the value of their investments and exit the company. While shareholders may impose certain restrictions on the sale of shares among themselves, these restrictions are typically established through mutual agreement in consideration of democratic values after they had the opportunity to discuss and negotiate these terms freely and without no force on any shareholder to accept them against their will. A core function of shareholders' rights, including agreed 'drag-along' and 'tag-along' provisions, is to enable shareholders to protect their interests and hold the company's management accountable through the judicial system if there is a breach of these rights due to non-compliance with invalid notices, ensuring a fair treatment and include specific avenues for legal seeking remedies. If shareholders voluntarily agree to 'drag-along' and 'tag-along' provisions and notice that their rights have not been promptly respected by other shareholders, they still have the right to initiate legal proceedings against infringing shareholders or the company itself. This may arise in cases of misconduct, breach of duty, or if they believe their interests are being unfairly prejudiced or oppressed by the company or other shareholders. These rights maintain a balance between the interests of majority and minority shareholders, allowing them to initiate legal actions to prevent unfair enforcement of 'drag-along' and 'tag-along' provisions. Furthermore, under these rights, shareholders have the right to access company documents and to receive a "drag-along or tag-along notice" attached with the proposed offers from potential purchasers. This access allows shareholders to make informed decisions and gather the necessary evidence for legal action or shares sales when shareholders' rights are properly invoked. Ultimately, statifying the UN conceptualisation of access to justice through the exercise of their agreed rights 'drag-along' and 'tag-along' provisions, and challenging any discrimination.

However, if the agreed-upon 'drag-along' and 'tag-along' provisions lack contractual specificity due to vagueness or ambiguity, they can create barriers to justice. In contrast, specific terms promote fairness, predictability, and efficient dispute resolution. The key issue lies in the drafting skills of shareholders regarding what 'drag-along' and 'tag-along' mean to them and how to implement them fairly without jeopardising the interests of others. Additionally, shareholders who believe that 'drag-along' and 'tag-along' provisions may be detrimental to them, forcing them to act in a self-serving manner, are likely to avoid entering into a shareholder agreement or business from the outset, typically due to a conflict of interest, if they recognise that these restrictions will harm their interests.

58 'Access to Justice' (*The Organisation for Economic Co-operation and Development (OECD)*, 2025) <https://www.oecd.org/en/topics/sub-issues/access-to-justice.html> accessed 30 September 2025.

2.3. The Right of First Refusal (ROFR)

Another recognisable restriction on the transferability of shares that received regulatory inclusion in the new Saudi Companies Law is the right of first refusal (ROFR), also referred to as the "pre-emptive right" by the Companies Law enacted by Royal Decree No. M/3 of 28 November 2015. This statutory recognition was enacted before the right of 'drag-long', and was introduced as a contractual option to purchase or redeem an asset (property, shares, etc.) before it is sold to others, offering control, security, and potential cost savings to the holder while influencing ownership stability for the existing buyer. Its significance spans real estate, startups, and SHAs.[59] Most forms of pre-emptive rights permit any shareholder wishing to transfer their company shares (the 'transferor') to any unaffiliated third party ('transferee') to send a written notice ('transfer notice') to each other shareholders offering them the right to first purchase the shares to be transferred, which may be all or part of such shareholder's shareholding (the 'offered shares') at the same price per-company share and other terms of the proposed unaffiliated new acquirer.[60] The primary justification for (ROFR) is the belief that the current right holder often values the property more than an outside buyer due to sentimental investments or goodwill from a long-term partnership. Furthermore, Jonathan Mitchell noted that a key aim of 'pre-emptive right' covenants is to stop existing shareholders from selling their shares in closely held corporations, to maintain consistent performance and protect the company from disruptions caused by a partner's sudden unilateral departure.[61]

Saudi Companies Law recognises that shareholders forming limited liability companies (LLCs) seek assurance about their partners, especially in closely held businesses with complex knowledge requirements. To address this concern, Article 178, titled 'Assignment of Equity Stakes' sets guidelines as well as specific circumstances for a partner's pre-emptive right to purchase an equity stake before it is sold to a non-partner, allowing for specifying

59 US Securities and Exchange Commission, 'Right of First Refusal and First Offer Agreement' (12 July 2011) <https://www.sec.gov/Archives/edgar/data/1299969/000119312511188646/dex105.htm> accessed 5 December 2025. See also, UN Trade and Development, 'Introduces State's pre-emption right on acquisition of strategic companies involved in solar' (*UN Trade and Development Investment Policy Hub*, 14 December 2023) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4518/hungary-introduces-state-s-pre-emption-right-on-acquisition-of-strategic-companies-involved-in-solar> accessed 5 December 2025.

60 Oregon Division of Financial Regulation (DFR), 'Right of First Refusal and Co-Sale Agreement' (*Oregon.gov*, 15 October 2018) <https://dfr.oregon.gov/business/reg/insurer/mergers/Documents/moda-delta/modahealth-deltadental-exhibit-a6.pdf> accessed 5 December 2025; 'Right of First Refusal ('ROFR') FAQ: Explaining ROFR Language in Paragraph 8 of QAP' (*City of New York*, sa) <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/rofr-faqs.pdf> accessed 5 December 2025. See also, Marco Ventoruzzo, 'Issuing New Shares and Preemptive Rights: A Comparative Analysis' (2012) 12 Richmond Journal of Global Law & Business 520.

61 Jonathan F Mitchell, 'Can a Right of First Refusal be Assigned?' (2001) 68(3) The University of Chicago Law Review 988.

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the valuation method for shares and extending the period for other shareholders to exercise their right of first refusal in the articles of association, which must be exercised within thirty days from receiving notification of the agreed price.[62]

2.3.1. Judicial Challenges to ROFR

The ROFR sometimes faces judicial challenges in Saudi courts due to non-compliance with application of the mandatory legal procedures for a valid invocation of that particular right. These failures undermined the enforceability of the ROFR against fellow shareholders in the affected companies. A notable example is case number 439245241, which was adjudicated under both the Commercial Court of first instance and Court of Appeal in Riyadh, the capital of Saudi Arabia, on November 23, 2022.[63] In this dispute, the court of first instance underscored the critical importance of adhering to the precise provisions outlined in the articles of association, and the exact wordings of the Companies Law with respect to the required procedures for invoking a valid ROFR application. It was found that the flawed procedures for redeeming shares were dependent on the partners' agreements regarding external requests. This condition contradicted both the statutory requirements and the terms set forth in the partners' covenants regarding the ROFR application. This ruling serves as a powerful reminder of the necessity of clarity and compliance in both corporate and contract law. More precisely, the plaintiff brought a lawsuit in the Commercial Court in Riyadh in his capacity as a partner against the defendants, who were also partners in Al-Falah Private Schools LLC (the Company) that had issued 600 shares, representing 100% of the capital, which amounts to 300,000 Saudi riyals (£58,941.63), and it had nine partners. This commercial relationship led to the redemption of the shares claimed, totalling 530, following a bid offer from the remaining partners who have expressed their desire to sell their shareholdings. The plaintiff became aware of the partners' collective intention to sell their shares in the company to third parties. On July 13, 2021, he sent a letter to the partners requesting that they allow him to exercise his right to redeem and purchase their shares in full, in accordance with Article 10 of the articles of association and in accordance with Companies Law. This was based on the fair valuation of shares on purchase offers from serious third parties. On July 15, 2021, the defendants sent a letter indicating their intention to sell their shares for 38,000,000 riyals (£7,470,356.31), despite having received a higher offer of 43,500,000 riyals (£8,551,211.80). In response, the plaintiff requested access to important documents to proceed with the sale and conduct due diligence. However, the defendants delayed and ignored the plaintiff's request. Unexpectedly, on December 23, 2021, the plaintiff received a letter from the company director about a formal offer to sell the company and its shares for 40 million riyals (£7,863,707.82) from Al-Manhal Private Schools Company, at which all partners had agreed to sell their shares at the specified price.

62 Royal Decree No M/132 of 1/12/1443 AH (n 1)art 178.
63 Case No 439245241 (n 6).

In response, the plaintiff requested the company's financial documents and details of the buyer's offer to assess if the sale price represented the fair value for acquiring the company.

The defendants claimed they received a purchase offer, but on 8 January 2022, the plaintiff expressed a desire to redeem his shares. This request included conditions that were not part of the buyer's original offer: a stipulation to adopt the purchase offer price as the initial price, and a requirement for partners to approve an amendment to the memorandum of association and the appointment of a new executive director, and most importantly, all partners must sign an attached commitment draft. This draft was created at the bank's request and does not mention the bank's name. It grants a 'blanket lien' or 'all-asset collateral', allowing the pledging of all company assets in exchange for a secured loan from any bank to finance the redemption of shares owned by other partners. These conditions exceeded the original contract terms. Despite the issues, the defendants contacted the plaintiff after the redemption period expired on February 9, 2022, offering him an additional 15 days to redeem his shares. They requested a certified cheque for the share value, but he failed to provide it by the deadline. Consequently, his right to redeem under the Companies Law lapsed. The plaintiff sought a court order to recover 530 shares from the defendants at fair value, citing compliance with Saudi Companies Law.

On November 23, 2022, the Commercial Court dismissed the case, rejecting all of the plaintiff's claims. Based on the foregoing observations, the court ruled that the plaintiff's method of redeeming shares owned by other partners was contrary to the law and any other governing documents of the company. The court partially examined the conditional relationship between the redemption of shares and the granting of a 'blanket lien' to finance the purchase of other partners' shares. The plaintiff requested a due diligence study of the company before finalising the purchase and reiterated this request in subsequent communications. He also asked for the completion of other procedures, such as appointing a new company director. However, these conditional requests contradicted the valid application of ROFR, as the other partners in the company were not obligated to comply with the plaintiff's demands for redemption. Furthermore, the plaintiff failed to meet the statutory deadline outlined in the Companies Law. Therefore, the court dismissed the case, rejecting all the plaintiff's requests.

The plaintiff was dissatisfied with the court of first instance's decision and appealed, arguing that his bid offer was contingent on completing sale procedures, including an assessment of the company's financial position. The court rejected this based on a friendly email between the plaintiff and his brother, misinterpreting it as the plaintiff setting conditions. In reality, the email outlined the buyer's conditions, and the plaintiff did not make his repayment request conditional on any new terms. Instead, he referred to the same conditions set by the buyer and accepted by the defendants. Despite these various claims, on Monday, May 8, 2023, the court of appeals in case number 4430309327 confidently affirmed that the earlier

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ruling was not only correct but also firmly grounded in sufficient rationale.[64] As a result, the case was compellingly rejected, underscoring the strength of the original decision.

Remarkably, these different courts' rulings show in practice that Saudi judges, in interpreting a clear contract clause, primarily apply the 'plain meaning' rule, which holds that the language should be given its natural, ordinary meaning, with the objective to determine the parties' intent as expressed in the written agreement, not their private or subjective intentions. The approach is objective, focusing on what a 'reasonable person' with all the available background knowledge would have understood the terms to mean at the time of contracting. Most importantly, the court will not rewrite or correct a bad or invalid application of an explicit clause relating to exit rights, so long as that application is not expressly set out in the contract itself and agreed by the shareholders. Ultimately, the purpose of interpretation is to identify what the parties agreed to, not what the court thinks they should have agreed to.

Similar to Saudi Arabia, ROFR have few judicial challenges in the U.K.; nevertheless, courts have underscored the critical importance of precise drafting and unwavering adherence to the requirements of notice in the triggering event, ensuring that clarity in these areas not only fosters understanding but also safeguards the integrity of the whole process of ROFR. The English High Court of Justice notably provided this observation in the case of *Kulkarni v Gwent Holdings Ltd.*[65] The subject matter in this particular, most recent UK precedent was a contractual dispute included in the SHA, in which the court delved into critical issues surrounding an accurate construction of the concept of 'repudiatory breach capable of remedy' from a practical perspective in pursuit of a deemed transfer clause in the SHA. The decision provides insights into the interpretation of contractual clauses that allow for termination or a mandatory transfer of shares from one shareholder to another in cases of 'material or persistent' breaches and or repudiatory breaches. This decision also thoughtfully examined whether such repudiatory breaches were inherently incapable of being remedied?[66] In a surprising turn, the court ruled in favour of the defendant, even though she committed several confirmed breaches, emphasising the crucial feature of contractual notices, particularly in SHAs, in relation to a compulsory transfer mechanism, including a 'drag-along' or 'buy-out', because the necessary notice to remedy the breach was not issued. In other words, when a non-infringing shareholder identifies a breach by other shareholders, it is their duty to promptly inform the board, which must then send a notice to the infringing shareholder, urging them to rectify the issues.

64 Case No 4430309327 (KSA Court of Appeal, 8 May 2023) <https://laws.moj.gov.sa/ar/JudicialDecisionsList/0/A9KffbR_0DxwcYPnikA2ruATzf-UvicrMPfSNKXY7AN5YWhVU0af1X89QFI8j8Ij> accessed 20 May 2025.

65 *Kulkarni v Gwent Holdings Ltd* (n 3).

66 Practical Law Commercial, 'Contract Breach Capable of Remedy Despite Being Repudiatory (Court of Appeal)' (*UK Practical Law*, 29 September 2025) <https://uk.practicallaw.thomsonreuters.com/w-048-3039?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 5 December 2025.

In *Kulkarni v Gwent Holdings Ltd*, the English High Court and the Court of Appeal provided significant clarity on the interpretation of "material breaches" and their remediability under SHAs. The dispute arose between the majority shareholder, Gwent Holdings Ltd, and a minority shareholder, Kulkarni, following the acquisition of a hospital. Kulkarni alleged that Gwent committed several material and repudiatory breaches, including the improper allocation of shares and the wrongful termination of the SHA.

Kulkarni contended that these breaches triggered a "deemed transfer notice" under clause 7.1(d) of the SHA, compelling Gwent to sell its shares to him. He argued that a repudiatory breach is, by its legal nature, "incapable of remedy" and thus required no notice period for rectification.

The Court of Appeal rejected this interpretation, establishing several key academic and practical precedents:

1) The court held that "remedying a breach" means curing the situation so matters are set right for the future, rather than purely compensating for past damage.

2) Legally, a repudiatory breach is not inherently irremediable; if parties intend for specific breaches to be irreversible, such terms must be explicitly stated in the contract.

3) Under clause 7.1(d), a transfer notice is not automatically deemed served upon a breach; it only occurs if the breach remains unremedied after the formal notice period (e.g., ten business days) has expired.

4) The court affirmed the principle of shareholder autonomy, strictly adhering to the agreed wording of the SHA rather than re-drafting terms to create harsher consequences than intended by the parties.

The court found that Gwent's actions, such as returning shares to the treasury and accepting director appointments, had effectively remedied the breaches. This ruling underscores that innocent parties seeking to enforce compulsory transfer mechanisms must strictly follow contractual notice provisions to avoid losing their right to such remedies.

Hypothetically, what would the Saudi courts' judgment be under the new Companies Law, considering the arguments in *Kulkarni v Gwent Holdings Ltd*? Indeed, the Saudi courts' judgment is expected to have divergent views in this respect. First, According to Article 11 of the new Companies Law under the heading "Partners' Agreement and Family Charter", the founders, partners or shareholders may, whether during the incorporation period of the company or after the completion of the incorporation procedures, enter into an agreement that regulates their relationship with each other or with the company, including the mechanism for the engagement of legal heirs, whether in person or through a company to be established among themselves for such a purpose. Most significantly, the agreement or family charter shall be binding, unless anything goes against the provisions of the Law, or the company's Memorandum of Incorporation or Articles of Association. In the case of *Kulkarni v. Gwent Holdings Ltd*, Clause 7(d) states that "a notice to remedy the breach must

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be served by the Board (with Shareholder Consent)". Since Kulkarni did not comply with this notice requirement, it is expected that a Saudi court would find Kulkarni ineligible for the compulsory transfer of Gwent's shares. This is due to his failure to meet the binding notice requirement under Article 11 of the new Companies Law.

Second, the Saudi courts are expected to consider Clause 7.1 of the Gwent Holdings SHA to be partially void, as it directly contradicts Articles 178 and 11 of the new Companies Law. More precisely, Article 178 specifically lists when the exercise of ROFR is permitted, whereas under section (4) 'shall not apply to the transfer of ownership of equity stakes by inheritance or bequest or by virtue of a judgment from the Competent Judicial Body'. Inherently, this prohibition is considered to be mandatory, which must be obeyed and cannot be changed, waived, or avoided by agreement between private parties, even if they explicitly try to do so, to protect public interest, uphold essential morals against discrimination between decedents and offspring. These rules contrast with supplementary/non-mandatory rules, where ROFR in the case of transfer of ownership of shares by inheritance, does not fall within this category. Now, in reference to Clause 7.1 in the Gwent Holdings SHA, the compulsory transfers, which mention that "A Shareholder is deemed to have served a transfer notice under clause 6.4 immediately before any of the following events: (a) the Shareholder's death;", Kulkarni and other shareholders have the right to exercise the Right of First Refusal (ROFR) if shares belonging to a deceased shareholder are transferred to their offspring. In such cases, mandatory transfers will occur to the other living shareholders. However, this particular event is prohibited by the mandatory section (4) of Article 178 of the new Saudi Companies Law, which by its non-supplementary nature, prevents shareholders such as Kulkarni and Gwent from agreeing to terms contrary to this law.

Moreover, since Article 11 mentions that any SHA shall be binding, unless anything is contrary to the provisions of the Law, clause 7.1 (a) of the SHA is considered to be void. On the other hand, Article 178 does not prevent shareholders from proposing reasons for compulsory share transfers to other existing shareholders, provided they align with regulatory restrictions.

3 CONCLISIONS

Foreign or local shareholders looking to establish business partnerships, whether through the formation of joint ventures or a corporation, may express an interest in incorporating mandatory restrictions on share sales, a practice several legal jurisdictions are now encountering, potentially exposing such clauses to challenge in national courts. This prompts an investigation into legal precedents that demonstrate how far courts allow shareholders to agree to restrictions on the free sale of shares. It also raises questions about potential court rulings if shareholder(s) fail to apply these restrictions validly and on a sound legal basis. Saudi Arabia implemented statutory amendments to its new Companies

Law in 2022, adopting a profound systemic philosophy that holds that shares in a corporation are not merely property to be openly transferred at will; instead, they may forge personal relationships akin to those of the business founders, especially where the business is specific. This perspective emphasises the life-saving issue of selecting one's associates within a corporation, much like one would in a partnership, which invites no more substantial objection. This set of reasons is well-supported by the English courts' tradition of upholding share transfer restrictions, provided they are rooted in fundamental principles of contract law, as Lord Wilberforce observed in *Ebrahimi v Westbourne Galleries Ltd.*

Compulsory restrictions on the sale of shares are vital to ensure smooth corporate exits and to prioritise shareholder interests. To make their stockholdings more appealing, sellers should consider offering 100% of the company's shares, creating an irresistible opportunity for buyers. Most critically, since exit rights are now officially recognised by law in Saudi Arabia, shareholders must strictly comply with all prerequisites for their valid exercise. Most importantly, the legal articles governing share sale transactions are mandatory, and shareholders are required to fully adhere to the specific guidelines set out in these laws. If shareholders fail to comply, any compulsory transfers of shares will be considered null and void. Therefore, shareholders cannot agree to terms that contradict these legal requirements.

A comparison with leading legal precedents reveals that courts in the UK, France, and Saudi Arabia encourage and enforce both validly drafted and applied compulsory restrictions on the sale of shares, placed in either the articles of association or shareholders' agreements, based on the contractual freedom of the parties. Ultimately, the purpose of their interpretation is to identify what the parties agreed to, not what the courts think they should have agreed to. Leading legal precedents discussed in this research study show without a doubt that whenever these compulsory restrictions and obligations were challenged in court, they were strictly interpreted, requiring literal compliance with triggering events and fair valuation to avoid unfair prejudice to the interests of innocent shareholders. Additionally, courts will not broaden the compulsory transfer provisions beyond what is clearly stated in the articles of association or any agreement. In simpler terms, courts will not intervene in the wording of the intended contract to re-draft it on behalf of the shareholders.

Yet, while the rights of 'drag-along' particularly can lead to the expropriation of shares, this exceptional right is not generally considered unfairly prejudicial to the interests of minority shareholders, if the minority receives the same price and terms offered to buy the shares of the majority shareholders. Nevertheless, some courts believe that mandatory restrictions on share sale transactions must be drafted in good faith for the company's benefit, enabling access to justice for all shareholders.

The new Companies Law, or at least companies that are doing business in Saudi Arabia, in which their businesses are specifically designed for applying the concept of a quasi-partnership, need to adopt more sensible and practical solutions for addressing the

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evident failures of both majority and minority shareholders in share sales restrictions, rather than relying solely on litigation. One possible approach could be to require compliant shareholders to request an order for specific performance to be issued from higher authorities, such as the Ministry of Commerce, to act for and on their behalf to perform their obligations under the articles of association, or a 'power of attorney' to execute the compulsory sale transaction on behalf of dissenting shareholders who oppose significant corporate sales.

REFERENCES

1. Abboud J, 'The New Companies Law in the Kingdom of Saudi Arabia: What to Expect' (*BSA Law*, 7 June 2023) <https://www.bsalaw.com/insight/the-new-companies-law-in-the-kingdom-of-saudi-arabia-what-to-expect/> accessed 18 November 2025.
2. Agrahari S, 'Share Transfer Restrictions: Enforceability of the Provisions of a Shareholder Agreement vis-à-vis the Articles of Association' (2022) 5(1) International Journal of Law Management & Humanities 2168, doi:10.10000/IJLMH.112765
3. Al-Qahtani S and Albakjaji M, 'The Role of the Leal Frameworks in Attracting Foreign Investments: The Case of Saudi Arabia' (2023) 6(Spec) Access to Justice in Eastern Europe 85, doi:10.33327/AJEE-18-6S001
4. Bienz C and Walz U, 'Venture Capital Exit Rights' (2010) 19(4) Journal of Economics & Management Strategy 1071, doi:10.1111/j.1530-9134.2010.00278.x
5. Brown N and Rooney C, 'Meaning of Contractual Duty of Good Faith (*Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd*)' (*LexisNexis*, 1 November 2022) <https://www.lexisnexis.co.uk/legal/news/meaning-of-contractual-duty-of-good-faith-re-compound-photonics-group-ltd-faulkner-v-vollin-holdings> accessed 5 December 2025
6. Cass F, 'Attracting FDI to Transition Countries: The Use of Incentives and Promotion Agencies' (2007) 16(2) Transnational Corporations 77
7. Castelle KK, 'La Promesse De Vente Dans Les Clauses De Drag Along (Cass Com, 27 Novembre 2024)' (*Alerion Avocats*, 31 March 2025) <https://www.alerionavocats.Com/La-Promesse-De-Vente-Dans-Les-Clauses-De-Drag-Along-Cass-Com-27-Novembre-2024-N23-10-385/> accessed 5 December 2025
8. Chapman L and others, 'Investor Relations, Engagement, and Shareholder Activism' (2022) 97(1) Accounting Review 77, doi:10.2308/TAR-2018-0361
9. Cuervo-Cazurra A, Silva-Rêgo B and Figueira A, 'Financial and Fiscal Incentives and Inward Foreign Direct Investment: When Quality Institutions Substitute Incentives' (2022) 5 Journal of International Business Policy 417, doi:10.1057/s42214-021-00130-9

10. Dodsworth J and Sedghi D, 'Court Upholds Drag-along Provision' (*Lexology*, 10 August 2018) <https://www.lexology.com/library/detail.aspx?g=b46dbdd8-ecbc-44b1-8ecc-3e973d879fd8> accessed 5 December 2025

11. Elhilali C, 'The General Budget in the Kingdom of Saudi Arabia: Between the Governance Requirements and Financial Sustainability' (2023) 6(Spec) Access to Justice in Eastern Europe 59, doi:10.33327/AJEE-18-6S006

12. Gauntlett J and Skipper M, 'Joint Ventures: An Overview' (*Norton Rose Fulbright*, 2025) <https://www.nortonrosefulbright.com/en/knowledge/publications/dbff2f61/joint-ventures-an-overview> accessed 20 May 2025.

13. Greenberger JJ, 'Minority Investor Rights in Private Equity Transactions' (2001) 4(2) The Journal of Private Equity 47

14. Horáková B, 'Drag-along and Tag-along Clauses in Shareholder Agreements - Czech Law Perspective' in Grmelová N (ed), *Perspectives of Law in Business and Finance* (ADJURIS 2023) 29

15. Kumar J and Mehra R, 'Beware Rights of Shareholders' (2006) 25(10) International Financial Law Review 40

16. Lacave IS and Gutierrez NB, 'Specific Investments, Opportunism and Corporate Contracts: A Theory of Tag-along and Drag-along Clauses' (2010) 11 European Business Organization Law Review 423, doi:10.1017/S1566752910300061

17. Li Z, 'An Assessment of the Effectiveness of the Unfair Prejudice Remedy in UK Company Law: How Can We Guarantee Appropriate Judicial Discretion?' (2022) 7(2) Cambridge Law Review 72

18. Linklater L, 'Shareholder Disputes: Unfair Prejudice Petitions' (2022) 165 Solicitors Journal 24

19. Little RB and Orien JA, 'Issues and Best Practices in Drafting Drag-Along Provisions' (*Harvard Law School Forum on Corporate Governance*, *14 December 2016*) <https://corpgov.law.harvard.edu/2016/12/14/issues-and-best-practices-in-drafting-drag-along-provisions/> accessed 5 December 2025

20. Mahbub T and others, 'Factors Encouraging Foreign Direct Investment (FDI) in the Wind and Solar Energy Sector in an Emerging Country' (2022) 41 Energy Strategy Reviews 100865, doi:10.1016/j.esr.2022.100865

21. Matekenya W and Moyo C, 'Foreign Divestment, Economic Growth and Development in South Africa: An Empirical Analysis' (2023) 16(1) *Journal of Chinese Economic and Foreign Trade Studies* 4, doi:10.1108/JCEFTS-01-2022-0006

22. Matthews T, 'Drag Along and Tag Along—Fundamentals' (*LexisNexis*, 5 June 2025) <https://www.lexisnexis.co.uk/legal/guidance/drag-along-tag-along-fundamentals> accessed 5 December 2025

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23. Maurseth PB, Masso J and Holmen RB, 'FDI and Trade for Foreign Market Entry: Theory and Evidence from Estonia' (2025) 25(1) Baltic Journal of Economics 39, doi:10.1080/1406099X.2025.2463863

24. Mepharishvili T, 'The Principle of Good Faith in Contractual Relations' (2025) 21(39) European Scientific Journal 162, doi:10.19044/esj.2025.v21n39p162

25. Mitchell JF, 'Can a Right of First Refusal be Assigned?' (2001) 68(3) The University of Chicago Law Review 985

26. O'Neal FH, 'Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting' (1952) 65(5) Harvard Law Review 773, doi:10.2307/1337124

27. Park J and Yoon W, 'A Foreign Subsidiary's Largest Shareholder, Entry Mode, and Divestitures: The Moderating Role of Foreign Investment Inducement Policies' (2022) 28(3) European Research on Management and Business Economics 100197, doi:10.1016/j.iedeen.2022.100197

28. Pintér A, 'Drag Along Right in Hungarian Venture Capital Contracts' (2020) ELTE Law Journal 189

29. Salim MR, 'Relevance of Partnership Principles in Company Law-Winding-up on the "Just and Equitable" Ground' (2001) 28 Journal of Malaysian and Comparative Law 169

30. Steedman CM and others, 'The New Saudi Companies Law: What Is New?' (*Squire Patton Boggs*, 24 August 2022) <https://www.lexology.com/library/detail.aspx?g=1667610c-c5c2-49d4-8936-df0c37ff31ae> accessed 28 November 2025

31. Thomas J and Andre Jr, 'Restrictions on the Transfer of Shares: A Search for a Public Policy' (1978) 53(3) Tulane Law Review 776

32. Ventoruzzo M, 'Issuing New Shares and Preemptive Rights: A Comparative Analysis' (2012) 12 Richmond Journal of Global Law & Business 517

33. Wang J and Zhao H, 'Saudi Arabia Promotes Investment with New Companies Law' [2022] China Business Law Journal <https://law.asia/saudi-arabia-new-companies-law/> accessed 18 November 2025.

34. Woo HS and others, 'How Increased Foreign Competition Motivates Domestic Firms to Do Good: An Examination of Foreign Entry Mode and Domestic CSR Response' (2022) 15(4) Journal of Strategy and Management 538, doi:10.1108/JSMA-05-2021-0118

35. Zada S, 'Redefining Balance: A Fresh Take on Unfair Prejudice Remedy in UK Corporate Law' (2023) 8(3) Journal of Business 1, doi:10.18533/2ndwmz93

36. Zhou J, 'Dissolution of Trusts in Equity's Inherent Jurisdiction' (2025) 31(9) Trusts & Trustees 500, doi:10.1093/tandt/ttaf072

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Summary: 1. Introduction. – 2. Restrictions on share transfers. – *2.1. FDI and its relationship to restrictions on share transfers in Saudi Arabia. – 2.2. Drag-along and tag-along rights. – 2.2.1. Testing the enforceability of the 'drag-along' right in the English and French courts.* – 2.3. The right of first refusal (ROFR). – *2.3.1. Judicial challenges to ROFR.* – 3. Conclusions

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАБЕЗПЕЧЕННЯ РЕАЛІЗАЦІЇ ПРАВ ІНВЕСТОРІВ НА ВИХІД У ЗАКОНОДАВСТВІ САУДІВСЬКОЇ АРАВІЇ: БАЛАНСУВАННЯ ДОГОВІРНОЇ АВТОНОМІЇ ТА ЗАХИСТУ ПРАВ МІНОРИТАРНИХ АКЦІОНЕРІВ У ПОРІВНЯЛЬНОМУ КОНТЕКСТІ

Ахмед Мансур

АНОТАЦІЯ

Передумови. *Зобов'язання акціонерів, закріплені у статутах або акціонерних угодах, є ключовими для управління приватними компаніями зі специфічними інвестиціями. Регулювання захисних механізмів забезпечує більш плавне розпорядження акціями на завершальному етапі життєвого циклу інвестицій. Обмеження щодо обігу акцій у Саудівській Аравії визнаються як регуляторними, так і судовими органами, що відповідає міжнародній практиці корпоративного права та стимулює внутрішні й прямі іноземні інвестиції відповідно до програми «Vision 2030». У цій статті досліджуються специфічні зобов'язання акціонерів, такі як право на примусовий продаж (drag-along) та переважне право купівлі (right of first refusal), які сприяють виходу акціонерів та підвищують інвестиційну привабливість компаній.*

Методи. *У дослідженні використано якісний, доктринальний та порівняльно-правовий методи. Критично розглянуто положення нового Закону Саудівської Аравії про компанії (2022) у поєднанні з прецедентною практикою Саудівської Аравії, а також нещодавніми юридичними прецедентами Великої Британії та Франції. Зокрема, проаналізовано знакові справи Kulkarni проти Gwent Holdings Ltd, Cunningham проти Resourceful Land Ltd, рішення Касаційного суду Франції (Cour de cassation) у справі № 23-10.385 (2024) та справу Саудівської Аравії № 439245241 (2022) для оцінки можливості примусового виконання прав на вихід.*

Результати та висновки. *Доведено, що хоча Закон Саудівської Аравії про компанії забезпечує основу для реалізації прав на вихід, певна невизначеність зберігається. Ключовою проблемою є необхідність регуляторних змін для впровадження механізмів негайного правового захисту (поза межами судових проваджень) у випадках невиконання зобов'язань недобросовісними акціонерами. Встановлено, що суди Саудівської Аравії суворо дотримуються положень про права на вихід, поважаючи свободу договору. Порівняльний аналіз свідчить, що суди Великої Британії та Франції загалом підтримують такі обмеження, якщо їхні умови є чіткими, точними та узгодженими на ринкових умовах. Однак французький прецедент підкреслює, що «обіцянка продажу» (drag-along) має містити визначену ціну для визнання її дійсною. Зроблено висновок, що*

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правова база Саудівської Аравії успішно розвивається у напрямку найкращих світових практик. Але для посилення правової визначеності саудівським компаніям рекомендується безпосередньо включати до статутів детальні положення про вихід, зокрема методи оцінки вартості часток та повноваження мажоритарних акціонерів підписувати документи про передачу акцій від імені незгодних міноритаріїв.

Ключові слова: *Прямі іноземні інвестиції, Саудівська Аравія, право на примусовий продаж, переважне право купівлі, захист міноритарних акціонерів, Закон про компанії Саудівської Аравії 2022 року, судове виконання, порівняльне правознавство, Сполучене Королівство, Франція*

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Research Article

AUTONOMOUS WEAPONS SYSTEMS AND EMERGING TECHNOLOGIES: LEGAL REGULATION CHALLENGES FOR NUCLEAR DISARMAMENT VERIFICATION

Alibek Bolat* and Sholpan Saimova

ABSTRACT

Background: *Autonomous weapons systems (AWS) and related emerging technologies are increasingly embedded in surveillance and decision-support architectures relevant to nuclear disarmament verification. This evolution intensifies concerns about accountability, human control and the reliability of evidentiary material generated by complex, opaque systems, including their downstream impact on fair-trial guarantees, evidentiary standards and the availability of effective remedies when such material is relied upon in judicial or quasi-judicial proceedings. The article asks whether existing international laws, especially nuclear disarmament treaties, international humanitarian law and general rules on state responsibility, adequately regulate the deployment of AWS-enabled capabilities in verification, or whether specific normative adaptations are required. By focusing on verification rather than battlefield use, the study highlights an underexplored dimension of the AWS debate and shows its significance for the credibility and sustainability of nuclear disarmament arrangements.*

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Methods: *The research relies on doctrinal and comparative legal analysis conducted by the authors, with artificial intelligence tools used solely for auxiliary tasks such as literature retrieval, material organisation, and preliminary screening of state practice, while all legal interpretations and normative assessments remain the independent work of the researcher. The study examines treaty regimes governing nuclear disarmament and non-proliferation, relevant soft-law instruments and the practice of international organisations involved in verification. It also compares policy documents and statements from multilateral forums concerning lethal AWS, verification technologies and the notion of meaningful human control to identify converging and diverging legal positions and emerging interpretive trends.*

Results and Conclusions: *Existing international law offers an essential but incomplete framework for regulating AWS-related verification. General principles of due diligence, precaution, proportionality, state responsibility and individual criminal liability apply, but they do not resolve challenges linked to high autonomy, algorithmic opacity and the delegation of legally significant judgments to machines. Future nuclear disarmament verification should therefore include explicit legal standards on meaningful human control, transparency, auditability and data governance for AI-enabled systems, with clear rules on attribution and review of machine-generated evidence. Developing concrete verification protocols, interpretive understandings, and institutional oversight to implement these standards would enhance legal certainty, scholarly and practical coherence, and confidence in verification, while preserving contestability, transparency and effective avenues of redress where autonomous outputs underpin allegations of non-compliance or individual responsibility.*

1 INTRODUCTION

Verification of nuclear disarmament is widely recognised as a necessary condition for any credible pathway towards a world without nuclear weapons. The existing non-proliferation and disarmament framework, centred on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and operationalised through the safeguards system of the International Atomic Energy Agency (IAEA) seeks to ensure that nuclear materials and activities remain exclusively peaceful.[1] At the same time, the strategic environment is being reshaped by a renewed nuclear arms race, the erosion of traditional arms-control instruments and the modernisation of both warheads and delivery systems by nearly all nuclear-armed states.[2]

1 IAEA, 'Safeguards and Verification' (*International Atomic Energy Agency (IAEA)*, 2025) <https://www.iaea.org/topics/safeguards-and-verification> accessed 3 December 2025; IAEA, 'Safeguards Overview: Comprehensive Safeguards Agreements and Additional Protocols' (*International Atomic Energy Agency (IAEA)*, 2025) <https://www.iaea.org/publications/factsheets/iaea-safeguards-overview> accessed 3 December 2025.

2 *SIPRI Yearbook 2025: Armaments, Disarmament and International Security* (56th edn, OUP 2025); SIPRI, 'Nuclear Risks Grow as New Arms Race Looms: New SIPRI Yearbook Out Now' (*Stockholm International Peace Research Institute (SIPRI)*, 16 June 2025) <https://www.sipri.org/media/press-release/2025/nuclear-risks-grow-new-arms-race-looms-new-sipri-yearbook-out-now> accessed

These dynamics have sharpened the long-standing concern that verification arrangements for future disarmament commitments must be both technically robust and politically legitimate. Initiatives such as the International Partnership for Nuclear Disarmament Verification (IPNDV), UNIDIR's work on verifying disarmament in the Treaty on the Prohibition of Nuclear Weapons (TPNW) and National Academies assessments of monitoring, verification and dismantlement capabilities illustrate an emerging ecosystem of research on innovative verification concepts, including the exploitation of big data, advanced sensors and remotely operated platforms.[3]

In parallel, rapid advances in artificial intelligence (AI), robotics and autonomy are transforming both military capabilities and verification technologies. On the verification side, the IAEA and research partners increasingly explore AI-enabled analysis of large heterogeneous datasets, as well as robotic and unmanned systems, including aerial drones, for tasks such as radiation mapping, container inspection and remote quasi-inspection of sensitive facilities.[4] This trend is also reflected in the IAEA's recent report to the General Conference, which highlights ongoing efforts to identify and assess emerging/innovative technologies to enhance the effectiveness and efficiency of the safeguards system.[5] On the military side, autonomous weapons systems (AWS) have become a central focus of legal and ethical controversy. The International Committee of the Red Cross (ICRC) defines AWS as systems which, once activated, select and apply force to targets without further human intervention and has called for new internationally agreed limits to preserve compliance with international humanitarian law (IHL) and ethical standards.[6] Within the framework of the Convention on Certain Conventional Weapons (CCW), the Group of Governmental Experts on lethal AWS has affirmed that IHL applies fully to all weapon systems and that human responsibility for decisions on the use of weapons must be retained, with appropriate

3 December 2025; Defence Industry Europe, 'SIPRI report highlights growing nuclear threat as modernization accelerates and arms control weakens' (*Defence Industry Europe*, 15 June 2025) <https://defence-industry.eu/sipri-report-highlights-growing-nuclear-threat-as-modernisation-accelerates-and-arms-control-weakens> accessed 3 December 2025.

3 IPNDV, 'Innovations in Nuclear Disarmament Verification: Research Poster Submissions from Experts around the World' (*International Partnership for Nuclear Disarmament Verification (IPNDV)*, 21 April 2020) <https://www.ipndv.org/news/innovations-in-nuclear-disarmament-verification-research-poster-submissions-from-experts-around-the-world/> accessed 3 December 2025.

4 Francisco F Parada Iturria and others, 'AI for Nuclear Safeguards Verification: ORNL Report' (*Oak Ridge National Laboratory*, November 2024) <https://www.ornl.gov/publication/ai-nuclear-safeguards-verification> accessed 3 December 2025.

5 IAEA, *Strengthening the Effectiveness and Efficiency of the Agency's Safeguards: Report of the Director General* (GC(68)/9, 12 August 2024) para 17 <https://www.iaea.org/sites/default/files/gc/gc65-16.pdf> accessed 3 December 2025.

6 ICRC, *ICRC Position on Autonomous Weapon Systems* (ICRC Position and Background Paper, May 2021) <https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems> accessed 3 December 2025.

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human control exercised across the life-cycle of such systems.[7] Civil society and human rights organisations argue that AWS risks digital dehumanisation, structurally undermines accountability and should be subject to new legally binding prohibitions, especially where meaningful human control is absent.[8]

These debates intersect in complex ways with evolving nuclear delivery systems and the broader AI-nuclear nexus. Long-range missiles remain the most salient nuclear delivery platforms, but attention is increasingly directed towards advanced drones (unmanned aerial vehicles, UAVs) and other uncrewed systems. Arms-control instruments such as the Missile Technology Control Regime (MTCR) explicitly treat rockets and UAVs capable of delivering a 500 kg payload to a range of at least 300 km as potential carriers of weapons of mass destruction, while analytical work by the Nuclear Threat Initiative (NTI) and others classifies UAVs alongside aircraft, ballistic missiles and cruise missiles as nuclear-relevant delivery systems.[9] Recent scholarship emphasises that emerging technologies, especially unmanned systems and increasingly autonomous platforms, could reshape both nuclear delivery and nuclear disarmament verification.[10] In parallel, studies on military AI and nuclear risk highlight how autonomy, machine learning decision support and autonomous ISR can compress decision-making timelines and amplify the dangers of escalation in what some describe as the "third nuclear age".[11] Recent UNIDIR work reinforces these concerns, noting that a number of States explicitly prioritise risks associated with the possible integration of AI into nuclear command, control and communications (NC3), and warning that such integration may exacerbate strategic-stability pressures by further compressing decision timeframes and increasing the probability of misperception or inadvertent escalation.[12]

7 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) (adopted 10 October 1980) <https://treaties.unoda.org/t/ccw> accessed 3 December 2025; CCW Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, 'Chairperson's Summary' (CCW/GGE.1/2020/WP.7, 19 April 2021) <https://docs.un.org/CCW/GGE.1/2020/WP.7> accessed 3 December 2025.

8 Human Rights Watch, *A Hazard to Human Rights: Autonomous Weapons Systems and Digital Decision-Making* (IHRC Harvard Law School 2025).

9 US Bureau of International Security and Nonproliferation, 'Missile Technology Control Regime (MTCR) Frequently Asked Questions' (*US Department of State*, 2025) <https://www.state.gov/bureau-of-international-security-and-nonproliferation/releases/2025/01/missile-technology-control-regime-mtcr-frequently-asked-questions> accessed 3 December 2025.

10 Esra Serim, 'Drone Technology and the Future of Nuclear Weapons' (*The Loop*, 23 July 2025) <https://theloop.ecpr.eu/advancing-drone-technology-and-the-future-of-nuclear-weapons> accessed 3 December 2025.

11 Vincent Boulanin (ed), *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk*, vol 1: Euro-Atlantic Perspectives (SIPRI 2019).

12 Yasmin Afina, *The Global Kaleidoscope of Military AI Governance: Decoding the 2024 Regional Consultations on Responsible AI in the Military Domain* (UNIDIR 2024); UNGA, 'Work of the Advisory Board on Disarmament Matters: Report of the Secretary-General' (A/80/240, 23 July 2025) para 27 <https://unidir.org/wp-content/uploads/2025/08/UNIDIR-2025-ABDM-Report.pdf> accessed 3 December 2025.

Despite this rapidly evolving landscape, the corresponding legal discourse remains fragmented. Legal analyses of AI in the nuclear field primarily address safety and regulatory issues in the civilian nuclear sector or the compatibility of AI-assisted NC3 architectures with international law and strategic stability concerns.[13] Work on verification focuses on institutional design and technical feasibility under the NPT and TPNW, with limited attention to how AI-enabled and autonomous tools, including drones used as verification platforms, affect evidentiary standards, due process and responsibility in disputes about compliance.[14] Conversely, core AWS debates concerning meaningful human control, foreseeability, accountability and the allocation of responsibility rarely consider settings in which autonomous or semi-autonomous systems generate, process or interpret verification-relevant data, or the specific problems posed when such systems may also be, or be closely related to, potential nuclear delivery platforms.[15] This lacuna is particularly problematic given broader concerns that emerging technologies could simultaneously lower barriers to the acquisition of nuclear-capable delivery systems, including certain categories of drones, and complicate the detection and attribution of treaty violations.[16]

Against this backdrop, the present article examines autonomous weapons systems and related emerging technologies as they pertain specifically to nuclear disarmament verification, with particular attention to autonomous and remotely operated drones both as potential carriers of nuclear weapons and as components of verification architectures. It asks whether, and to what extent, existing international law, including nuclear disarmament and non-proliferation treaties, IHL, international human rights law, and the law of state responsibility, adequately regulates AWS (and drone-enabled verification activities) or whether additional normative development is required. Building on doctrinal and comparative legal analysis of treaty provisions, soft-law instruments, state practice in CCW and nuclear disarmament fora, and policy guidance on AI in the nuclear domain, the article argues that current law provides an indispensable but incomplete framework. In outline, it concludes that legally robust and legitimate verification arrangements for future nuclear disarmament will require explicit and operational standards on meaningful human control, transparency, auditability and data governance for AI-, drone- and AWS-enabled verification systems, together with clear rules on attribution and evidentiary reliability where such systems may also be associated with nuclear delivery capabilities. By articulating these standards, the article seeks to bridge currently separate strands of scholarship on AWS, drones and nuclear verification, and to inform ongoing practical discussions on how to design trustworthy, legally sound verification mechanisms for future nuclear disarmament.[17]

13 IAEA, *Topical Issues in Nuclear Installation Safety: Strengthening the Safety of Evolutionary and Innovative Reactor Designs* (Proceedings Series, IAEA Publishing 2025).

14 Shirley Johnson and others, *IAEA Safeguards: Preparing for the Future* (NTI 2020)

15 SIPRI, *ICRC Position* (n 6).

16 *SIPRI Yearbook 2025* (n 2); SIPRI, 'Nuclear Risks Grow (n 2).

17 Vladislav Chernavskikh and Jules Palayer, 'Impact of Military Artificial Intelligence on Nuclear Escalation Risk' (2025) 6 SIPRI Insights on Peace and Security 1, doi:10.55163/FZIW8544

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A small but significant body of case law—ranging from the International Court of Justice's jurisprudence on nuclear testing and disarmament to European human-rights decisions on radiological risk and access to information and domestic and constitutional litigation on armed drones—further illustrates how courts already grapple with technologically mediated risks and access-to-justice guarantees, including, in particular, the fair-trial and equality-of-arms requirements under Article 6 ECHR and the effective-remedy standard under Article 13 ECHR (and, where EU law applies, Article 47 of the EU Charter of Fundamental Rights) even though these strands are rarely discussed together with nuclear verification.[18]

At the same time, questions about autonomous verification are not merely institutional or strategic. Verification findings can feed into diplomatic disputes, sanctions regimes, criminal prosecutions and domestic litigation, where they influence decisions that affect the rights and obligations of States and individuals. If the underlying evidence is generated or processed by autonomous systems, issues of chain of custody, explainability and error become directly relevant to classic access-to-justice guarantees such as the right to a fair trial, equality of arms and the right to an effective remedy. The present article, therefore, approaches the regulation of AWS- and drone-enabled verification not only as a matter of arms-control design, but also as part of a broader access-to-justice agenda, with particular relevance for European and Eastern European legal orders.

Research objectives and questions. This article pursues four objectives: (1) to map how existing international legal regimes (arms control, IHL, human rights, data protection and State responsibility) apply to autonomy and AI-enabled technologies in nuclear-disarmament verification; (2) to identify the verification-relevant normative elements that recur across these regimes (e.g., accountability, due process, auditability and data integrity); (3) to assess the extent to which current treaty practice and safeguards frameworks can operationalize these elements for autonomous verification tools; and (4) to propose a legally grounded set of minimum requirements for the admissibility and contestability of machine-generated verification evidence.

Accordingly, the article is guided by the following research questions:

RQ1: Which existing international legal norms are most directly applicable to autonomous/AI-enabled verification technologies in nuclear disarmament?

RQ2: What normative elements are necessary to ensure that autonomous verification outputs can be treated as reliable and legally usable evidence?

RQ3: Where do current verification regimes (including safeguards practice) leave gaps regarding auditability, attribution and responsibility for machine-mediated findings?

18 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECtHR 2013); Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

RQ4: What minimum legal and procedural safeguards are required to ensure accountability and effective remedies when autonomous verification outputs affect compliance determinations?

2 METHODOLOGY

This article adopts a qualitative, doctrinal and comparative legal research design. The core of the analysis consists of a systematic interpretation of international legal instruments relevant to nuclear disarmament and the regulation of emerging military technologies, including autonomous weapons systems (AWS), drones and AI-enabled verification tools. The doctrinal component follows the general rule of interpretation under the Vienna Convention on the Law of Treaties, combining textual, teleological and systemic approaches to assess how existing norms on disarmament, international humanitarian law, international human rights law and state responsibility apply to AWS- and drone-enabled verification activities. Particular attention is given to the evidentiary and accountability dimensions of verification, to connect the argument with broader guarantees of access to justice and fair trial rights in both international and domestic fora.

The corpus of primary materials was defined *ex ante* and is replicable. It consists of: (a) universal treaties and related instruments on nuclear disarmament and non-proliferation (such as the NPT and TPNW), conventional arms-control regimes relevant to delivery systems (including those covering missiles and unmanned aerial vehicles), and core IHL and IHRL instruments; (b) institutional documents, reports and technical guidance produced by the IAEA, United Nations disarmament bodies, the Convention on Certain Conventional Weapons (CCW) and other relevant international organisations concerning AWS, drones, AI and verification; (c) soft-law standards and expert principles proposed by international and regional organisations, professional associations and civil society (for example on meaningful human control, AI governance and responsible military AI); and (d) case law from international courts and tribunals—including the International Court of Justice's jurisprudence on nuclear testing and disarmament and European Court of Human Rights decisions on radiological risk and access to information, as well as selected judgments of constitutional and supreme courts on technologically mediated evidence, armed-drone operations and military innovation where access-to-justice guarantees are at stake. Secondary materials include peer-reviewed scholarship and policy reports on AWS, drones as potential nuclear delivery systems, nuclear verification, and AI in the nuclear domain, identified through targeted keyword searches across major legal and interdisciplinary databases (including Scopus and Web of Science) and leading regional law journals. All searches were conducted in 2024–2025 using stable keyword combinations (e.g. "autonomous weapons AND verification", "drones AND nuclear delivery", "AI AND nuclear safeguards", "meaningful human control AND evidence"), which are reported in the supplementary materials so that other researchers can replicate and update the corpus.

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The comparative element of the study has two layers. First, it compares the treatment of AWS, drones and AI-enabled verification across relevant treaty regimes and institutional practices, mapping convergences and divergences in how notions such as human control, foreseeability, proportionality and due process are articulated. Secondly, it selectively examines practice and doctrinal debates in Eastern European jurisdictions where questions of technologically mediated evidence, military use of AI and drones, or nuclear-related risks have prompted legislative or judicial responses. The analysis proceeds in three steps: 1) identification and classification of legal provisions and policy statements that bear on AWS- and drone-enabled verification; 2) reconstruction of their underlying normative assumptions, especially regarding human control, accountability and evidentiary reliability; and 3) evaluation of these assumptions against access-to-justice standards - in particular fair-trial and effective-remedy guarantees under international and regional human-rights instruments, leading to the normative proposals developed in the Results and Conclusions section. With a particular focus on the Council of Europe framework (ECHR Articles 6 and 13) and the EU standard of effective judicial protection (Charter Article 47), insofar as verification outputs may be used in proceedings or regulatory decisions within European jurisdictions. The tables and figures presented in the Results section, therefore, synthesise the material in a qualitative, interpretive manner rather than reporting a separate statistical dataset.

No separate empirical dataset involving human subjects, experimental measurements or proprietary computer code was generated for this research; instead, the study relies on doctrinal and policy analysis of publicly available legal and technical materials. All materials consist of publicly available legal and policy documents and published scholarship. Where access to materials depends on subscription-based databases or publisher paywalls, full citations are provided in the article so that readers with institutional access can consult the same sources. A consolidated list of all primary instruments and decisions, together with the keyword strings and inclusion/exclusion criteria used to construct the corpus, will be made available as supplementary material or via an open institutional repository, subject to the copyright and licensing conditions of the underlying documents. This enables other scholars to replicate the selection and to build upon the analytic framework proposed in this article.

Generative artificial intelligence (GenAI) was employed only as an auxiliary instrument in the research and writing process. Specifically, ChatGPT (OpenAI) was used to assist in: (a) preliminary mapping of existing literature and policy documents by suggesting additional search terms; (b) generating alternative formulations and structural options for certain sections; and (c) language refinement and consistency checks in the drafting stage. All legal interpretations, argumentation and conclusions were developed independently by the author, who reviewed, verified, and, where necessary, substantially rewrote any AI-assisted draft text. No AI tool was used to make legal or policy decisions, to generate original research findings, or to determine the normative positions advanced in the article.

The authors bear sole responsibility for the accuracy of citations, the selection and interpretation of sources, and all substantive claims contained in this work. The descriptive distributions and matrices in the Results section are based on this manual doctrinal and policy analysis and should be read as qualitative syntheses, not as the product of AI-driven document coding or statistical modelling.

3 RESULTS

The findings of this study can be organised into three interrelated clusters, which correspond to: 1) the extent to which existing international law regulates autonomous and AI-enabled technologies in nuclear disarmament verification; 2) the specific position of drones as both verification platforms and potential nuclear delivery systems; and 3) the emergence of a common set of normative standards that could guide the design and use of such technologies in legally robust verification architectures. Tables 1–4 and Figures 1–3 provide structured overviews of the doctrinal and policy-mapping results referred to below.

First, the cross-regime coding exercise shows that the bulk of relevant provisions in nuclear disarmament treaties, safeguards practice, international humanitarian law (IHL), human rights law and the law of state responsibility are formulated as obligations of control and due diligence, while a significantly smaller proportion directly addresses accountability and evidentiary reliability (Table 1).

***Table* 1. Cross-Regime Mapping of Relevant Legal Provisions**

Regime / Instrument Type	Example Instruments / Sources (generic)	Main Regulatory Focus for Verification Tech	Coded Category*
Nuclear disarmament and non-proliferation treaties	NPT, TPNW, bilateral reduction treaties	Prohibition of diversion, dismantlement obligations, verification mandates	Control & due diligence
Conventional arms control / delivery systems	Missile-related regimes, UAV export control rules	Limitations on delivery platforms, payload/range thresholds	Control & due diligence
International humanitarian law (IHL)	Geneva law and Hague law instruments	Conduct of hostilities, weapons reviews, targeting constraints	Control & due diligence
International human rights law (IHRL)	Core UN and regional human rights conventions	Right to life, fair trial, privacy, due process in evidence use	Accountability & evidentiary

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Regime / Instrument Type	Example Instruments / Sources (generic)	Main Regulatory Focus for Verification Tech	Coded Category*
Law of state responsibility	Draft Articles on Responsibility of States for ILW	Attribution, breach, reparation, complicity	Accountability
International criminal law	Statutes of international tribunals	Individual criminal responsibility, command responsibility	Accountability
Institutional safeguards and verification practice	Safeguards agreements, verification handbooks	On-site inspections, remote monitoring, data-handling standards	Control & due diligence
Soft law and expert principles on AI/AWS	Principles on meaningful human control, AI ethics	Human control, transparency, auditability, safety requirements	Mixed (all three categories)

*Coded categories: **Control & due diligence**, **Accountability**, **Evidentiary reliability**

A qualitative review of these provisions indicates that most are framed as obligations of control and due diligence, with a smaller cluster concerned with accountability mechanisms and an even more limited subset explicitly addressing evidentiary reliability. Figure 1 offers a stylised representation of this pattern.

Figure 1. Stylised distribution of legal provisions relevant to autonomous verification, by regulatory category

This distribution confirms that existing regimes were not drafted with autonomous or AI-enabled verification tools in mind: they provide clear expectations that states must exercise adequate control over weapons and related technologies, but they offer little explicit guidance on how to treat data generated by autonomous systems, how to ensure its auditability, or how to allocate responsibility when such systems malfunction or embed bias. The gap is particularly evident when these general norms are read alongside contemporary debates on autonomous weapon systems (AWS), where the ICRC and others have called for new legally binding rules to address unpredictability, human control and responsibility in the use of autonomous force.[19] The findings therefore indicate that, while AWS debates already recognise the need for technologically specific limits, analogous questions arising in the context of nuclear disarmament verification remain only partially articulated in existing instruments.

Second, the technical and policy mapping demonstrates that drones occupy a particularly sensitive dual-use position. On the one hand, safeguards-oriented work by laboratories and international partners shows that unmanned aerial vehicles (UAVs) can greatly enhance verification by enabling remote visual inspection, environmental sampling and radiation mapping in inaccessible or hazardous locations.[20] On the other hand, both technical reports and recent analyses of nuclear safety and security highlight that many of the same UAV configurations—especially long-range systems with modular payload bays—possess characteristics comparable to delivery platforms for weapons of mass destruction or can be repurposed for hostile operations against nuclear facilities.[21]

A structured summary of technical characteristics relevant to verification is provided in Table 2, while Figure 2 visualises this overlap, showing that some archetypal verification drones fall within recognised missile-technology thresholds or could be modified to do so. The findings thus confirm that drones deployed in verification roles cannot be treated solely as benign technical aids; they must also be viewed as potential objects of regulation in their own right, raising proliferation, targeting, and escalation concerns that intersect with their verification functions. Related case law on armed-drone operations—such as the German Ramstein litigation, United States federal cases in the Al-Aulaqi line and criminal proceedings involving planned drone-delivered attacks—underscores that courts already treat certain categories of drones as inherently dangerous weapons and scrutinise the adequacy of legal frameworks governing their use, including in terms of extraterritorial obligations and access to effective remedies.

19 ICRC, *ICRC Position* (n 6).

20 John E Smart and others, *Nuclear Safeguards Applications Employing Unmanned Airborne Vehicles* (PNNL-25394, Pacific Northwest National Laboratory 2016).

21 Sven Dokter, 'The Role of Drones in Nuclear Safety and Security - An Overview of the Benefits and Risks of Using this Technology' (*European Technical Safety Organisations Network (ETSON)*, 11 September 2025) <https://www.etson.eu/node/429> accessed 3 December 2025.

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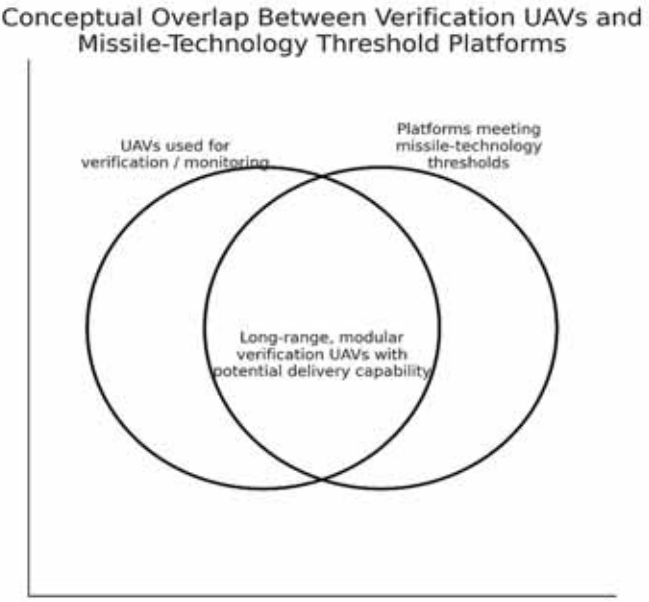
***Table* 2. Technical archetypes of AWS and drone-enabled systems considered in the verification analysis**

System Type / Archetype	Primary Verification Function	Autonomy Level (low–high)	Typical Payload / Capability	Sensor Suite (examples)	Auditability (log / traceability features)	Dual-Use Assessment (delivery risk)
Autonomous inspection UAV (short-range)	Perimeter monitoring, radiation mapping	Medium	Lightweight detectors, cameras	EO/IR cameras, basic radiation sensors	Flight logs, sensor logs, basic anomaly reports	Low–medium (limited payload, range)
Long-range UAV with modular bay	Area surveillance, remote observation of facilities	Medium–high	Modular bay up to several hundred kg	EO/IR, SAR, SIGINT payloads	Detailed mission logs, payload usage logs	High (meets missile-type MTCR thresholds)
Fixed autonomous ground sensor network	Continuous local monitoring (radiation, movement)	Medium	Fixed, non-mobile	Radiation detectors, motion sensors	Continuous data logging, local tamper-evident storage	Low (no delivery capability)
AI-based anomaly-detection platform	Off-site analysis of multimodal verification data	High (algorithmic)	Non-physical, software-based	Input: satellite imagery, sensor streams	Versioned models, change logs, decision logs	Indirect (supports targeting/ intelligence)
Autonomous surface/underwater vehicle	Monitoring of maritime nuclear sites	Medium–high	Sensors, possible heavy payload	Sonar, radiation detectors, navigation aids	Mission logs, route tracking, sensor data logs	Medium–high (potential for delivery modification)



Note. Venn diagram **Circle A (left):** UAVs deployed or proposed for verification/monitoring tasks (Characteristics: long loiter time, high-resolution sensors, secure comms.); **Circle B (right):** Platforms meeting missile-related payload/range thresholds for WMD delivery (Characteristics: payload ≥ 500 kg and range ≥ 300 km, or equivalent criteria). **Intersection: -** Class of long-range drones used for surveillance that also meet or could easily be modified to meet delivery thresholds; - Systems with modular bays, autonomous navigation, and secure guidance.

***Figure* 2. Conceptual overlap between UAVs used for nuclear verification and UAVs meeting recognised missile-technology thresholds**

Third, the analysis of state submissions to the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on lethal AWS, ICRC guidance, NGO advocacy and specialist safeguards literature reveals a converging set of normative elements that could serve as building blocks for regulating autonomous and AI-enabled verification systems. These elements include requirements for meaningful human control over critical functions, limitations on unpredictability, transparency and explainability of system behaviour, robust data integrity and cybersecurity safeguards, and pre-deployment technical-legal reviews.[22] The frequency distribution of these elements is displayed in **Figure 3, while** a consolidated matrix of recurring normative themes is presented in **Table 3.**

22 Cristina Siserman-Gray and others, 'Regulatory Challenges Related to the Use of Artificial Intelligence for IAEA Safeguards Verification' (*Institute of Nuclear Materials Management (INMM)*, 2023) <https://resources.inmm.org/annual-meeting-proceedings/regulatory-challenges-related-use-artificial-intelligence-iaea> accessed 4 December 2025.

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***Table* 3. Recurring normative elements in discourses on AWS, drones and AI-enabled verification**

Normative Element / Principle	State Submissions (frequency)	Institutional Reports (frequency)	Expert / NGO Principles (frequency)	Typical Formulation (generic)
Meaningful human control	High	Medium	High	Human officials must retain effective authority and practical ability to 1) authorize and constrain verification missions, 2) supervise and intervene/override autonomous behaviour, and 3) validate and sign-off autonomous outputs before they generate legal effects (evidence, compliance findings, or enforcement triggers)
Transparency and explainability	Medium	High	High	System behaviour and decision paths must be understandable.
Data integrity and cybersecurity	Medium	High	Medium	Verification data must be protected against tampering and intrusion.
Pre-deployment review and certification	Low–medium	Medium	High	Systems must undergo technical–legal review before use.
Proportionality and risk assessment	Medium	Medium	Medium	Use must be preceded by context-sensitive risk analysis.
Remedies, accountability, redress	Low–medium	Low–medium	Medium	Mechanisms for responsibility and redress must be specified.

Note: Entries "high", "medium" and "low" reflect the author's qualitative assessment of the prominence of each element in the sampled materials rather than the output of a formal quantitative coding exercise.

Meaningful Human Control in verification. For the purposes of nuclear disarmament verification, meaningful human control (MHC) should be understood as the continuous and effective involvement of designated human officials in the critical verification functions that can produce legal consequences. Unlike the use-of-force context, where MHC primarily concerns human control over target selection and the application of force, in the verification context, MHC concerns human control over evidence generation and compliance assessment. At minimum, MHC requires: 1) human authorisation of mission objectives, geographic scope and rules of operation; 2) practical ability to supervise operations and intervene/override or abort autonomous behaviour; and 3) human validation and formal sign-off of any machine-generated compliance-relevant assessment before it is treated as evidence or triggers enforcement measures. MHC, therefore, depends on auditable logs, explainability sufficient for review, and an institutional review pathway that can correct or contest autonomous outputs.[23]

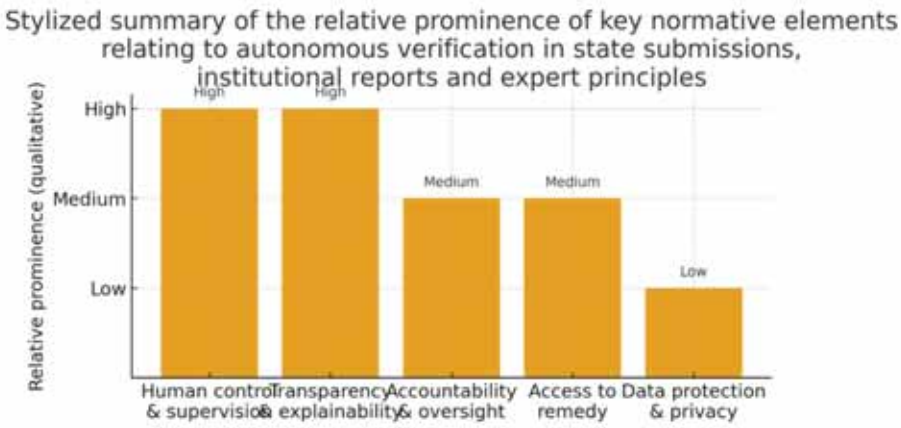

Figure 3. Stylised summary of the relative prominence of key normative elements relating to autonomous verification in state submissions, institutional reports and expert principles

At the same time, studies on AI in nuclear safeguards underline that AI-based tools are already being explored for anomaly detection, pattern recognition and the fusion of geospatial and operational data, while stressing that these developments must be aligned with evolving AI regulatory frameworks and safeguards-specific legal constraints.[24] The findings of this study systematise these strands by showing that, across the examined

23 UNIDIR Security and Technology Programme, *The Weaponization of Increasingly Autonomous Technologies: Considering How Meaningful Human Control Might Move the Discussion Forward* (UNIDIR 2014) 4.

24 Ahmed Abdelrahman Ibrahim and Hak-Kyu Lim, 'A Deterministic Assurance Framework for Licensable Explainable AI Grid-Interactive Nuclear Control' (2025) *18*(23) *Energies* 6268, doi:10.3390/en18236268.

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discourse, there is implicit agreement on a core normative grammar-human control, transparency, auditability, data protection, but that explicit, verification-specific operationalisation of these principles is still largely absent.

Finally, the jurisprudential survey summarised in Table 4 shows that courts and quasi-judicial bodies have begun to engage with technologically generated evidence and with disputes arising from nuclear-related risks and armed drone operations. One cluster of decisions, exemplified by *Prosecutor v Ahmad Al Faqi Al Mahdi (ICC)*, *Big Brother Watch and Others v the United Kingdom* (ECtHR), *City of Sioux City v Jacobsma* and *State v Loomis*, addresses satellite imagery, bulk interception, automated enforcement and algorithmic risk scoring, and thus illustrates how judges assess the admissibility, probative value and contestability of machine-generated evidence.

A second cluster, including the ICJ's Nuclear Tests, Nuclear Weapons and Marshall Islands cases, ECtHR judgments such as McGinley and Egan, LCB and Roche, and domestic and constitutional litigation on armed drones in Germany (Ramstein) and the United States (the Al-Aulaqi line of cases), concerns the evidentiary and remedial dimensions of nuclear testing, radiological exposure and lethal drone strikes.

Taken together, these strands reveal both a willingness to admit technologically mediated evidence and a persistent concern with issues such as chain of custody, access to underlying data, the burdens of proof and the effective availability of remedies.

While none of the decisions examined directly addresses autonomous nuclear disarmament verification, they illustrate the types of procedural safeguards that will be necessary if autonomous or AI-enabled verification outputs are used to support allegations of non-compliance or to justify sanctions and other coercive measures, and they show how courts link technologically mediated risk to fair-trial guarantees, equality of arms and the right to an effective remedy. Against the background of broader analyses of AI, strategic stability, and nuclear risk—which emphasise compressed decision-making timelines, new escalation pathways and uncertainties in human-machine interaction—the study concludes that integrating autonomous and AI-enabled systems into nuclear disarmament verification without explicit evidentiary and accountability standards would risk exacerbating, rather than reducing, doubts about compliance and fairness.[25]

Taken together, the findings support three core conclusions: 1) existing law forms a necessary but incomplete basis for regulating autonomous verification technologies; 2) drones used for verification must be governed with full awareness of their dual-use potential as nuclear-relevant delivery systems; and 3) future nuclear disarmament arrangements will need to codify verification-specific standards on human control,

25 Olivia Le Poidevin, 'Nations Meet at UN for «Killer Robot» Talks as Regulation Lags' (*Reuters*, 12 May 2025) <https://www.reuters.com/sustainability/society-equity/nations-meet-un-killer-robot-talks-regulation-lags-2025-05-12> accessed 4 December 2025.

transparency, data governance and evidentiary treatment if they are to maintain both technical effectiveness and legal legitimacy.

***Table* 4. Selected judicial decisions on technology-generated evidence and their implications for autonomous verification and access to justice**

Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
Prosecutor v. Ahmad Al Faqi Al Mahdi No. ICC-01/12-01/15, 27 September 2016[26]	International Criminal Court	Satellite and aerial imagery, remote sensing, digital reconstructions	Reliability, authentication and corroboration of imagery-based evidence	Evidence admitted as part of a broader evidentiary mosaic, with explicit discussion of corroboration and expert validation	Illustrates conditions under which high-tech imagery can satisfy evidentiary standards and be subjected to adversarial challenge when used to support legally significant findings.
Big Brother Watch and Others v. the United Kingdom Apps Nos. 58170/13, 62322/14 and 24960/15, 25 May 2021[27]	European Court of Human Rights (Grand Chamber)	Bulk interception, communications-data collection and algorithmic selectors	Right to privacy and freedom of expression versus national-security surveillance; adequacy of safeguards and ex post remedies	Violations found due to insufficient safeguards and oversight; emphasis on foreseeability and effective remedies	Sets out requirements for legal frameworks governing large-scale, automated data collection and for ensuring effective remedies where such systems are used.
City of Sioux City v. Jacobsma No. 13–1502, 20 February 2015[28]	National supreme court (United States, Iowa)	Automated speed-enforcement cameras	Burden of proof, presumption of innocence and due process where liability is based on machine-generated data	Automated-enforcement scheme upheld under a model of rebuttable presumption and with opportunities to contest machine-generated evidence	Illustrates judicial approaches to the probative value of automated sensor data and the need to preserve contestability for affected parties.

26 *Prosecutor v Ahmad Al Faqi Al Mahdi* no ICC-01/12-01/15-171 (ICC, Trial Chamber VIII, 27 September 2016) <https://www.icc-cpi.int/court-record/icc-01/12-01/15-171> accessed 6 December 2025.

27 *Big Brother Watch and Others v the United Kingdom* App nos 58170/13, 62322/14 and 24960/15 (ECtHR [GC], 25 May 2021) <https://hudoc.echr.coe.int/eng?i=001-210077> accessed 6 December 2025.

28 *City of Sioux City v Jacobsma* no 13–1502 (Iowa Sup Ct, 20 February 2015) <https://law.justia.com/cases/iowa/supreme-court/2015/131502.html> accessed 6 December 2025.

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Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
State v. Loomis No. 2015AP157-CR, 13 July 2016[29]	National supreme court (United States, Wisconsin)	Proprietary algorithmic risk-assessment tool (COMPAS)	Opacity of algorithm, fair-trial guarantees and due process in sentencing decisions	Use of risk scores permitted only as one factor among others, with warnings about limitations and safeguards to preserve judicial discretion	Demonstrates judicial concern with explainability, transparency and the ability of defendants to challenge algorithmic assessments.
Nuclear Tests (Australia v. France), 20 December 1974[30]	International Court of Justice (ICJ)	French atmospheric nuclear tests in the South Pacific and their monitoring (air and sea measurements, remote sensing)	Admissibility of a claim following France's unilateral announcements to cease atmospheric testing; sufficiency of the state's public statements as evidence of a change in the legal situation and fulfillment of an obligation	The Court found that France's public statements about the cessation of atmospheric testing created legally binding unilateral obligations, and as a result the dispute lost its subject matter; the case was dismissed.	Demonstrates that official declarations and observational data can serve as elements of a "verification regime" even without a formal treaty. It demonstrates how the Court assesses the reliability and sufficiency of evidence of the cessation of nuclear activity-an important precedent for discussing the credibility of autonomous and remote verification systems. It is important for access to justice that the Court uses a standard that allows applicant states to rely on publicly available evidence (declarations and technical data), and not just internal documentation.

29 *State v Loomis* no 2015AP157-CR (Wis Sup Ct, 13 July 2016) <https://law.justia.com/cases/wisconsin/supreme-court/2016/2015ap000157-cr.html> accessed 6 December 2025.

30 *Nuclear Tests (Australia v France)* (ICJ, 20 December 1974) <https://www.icj-cij.org/case/58> accessed 6 December 2025.

Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
Legality of the Threat or Use of Nuclear Weapons, 8 July 1996[31]	International Court of Justice, advisory opinion at the request of the UN General Assembly.	Nuclear weapons as a specific type of weapon; assessment of their compatibility with the UN Charter and IHL; emphasis on the obligation to conduct disarmament negotiations "under strict and effective international control."	The Court's competence to give an opinion; the limits of its advisory function in the sensitive field of security and disarmament.	The Court found the request admissible and issued an advisory opinion. It stated that, in general, the threat or use of nuclear weapons is incompatible with IHL, but was unable to definitively resolve the issue in the "extreme case of self-defense, when the very existence of a State is at stake". It affirmed the obligation to negotiate nuclear disarmament and pursue it to a conclusion.	Normative foundation: the rationale that any autonomous verification mechanisms serve the purpose of implementing nuclear disarmament obligations. The formula of "strict and effective international control" logically leads to the development of technical and algorithmic means of verifying treaty compliance. For access to justice, this establishes a framework within which courts and quasi-judicial bodies evaluate evidence of compliance/violation of disarmament obligations, including data obtained through autonomous systems.
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom),	International Court of Justice	Obligations under Article VI of the NPT and customary law on nuclear disarmament negotiations; the question of whether nuclear powers are conducting genuine negotiations	The existence of a "dispute" between the Marshall Islands and the defendants at the time of the application; the standard of proof of the dispute and the jurisdiction of the Court	The court, by a majority, found that there was no proven dispute and declined jurisdiction without proceeding to the merits.	The high threshold for proving the existence of a dispute is indicative – important for all cases where the applicant relies on open sources, technical data, and automated analysis of state behavior. From an access to justice perspective,

31 *Legality of the Threat or Use of Nuclear Weapons* (ICJ, 8 July 1996) <https://www.icj-cij.org/case/95> accessed 6 December 2025.

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Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
5 October 2016[32]					the case demonstrates how insufficient empirical evidence (including monitoring data) can lead to a case being denied admission to trial.
Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, 3 BJs 7/12-4, 20 June 2013[33]	The Federal Attorney General at the Federal Court of Justice of Germany (Bundesgerichtshof) has decided not to initiate criminal proceedings against a complaint regarding the targeted use of a combat drone.	The attack by a combat drone on a building in Mir Ali, Pakistan; the launch of a missile from a drone against suspected members of an armed group is a classic example	Can the use of a drone to launch a missile at a building be classified as a use of armed force in a non-international armed conflict and/or a war crime? Is a German agency obligated to investigate possible war crimes if part of the operation involves foreign territory and foreign services?	The Federal Prosecutor declined to prosecute based on his assessment of the facts and applicable law; in effect, it was recognized that under the circumstances there were insufficient grounds for criminal prosecution.	Shows how the fact-finding body relies on a limited body of information about a drone strike (military secrecy, intelligence). Highlights the problem: without transparent mechanisms for registering and monitoring drone operations (which autonomous verification systems could potentially provide), victims are virtually deprived of effective access to justice.
Ramstein – Deployment of Drones, 2 BvR 508/21, 15 July 2025[34]	German administrative courts and the Federal Constitutional Court – Yemeni complaints against	The use of American attack drones in Yemen, relying on the infrastructure of Ramstein Air Base (signal	What is the scope of Germany's obligation to protect the right to life of individuals outside its territory if German territory or	The Supreme Administrative Court (OVG Münster) initially recognized Germany's	These decisions are critical to your topic: they demonstrate that a state hosting the infrastructure (Ramstein) may

32 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (ICJ, 5 October 2016) <https://www.icj-cij.org/case/160> accessed 6 December 2025.

33 *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan (Targeted Killing in Pakistan Case)* 3 BJs 7/12-4 (BVerfG Public Prosecutor General, 20 June 2013) <https://casebook.icrc.org/case-study/germany-aerial-drone-attack-mir-alipakistan> accessed 6 December 2025.

34 *Ramstein – Deployment of Drones* 2 BvR 508/21 (BVerfG, 15 July 2025) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2025/07/rs20250715_2bvr050821en.html> accessed 6 December 2025.

Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
	Germany's participation in the US drone strike program via the Ramstein air base	relay, flight control, satellite channels)	infrastructure is used for drone strikes? Should Germany conduct more stringent legal assessments and oversight of US drone operations' compliance with international law?	obligation to actively review the legality of drone strikes. The Federal Administrative Court and then the Federal Constitutional Court limited this obligation: the complaints were rejected, emphasizing the government's broad discretion in the area of foreign and defense policy; the constitutional complaint was found to be unfounded.	have positive obligations to "control" the use of drones. Autonomous/algorithmic verification systems can be considered as a tool that a state must implement to fulfill this obligation of control (log collection, automatic mission registration, algorithmic auditing of compliance with IHL). From an access to justice perspective, the decisions highlight how difficult it is for victims of drone strikes to document the facts and obtain judicial redress in the absence of transparent technical verification mechanisms.
Al-Aulaqi et al v. Panetta et al, No. 1:2012cv01192, 4 April 2014[35]	United States District Court for the District of Columbia	Targeted killings using attack drones in Yemen, including US citizens (Anwar and Abdulrahman Al-Awlaki); inclusion on a "kill list" and subsequent use of drones.	Is a preliminary judicial review of a person's inclusion on a secret target-killing list possible (political question doctrine?)? The procedural standing of relatives of the deceased and the admissibility of considering claims for violation of constitutional rights	In both cases, the court dismissed the merits on the grounds of lack of standing and political question; in effect, it was established that judicial review of	These cases vividly illustrate how the secrecy and lack of transparent procedures governing drone operations deprive victims and their families of effective legal redress. Your article contrasts this with

35 *Al-Aulaqi et al v Panetta et al* no 1:2012cv01192 (US D DC, 4 April 2014) <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2012cv01192/155312> accessed 6 December 2025.

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Case	Forum / Jurisdiction	Technology involved	Core procedural issue	Admissibility outcome (simplified)	Relevance for autonomous verification and access to justice
			related to drone strikes.	decisions on the use of attack drones is extremely limited.	the idea of autonomous verification: algorithmic accounting and independent auditing can reduce reliance on political discretion and strengthen procedural guarantees of fair trials.
United States v. Rezwan Ferdaus, No. 1:11-cr-10331-RGS, 1 November 2012[36]	United States District Court for the District of Massachusetts	Planning attacks on the Pentagon and the Capitol using small, remote-controlled aircraft/drones loaded with explosives and providing detonators to individuals the defendant believed to be terrorists.	Classification of the use of drones as weapons of mass destruction/dangerous weapons under anti-terrorism legislation; the scope of liability for the preparation and attempted attack using explosives delivered by drones	The defendant pleaded guilty to several charges (terrorism, attempted use of weapons of mass destruction, material support for terrorism); the court sentenced him to a lengthy prison term.	The case demonstrates that national legal systems already explicitly consider drones as explosive devices and potential weapons of mass destruction, which strengthens the argument for the need for strict control and reporting regimes for their use. For your article, it is useful as a bridge between the military and civilian dimensions: autonomous verification mechanisms can be applied not only in interstate disarmament agreements but also in the context of law enforcement to prevent the use of drones to attack critical infrastructure.

36 *United States v Rezwan Ferdaus* no 1:11-cr-10331-RGS (US D Mass, 1 November 2012) <https://www.investigativeproject.org/case/595/us-v-ferdaus-pentagon-us-capitol-plot> accessed 6 December 2025.

As explained in the Methodology section, the corpus combines treaty provisions, institutional reports, technical specifications, expert statements and case law, and the Results section draws on this mixed set of sources for cross-regime comparison.

4 DISCUSSION

The findings of this study broadly confirm the initial hypothesis that existing international law offers a necessary but incomplete framework for governing autonomous and AI-enabled technologies in nuclear disarmament verification. At the level of principle, norms on state responsibility, due diligence, weapons reviews and IHL rules on the conduct of hostilities already impose robust expectations of human control, predictability and accountability in the use of weapons systems.[37] However, when these norms are applied to verification tools such as autonomous data-collection platforms, AI-driven anomaly detection, and drone-based inspection systems, significant gaps emerge regarding evidentiary standards, the auditability of algorithmic outputs, and the allocation of responsibility for technically mediated non-compliance assessments. This result complements the ICRC's call for new legally binding rules on autonomous weapon systems and meaningful human control, while extending the analysis beyond the battlefield to the verification infrastructures that underpin nuclear disarmament regimes.[38]

Cyber resilience, spoofing, and legal responsibility. Autonomous verification drones rely on geolocation and time-stamping to link observations to treaty-relevant coordinates. Coordinate manipulation (e.g., GNSS spoofing) can produce technically "plausible" outputs while attaching them to the wrong location and/or mission context, thereby compromising the chain-of-custody and the reliability of compliance-relevant evidence. This creates a compounded attribution problem: it becomes difficult to distinguish an actual violation from a corrupted verification record, and the technical attribution of the interference itself is also complicated. From a legal perspective, this strengthens the case for 1) explicit integrity and cyber-resilience obligations in verification arrangements (tamper-evident logging, authenticated telemetry, redundancy/corroboration, incident disclosure and forensic access) and 2) procedural safeguards before autonomous outputs can trigger legal effects, including a structured opportunity to challenge both the data and the integrity of the collection process.

From the standpoint of access to justice, these gaps create uncertainty about how parties can meaningfully contest machine-generated verification findings, demand disclosure of

37 Neil Davison, 'A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law' (2017) 30 UNODA Occasional Papers 5.

38 ICRC, 'International Committee of the Red Cross (ICRC) Position on Autonomous Weapon Systems: ICRC Position and Background Paper' (2021) 102 *International Review of the Red Cross 1335, doi:10.1017/S1816383121000564.*

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underlying models and data, and obtain effective remedies when autonomous systems contribute to erroneous or discriminatory outcomes.

The case law surveyed in this article confirms that these concerns are not hypothetical. In the nuclear field, ICJ and ECtHR decisions on atmospheric testing, radiological exposure and access to information (Nuclear Tests, Nuclear Weapons, McGinley and Egan, LCB, Roche) show how evidentiary uncertainty, secrecy and limited access to technical data can shape the justiciability of claims and the availability of remedies. In parallel, constitutional and administrative litigation on armed-drone operations in Germany (Ramstein) and the United States (the Al-Aulaqi cases) illustrates both the potential and the limits of judicial review where lethal force is exercised through remote or semi-autonomous platforms and key operational information remains classified. From an access-to-justice perspective, these strands reinforce the need for verification architectures that generate auditable records, allow affected parties and courts to reconstruct critical decision points, and provide sufficiently transparent explanations of how autonomous and AI-enabled systems contributed to compliance assessments.

In comparative perspective, these findings resonate with, but also refine, earlier work on AI, autonomy and strategic stability. The SIPRI series on artificial intelligence and nuclear risk has shown that AI-enabled systems may compress decision-making timelines, introduce new escalation pathways, and complicate crisis management, especially in nuclear command, control, and communications and on advanced delivery platforms.[39] By contrast, the present study concentrates on the upstream moment in which compliance with disarmament or non-proliferation obligations is assessed, documented and, ultimately, contested. It suggests that many of the destabilising features identified in the AI/strategic-stability literature – opacity of complex models, difficulty of validating performance across contexts, and the risk of automation bias-also arise when autonomous or AI-enabled systems are embedded in verification architectures. If verification outcomes are increasingly shaped by systems whose functioning is not transparent to inspectors, diplomats or courts, the credibility of assurances and the perceived fairness of compliance procedures may be undermined even in the absence of any material breach.

The dual-use role of drones is a central illustration of this tension. Technical work by Pacific Northwest National Laboratory has demonstrated that unmanned aerial vehicles (UAVs) can significantly enhance IAEA-type safeguards through remote imaging, environmental sampling and access to hazardous or otherwise unreachable locations.[40] At the same time, policy analyses on the future of IAEA safeguards underline the importance of preserving confidence in verification conclusions and managing perceptions of politicisation or technological overreach. Parallel arms-control discussions point out that many UAV configurations have characteristics comparable to recognised delivery systems and therefore

39 Vincent Boulanin and others, *Artificial Intelligence, Strategic Stability and Nuclear Risk* (SIPRI 2020).
40 Smart and others (n 20).

raise questions about their regulation in zones free of weapons of mass destruction and their delivery vehicles.[41] Recent commentary on drone technology and the future of nuclear weapons further emphasises that AI-enabled drones may blur the line between strategic delivery platforms and ostensibly defensive or verification-oriented systems.[42] Taken together, these strands reinforce the study's conclusion that drones deployed in verification roles cannot be treated as neutral technical enablers; they must be governed as potential vectors of nuclear risk in their own right, with appropriate limits on range, payload, autonomy and data-handling functions.

The emerging normative template identified in the findings also aligns with broader civil-society and expert discourse on autonomous weapon systems. ICRC instruments, UN disarmament debates, and NGO advocacy repeatedly call for meaningful human control, limits on unpredictability, and robust legal review of new weapons, while emphasising that accountability cannot be transferred to machines. Human Rights Watch's recent report on autonomous weapons and digital decision-making adds a human rights perspective, arguing that delegating life-and-death decisions to opaque systems jeopardises rights to life, non-discrimination, and an effective remedy, and therefore warrants a legally binding instrument.[43] The present study suggests that the same normative elements-human control, transparency, predictability and access to remedy- should be systematically transposed into the design, deployment and legal assessment of autonomous or AI-enabled verification systems, including those based on drones. For courts and compliance bodies, particularly in Eastern European jurisdictions where ECHR standards (Articles 6 and 13 ECHR) structure domestic procedure, these elements translate into concrete doctrinal requirements that evidence derived from autonomous verification chains remains intelligible, contestable and accompanied by clear avenues of appeal. Doing so would help ensure that technologically sophisticated verification does not erode, but rather reinforces, the rule-of-law foundations of disarmament processes.

In practical terms, the findings indicate that future nuclear disarmament and non-proliferation arrangements should incorporate verification-specific obligations on data governance, algorithmic transparency and evidentiary treatment. Work on AI for nuclear safeguards verification by Oak Ridge National Laboratory already highlights both the promise and the risks of introducing machine-learning tools into safeguards practice, stressing the need for careful integration with existing legal and institutional standards.[44] Building on this and on NTI-sponsored analyses of the future of IAEA safeguards, states and international organizations could, for example, require: 1) pre-deployment legal-technical reviews of verification algorithms and autonomous

41 Christian Weidlich and others, 'Unmanned Aerial Vehicles: A Challenge to a WMD/DVs Free Zone in the Middle East' (2012) 8 Policy Briefs for the Middle East Conference on a WMD/DVs Free Zone 1.

42 Serim (n 10).

43 Human Rights Watch (n 8).

44 Parada Iturria and others (n 4).

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platforms; 2) auditable logging of system behavior and data transformations throughout the verification chain; 3) clear rules on when and how machine-generated evidence may be used to support non-compliance findings; and 4) mechanisms for independent expert challenge and review of contested technical assessments.[45] For drones specifically, verification mandates might include explicit constraints on operational envelopes and payload configurations, integration of cybersecurity and data-protection standards, and measures to separate verification UAV fleets from systems designed or perceived as potential nuclear delivery platforms.

At the same time, several limitations of the present study must be acknowledged. First, the analysis is primarily doctrinal and policy-oriented: it relies on open-source legal instruments, technical reports, policy papers, and expert commentary, and thus cannot capture classified or state practice materials that may significantly shape how autonomous and AI-enabled systems are actually being integrated into nuclear infrastructures. Second, the coding of legal and policy documents, particularly the identification of core normative elements, necessarily involves a degree of interpretive judgement, even though it was guided by existing syntheses on AI, AWS and strategic stability.[46] Third, the study is technology-sensitive but does not undertake independent technical validation of specific algorithms, platforms or deployment concepts; its conclusions about risk and responsibility are therefore conditional on the current state of public technical knowledge, which is itself rapidly evolving. Finally, while the discussion incorporates global perspectives, it inevitably reflects the biases of the English-language literature and of debates taking place in UN and Euro-Atlantic forums.

These limitations point directly to future research needs. One priority is empirical, interdisciplinary work that brings together lawyers, computer scientists and verification practitioners to model concrete verification scenarios involving autonomous systems and drones, including stress-testing proposed standards for human control, transparency and auditability. Another is region-specific analysis of how autonomous verification tools might be perceived and regulated in different strategic environments, for example, within prospective WMD-free zones in the Middle East or in regions highlighted in SIPRI's East Asian and South Asian volumes on AI and nuclear risk.[47] Region-specific perspectives are particularly important. For example, UNIDIR's recent regional analysis of AI-driven threat perceptions in the Middle East WMD-Free Zone context illustrates how the same enabling technologies can be interpreted either as drivers of arms-racing dynamics or as potential

45 John Carlson, Vladimir Kuchinov and Thomas Shea, *The IAEA's Safeguards System as the Non-Proliferation Treaty's Verification Mechanism* (NTI Paper, Nuclear Threat Initiative 2020).

46 Boulanin (n 11); SIPRI, 'Artificial intelligence, strategic stability and nuclear risk: Euro-Atlantic perspectives – new SIPRI volume now available' *(Stockholm International Peace Research Institute (SIPRI)*, 6 May 2019) <https://www.sipri.org/news/2019/artificial-intelligence-strategic-stability-and-nuclear-risk-euro-atlantic-perspectives-new-sipri> accessed 4 December 2025.

47 Lora Saalman (ed), *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk, vol 2: East Asian Perspectives* (Policy Paper, SIPRI 2019).

facilitators of risk-reduction and verification arrangements, depending on regional security conditions and negotiating priorities.[48] A third direction is to explore how evidentiary doctrines in international and domestic courts can adapt to machine-generated verification outputs without sacrificing principles of adversarial challenge, due process and public reason-giving. Finally, as both AI and drone technologies continue to develop, longitudinal studies will be needed to track whether the integration of autonomous systems into verification practices actually enhances confidence in compliance or instead generates new forms of contestation and mistrust. The present study offers an initial legal framework for this inquiry, but sustained engagement by states, international organizations and scholars will be required to translate its proposals into operational, treaty-ready norms.

5 CONCLUSIONS

This article set out to answer a straightforward but largely neglected question: how do autonomous weapons systems, drones and other AI-enabled technologies fit into the legal framework of nuclear disarmament verification? To address it, the study used doctrinal and comparative legal methods. It systematically examined treaty law on disarmament and non-proliferation, international humanitarian and human rights law, the law of state responsibility, soft-law standards on autonomous systems and AI, state practice in multilateral forums, and selected case law on technology-generated evidence. Rather than proposing entirely new concepts, the method was to read these existing sources together and to test how far they can be stretched to govern autonomous and semi-autonomous verification tools, including drones that are technically capable of acting as nuclear delivery platforms.

The main results can be summarised quite concretely. First, current international law does reach autonomous and AI-enabled verification systems, but only in a general and fragmented way. It speaks clearly about state control, due diligence and responsibility, yet remains largely silent on how to treat machine-generated verification data as legal evidence, how to ensure its auditability, and how to allocate responsibility when automated systems influence compliance assessments. Second, drones emerge as a genuinely dual-use technology: the same classes of unmanned aerial vehicles that can greatly improve verification by extending the reach of inspections also share key technical parameters with platforms that raise proliferation and deterrence concerns. Third, across ICRC guidance, CCW debates, safeguards practice and AI-governance discussions, a fairly stable cluster of normative building blocks can be identified-meaningful human control, limits on unpredictability, transparency and explainability, data-integrity and cyber-security

48 Nasser bin Nasser, *The Impact of Artificial Intelligence on Regional Security, Threat Perceptions and the Middle East WMD-Free Zone* (UNIDIR 2025); Wenting He, *Enabling Technologies and International Security: A Compendium* (UNIDIR 2024) 5-7.

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safeguards, and pre-deployment legal-technical review–even though these elements are rarely translated into detailed, verification-specific standards.

On this basis, the article's central claim can be confirmed. Existing law provides a necessary foundation, but it is not sufficient on its own to guarantee that autonomous and AI-enabled verification will be both effective and legitimate. The contribution to legal scholarship lies in three clarifications. First, it shows that the AWS debate cannot remain confined to battlefield uses: many of its core concepts, especially meaningful human control and accountability, must be carried over into the design and legal evaluation of verification chains. Second, it reframes drones used for monitoring not only as instruments of verification but also as objects that require careful legal classification due to their proximity to recognised nuclear delivery systems. Third, it organises dispersed principles from disarmament law, AI governance, and human rights practice into an integrated set of criteria that can guide future regulation of autonomous verification technologies. In this way, the study slightly shifts the state of knowledge: the problem is no longer whether law applies to such systems, but rather what additional, verification-specific standards are needed for evidence, responsibility, and the management of dual-use platforms.

The practical and forward-looking implications follow directly from this. In terms of implementation, the analysis suggests that future nuclear disarmament agreements and safeguards arrangements should move beyond technology-neutral formulations and incorporate explicit clauses on: (i) minimum requirements for human control over critical verification functions; (ii) transparency and logging of algorithmic processes that shape verification conclusions; (iii) secure and traceable handling of data produced by autonomous sensors and platforms; and (iv) the special treatment of drones whose technical characteristics bring them close to delivery systems regulated in other arms-control regimes. These elements can be developed through interpretative understandings, verification protocols, institutional review procedures and model guidelines for the design and certification of autonomous verification tools.

At the same time, the work points to clear avenues for further research and gradual implementation. Interdisciplinary projects can test proposed standards in simulated verification scenarios, helping to translate broad legal principles into technical specifications and test procedures. Regional case studies can explore how different security environments-particularly those where nuclear risks and unmanned systems are already closely intertwined- might adapt and refine these standards. Courts and compliance bodies, in turn, will need to experiment with evidentiary rules that allow for the use of machine-generated verification outputs while preserving due process and meaningful avenues for challenge. The jurisprudence reviewed in this article— from ICJ and ECtHR cases on nuclear risk and radiological exposure to domestic litigation on armed drones and algorithmic decision-support—already sketches the contours of such rules, even if it has not yet been systematically connected to the design of nuclear disarmament verification regimes. Taken together, these steps outline a realistic path for

integrating autonomous systems, drones, and AI into nuclear disarmament verification that strengthens, rather than weakens, both legal certainty and trust between states. At the same time, by embedding access-to-justice safeguards—fair-trial guarantees, robust evidentiary standards and effective remedies—into the regulation of autonomous verification, these measures can help ensure that technologically sophisticated compliance mechanisms reinforce, rather than erode, the ability of individuals and States to obtain justice in disputes over nuclear disarmament obligations.

REFERENCES

1. Abdelrahman Ibrahim A and Lim HK, 'A Deterministic Assurance Framework for Licensable Explainable AI Grid-Interactive Nuclear Control' (2025) *18*(23) *Energies* 6268, doi:10.3390/en18236268
2. Afina Y, *The Global Kaleidoscope of Military AI Governance: Decoding the 2024 Regional Consultations on Responsible AI in the Military Domain* (UNIDIR 2024)
3. Boulanin V (ed), *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk*, vol 1: Euro-Atlantic Perspectives (SIPRI 2019)
4. Boulanin V and others, *Artificial Intelligence, Strategic Stability and Nuclear Risk* (SIPRI 2020)
5. Carlson J, Kuchinov V and Shea T, *The IAEA's Safeguards System as the Non-Proliferation Treaty's Verification Mechanism* (NTI Paper, Nuclear Threat Initiative 2020)
6. Chernavskikh V and Palayer J, 'Impact of Military Artificial Intelligence on Nuclear Escalation Risk' (2025) 6 SIPRI Insights on Peace and Security 1, doi:10.55163/FZIW8544
7. Davison N, 'A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law' (2017) 30 UNODA Occasional Papers 5
8. Dokter S, 'The Role of Drones in Nuclear Safety and Security: An Overview of the Benefits and Risks of Using this Technology' (*European Technical Safety Organisations Network (ETSON)*, 11 September 2025) <https://www.etson.eu/node/429> accessed 3 December 2025
9. He W, *Enabling Technologies and International Security: A Compendium* (UNIDIR 2024)
10. Johnson S and others, *IAEA Safeguards: Preparing for the Future* (NTI 2020)
11. Le Poidevin O, 'Nations Meet at UN for Killer Robot Talks as Regulation Lags' (*Reuters*, 12 May 2025) <https://www.reuters.com/sustainability/society-equity/nations-meet-un-killer-robot-talks-regulation-lags-2025-05-12> accessed 4 December 2025
12. Nasser N, *The Impact of Artificial Intelligence on Regional Security, Threat Perceptions and the Middle East WMD-Free Zone* (UNIDIR 2025)

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13. Parada Iturria FF and others, 'AI for Nuclear Safeguards Verification: ORNL Report' (*Oak Ridge National Laboratory*, November 2024) <https://www.ornl.gov/publication/ai-nuclear-safeguards-verification> accessed 3 December 2025
14. Saalman L (ed), *The Impact of Artificial Intelligence on Strategic Stability and Nuclear Risk, vol 2: East Asian Perspectives* (Policy Paper, SIPRI 2019)
15. Serim E, 'Drone Technology and the Future of Nuclear Weapons' (*The Loop*, 23 July 2025) <https://theloop.ecpr.eu/advancing-drone-technology-and-the-future-of-nuclear-weapons> accessed 3 December 2025
16. Siserman-Gray C and others, 'Regulatory Challenges Related to the Use of Artificial Intelligence for IAEA Safeguards Verification' (*Institute of Nuclear Materials Management (INMM)*, 2023) <https://resources.inmm.org/annual-meeting-proceedings/regulatory-challenges-related-use-artificial-intelligence-iaea> accessed 4 December 2025
17. Smart JE and others, *Nuclear Safeguards Applications Employing Unmanned Airborne Vehicles* (PNNL-25394, Pacific Northwest National Laboratory 2016)
18. Weidlich C and others, 'Unmanned Aerial Vehicles: A Challenge to a WMD/DVs Free Zone in the Middle East' (2012) 8 Policy Briefs for the Middle East Conference on a WMD/DVs Free Zone 1

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АВТОНОМНІ СИСТЕМИ ОЗБРОЄННЯ ТА НОВІТНІ ТЕХНОЛОГІЇ: ВИКЛИКИ ПРАВОВОГО РЕГУЛЮВАННЯ ПЕРЕВІРКИ ЯДЕРНОГО РОЗЗБРОЄННЯ

Алібек Болат та Шолпан Саймова

АНОТАЦІЯ

Вступ. *Автономні системи озброєння (АСО) та пов'язані з ними новітні технології дедалі частіше інтегруються в архітектуру спостереження та підтримки прийняття рішень, що мають значення для перевірки ядерного роззброєння. Ця тенденція посилює занепокоєння щодо підзвітності, людського контролю та надійності доказів, відтворених складними і непрозорими системами. Зокрема, це стосується їхнього подальшого впливу на гарантії справедливого судового розгляду, стандарти доказування та наявність ефективних засобів правового захисту, коли такі докази використовуються у судових або квазісудових провадженнях. У статті ставиться питання про те, чи чинне міжнародне право — зокрема договори про ядерне роззброєння, міжнародне гуманітарне право та загальні правила відповідальності держав — належним чином регулює процеси розгортання спроможностей на основі АСО під час перевірки, чи необхідні специфічне нормативне регулювання. Фокусуючись на процесі перевірки, а не на застосуванні на полі бою, в дослідженні висвітлюється малодосліджений аспект дискусії щодо АСО та демонструється його значення для забезпечення надійності та стійкості домовленостей про ядерне роззброєння.*

Методи: *Дослідження ґрунтується на доктринальному та порівняльно-правовому аналізі, проведеному авторами; інструменти штучного інтелекту використовувалися виключно для допоміжних завдань, таких як пошук літератури, організація матеріалів та попередній скринінг державної практики, тоді як усі правові інтерпретації та нормативні оцінки залишаються незалежною роботою дослідників. У дослідженні аналізуються договірні режими, що регулюють ядерне роззброєння та нерозповсюдження, відповідні інструменти «м'якого права» та практика міжнародних організацій, залучених до перевірки. Також порівнюються програмні документи та заяви на багатосторонніх форумах щодо летальних АСО, технологій перевірки та концепції «значущого людського контролю» з метою виявлення спільних і відмінних правових позицій та нових інтерпретаційних тенденцій.*

Результати та висновки: *Чинне міжнародне право надає необхідну, але неповну базу для регулювання перевірки за допомогою АСО. Застосовуються загальні принципи належної обачності (due diligence), застережності, пропорційності, відповідальності держав та індивідуальної кримінальної відповідальності, проте це не вирішує проблем, пов'язаних із високим рівнем автономії, алгоритмічною непрозорістю та делегуванням машинам юридично значущих рішень. Тому майбутня перевірка ядерного роззброєння повинна включати чіткі правові стандарти щодо значущого людського контролю, прозорості, можливості аудиту та управління даними для систем на основі ШІ, з чіткими правилами атрибуції та перегляду доказів, згенерованих машинами. Розробка конкретних протоколів перевірки, інтерпретаційних домовленостей та інституційного нагляду для впровадження цих стандартів посилить правову визначеність, наукову та практичну узгодженість, а також довіру до процесу перевірки. Водночас це дозволить зберегти можливість оскарження, прозорість та ефективні шляхи відшкодування у випадках, коли автономні результати стають основою для звинувачень у недотриманні зобов'язань або індивідуальній відповідальності.*

Ключові слова: *автономні системи озброєння, перевірка ядерного роззброєння, новітні технології, верифікація на основі ШІ, значущий людський контроль, міжнародно-правове регулювання.*

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Research Article

PROCEDURALLY RELEVANT VULNERABILITIES OF CHILDREN IN CRIMINAL PROCEEDINGS: ADAPTED AND CHILD-SENSITIVE PROCEDURAL MODELS

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ABSTRACT

Background: *Ensuring children's effective participation in criminal proceedings is a major challenge for European justice systems, which increasingly recognise that children's developmental, psychological, social, and other characteristics may create susceptibility to procedural disadvantage. Existing guidance, however, is fragmented and insufficiently structured. This article examines the structure and function of procedural protections applicable to children who participate in criminal proceedings as offenders, victims, or witnesses. It focuses on the concept of procedurally relevant vulnerabilities, understood as durable intrinsic conditions that impair a child's ability to understand, participate in, or cope with the criminal process by increasing susceptibility to procedural disadvantages.*

Method: *This study employs doctrinal analysis of EU law, the UN Convention on the Rights of the Child, and the jurisprudence of the European Court of Human Rights to develop an analytical framework grounded in the concept of procedurally relevant vulnerabilities. It proposes a functional*

typology of vulnerabilities and evaluates its procedural implications. Two procedural models are examined – adapted procedures for juvenile offenders and child-sensitive procedures for victims and witnesses – through a structure of core rights, procedural safeguards, and procedural options.

***Results and Conclusions**: The two models pursue distinct purposes and rely on different, though flexible and case-adaptable, approaches to vulnerabilities to ensure fairness, protection, and effective participation. The suggested framework strengthens the coherence and predictability of child-related procedural practice and offers a conceptual foundation for judicial guidance and potential harmonization within European criminal justice involving children. Three core contributions are advanced: (1) an operational definition of procedurally relevant vulnerability; (2) a principled separation of adapted and child-friendly procedural models; and (3) a matrix tool for mapping vulnerability-sensitive procedural responses across children's procedural roles.*

1 INTRODUCTION

Ensuring the effective participation of children in criminal proceedings is a challenge for contemporary justice systems.[1]

European criminal-justice systems increasingly acknowledge that children differ from adults not merely in legal status but also in developmental, psychological, social, and other capacities that may render them more susceptible to harm or procedural disadvantage. Yet practical knowledge on how children interact with criminal proceedings, how their characteristics affect participation in different procedural roles, and how such characteristics should be addressed is fragmented and inconsistent.[2]

Children, as a broad and heterogeneous group, do not easily sustain generalisation-based solutions. Such approaches are methodologically risky and have increasingly been overshadowed by case-by-case methods. The tension between general and individual approaches is particularly acute in the context of criminal justice. It is best resolved not by abandoning general standards in favour of individualised discretion, nor by favouring efficiency over specific needs. A recommended approach would seek goal-oriented, holistic models that equip authorities with specialised knowledge of how flexible, multi-solution mechanisms may be applied to secure the child's best interests in concrete cases. What remains deficient is a deeper, knowledge-based understanding of the specific characteristics that children may present beyond age alone, how these characteristics shape their procedural behaviour, and which procedural responses best safeguard their rights.

1 FRA, *Mapping of Child Protection Systems in the EU: Update 2023* (Publications Office of the EU 2024)

2 FRA, *Towards Integrated Child Protection Systems: Challenges, Promising Practices and Ways Forward* (Publications Office of the EU 2025) doi:10.2811/7596124; FRA, *Fundamental Rights Report 2024* (Publications Office of the EU 2024) doi:10.2811/28742.

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This article aims to clarify the structure of these responses by developing an analytical framework grounded in a concept of *procedurally relevant vulnerabilities and mapping it against* two distinct procedural models: the adapted criminal procedure for juvenile offenders and the child-sensitive (friendly) procedure for child victims and witnesses.

Existing scholarship on child-friendly justice has primarily developed along trauma-sensitive procedural adaptations for victims[3] or participatory rights and fair-trial guarantees for defendants.[4] Children are primarily viewed as age-specific participants in procedures without distinguishing their capacities determined only by age from other characteristics subject to individual assessment, which might by themselves additionally undermine the quality of trial comprehension and participation. Moreover, age – though extensively analysed as a procedurally relevant factor – is not universally analysed from a vulnerability-sensitive standpoint, as it does not always warrant such an approach. Parallel debates address vulnerability as a broad social condition or as an individual deficit, often without distinguishing its procedural relevance.[5] Less independent attention has been given to the structural incompatibility between participation models for accused children and protective models for child victims, or to vulnerability as a criterion for allocating procedural safeguards and remedies. The literature does not always systematically distinguish between children's procedural roles, nor does it operationalise vulnerability as a procedural-legal concept which is relevant, yet different for both roles and distinct from risk factors.[6]

The study addresses this gap by **developing** a practical definition of procedurally relevant vulnerability – distinguishing it from related phenomena such as situational and materially-relevant vulnerabilities and risk factors, and by proposing a functional typology consistent with the relevant acquis of EU law (Directives 2012/29/EU and 2016/800/EU),[7] the

3 Ursula Kilkelly, *Barriers to the Realisation of Children's Rights in Ireland* (Office for the Ombudsman for Children 2007); Ursula Kilkelly, *Listening to Children about Justice: Report of the Council of Europe's Consultation with Children on Child-Friendly Justice* (Council of Europe Publishing 2010); ECtHR, *Guide on the Case-Law of the European Convention on Human Rights: Rights of the Child* (Council of Europe, updated 31 August 2025).

4 Ton Liefaard, 'Access to Justice for Children: Towards an International Standard?' (2019) 27(2) *The International Journal of Children's Rights* 195, doi:10.1163/15718182-02702002; Terre des Hommes, 'Our Impact: For Children's Access to Justice' (*Terre des Hommes*, 2025) <https://www.tdh.org/en/our-impact/justice> access 20 November 2025.

5 Illustrative example in FRA, *Towards Integrated Child Protection Systems (n2) 37-40;* Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, doi:10.1093/icon/mot042; Julia Korkman and others,' *White Paper on Forensic Child Interviewing: Research-Based Recommendations by the European Association of Psychology and Law*' (2024) 31(8) Psychology, Crime & Law 987, doi:10.1080/1068316X.2024.2324098.

6 FRA, *Towards Integrated Child Protection Systems (n 2) 8.*

7 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA [2012] OB L 315/57; 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.

UN Convention on the Rights of the Child (CRC),[8] and the case law of the European Court of Human Rights (ECtHR).[9] It examines the procedural implications of various categories of vulnerability. It compares how they interact with the protective measures specific to the adapted and the child-friendly participation models, which are classified into core procedural rights, procedural safeguards, and discretionary procedural options. Based on this, it builds a structured role-sensitive matrix tool for mapping vulnerability-responsive procedural responses across children's procedural roles, thereby clarifying the normative trade-offs between protection and defence rights.

2 METHODOLOGY

This study employs a doctrinal legal research methodology consisting of systematic analysis, interpretation, and functional systematisation and comparison of normative legal sources. The primary materials analysed include EU secondary law, the UN Convention on the Rights of the Child, and selected ECtHR judgments, all of which are directly relevant to children's procedural participation and vulnerability assessment. General scientific methods of analysis, abstraction, and classification were applied. Specialised legal methods include teleological interpretation, functional comparison of procedural models, and normative systematisation.

The ECtHR's case law has been selected where the Court explicitly addresses children's procedural capacity, vulnerability, or effective participation. It is analysed using a functional approach, focusing on how specific child characteristics affect effective participation and trigger procedural safeguards. The analysis does not seek to reconstruct individual judgments exhaustively, but rather to identify functional reasoning patterns in the Court's analysis of children's effective participation in criminal proceedings. In particular, attention is paid to how the Court distinguishes between durable personal conditions that structurally impair a child's procedural capacity and situational factors that affect fairness only contextually. This approach allows case law to be used analytically rather than declaratively to support of the conceptual distinctions developed in the article.

To **additionally** reinforce practical grounding**, the analysis cross-checks recent instruments** that operationalise vulnerability in practice.[10]

8 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) <https://docs.un.org/a/res/44/25> accessed 20 November 2025.

9 Bulgarian national legislation, particularly the Code of Criminal Procedure (CCP), is occasionally referred to in examples. See, Criminal Procedure Code of the Republic of Bulgaria (effective 29 April 2006) [2005] State Gazette 86.

10 ECtHR, *Guide on the Case-Law* (n 3); FRA, *Towards Integrated Child Protection Systems* (n 2); UN, '*Draft General Comment No 27 on Children's Right to Access to Justice and to an Effective Remedy*' *CRC/C/GC/27* (*United Nations Human Rights: Office of the High Commissioner for Human Rights*, 1 February 2024) <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-27-childrens-right-access> accessed 20 November 2025; Shauneen Lambe and others, *Child-Friendly Justice Assessment Tool* (Child-friendly Justice Project, Council of Europe 2025).

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The typology of procedurally relevant vulnerabilities was derived inductively from recurring impairment patterns and legal responses identified in these sources, and tested deductively against the two procedural models applicable to children. The three-tier analytical matrix was constructed by mapping these vulnerability categories against two procedurally distinct participation models applicable to children – adapted procedures for offenders and child-friendly procedures for victims and witnesses – and identifying legally relevant points of interaction and divergence. The matrix serves as an analytical tool to visualise these interactions and their limits. It is analytical rather than predictive and does not replace individual assessment. The study thus uses conceptual analysis to systematise vulnerability categories and to examine their functional interaction with the two procedural models applicable to children.

Given the normative and structural nature of the research goal – how vulnerability is conceptualised and operationalised across legal frameworks – this methodology is the most appropriate. While empirical data are indispensable for evaluating implementation, the present study focuses on the legal architecture that determines when and how procedural protections are triggered. Empirical assessment of national practice, therefore, lies beyond its scope.

The purpose of the article is, therefore, not to suggest legislative reform but to provide a coherent conceptual structure that supports lawful, consistent, and vulnerability-informed procedural practice.

3 PROCEDURALLY-RELEVANT VULNERABILITIES - CONCEPTUAL FRAMEWORK

Building on the conceptual distinctions outlined above, this section operationalises vulnerability as a procedural-legal concept, distinct from both universal vulnerability theories and risk-based approaches.

3.1. Definition and Differentiations

Legal doctrine throughout the EU struggles to reach a comprehensive consensual definition of what constitutes vulnerability in the criminal justice context. EU secondary law employs the term inconsistently, e.g., Directive 2012/29/EU (Articles 22–23, Recitals 38–39) uses a broad and variable concept of 'victims with specific protection needs', also described as 'vulnerable', or 'particularly vulnerable', whereas Directive 2016/800/EU grounds vulnerability in concrete impairments relevant to the child's procedural capacity (Recital 27; Articles 7, 6(4), and 13(2)).

In its elaborations on effective participation, ECtHR stresses the necessity that the accused child have a broad understanding of the trial's nature and potential outcomes, fully considering the child's age, level of maturity, and intellectual and emotional

capacities, as well as other characteristics of the child. Although the Court does state that the child's right to effective participation requires 'due regard to his vulnerability and capacities from the first stages of procedural involvement',[11] it does not define these factors as vulnerabilities but rather as contributors to 'feelings of intimidation and inhibition' and thus as criteria to guide potential measures to promote ability to comprehend and participate.[12] Moreover, the Court analyses them together with relevant 'circumstances surrounding the criminal proceedings',[13] clearly not distinguishing durable intrinsic features of the child from situational external factual conditions. As a result, the term 'vulnerability' is frequently used intuitively or expansively which complicates the design of coherent procedural responses and threatens to either over- or under-include children who potentially require special protection.

In legal and socio-legal scholarship, vulnerability has been conceptualised variously as a universal human condition, a situational social disadvantage, or an individual deficit requiring protection.[14] While these approaches illuminate important dimensions of inequality and serve important normative and policy functions related to risk management, they often remain insufficiently operational for procedural law, as they offer limited guidance for allocating procedural rights and safeguards within criminal proceedings. This study aligns with their basic findings, but deliberately adopts a narrower, procedural-legal understanding, focused on vulnerability as a condition affecting the child's capacity to exercise procedural rights effectively. For criminal procedure, an operational concept must identify when differential treatment is legally justified and what procedural consequences follow. Accordingly, this article treats vulnerability not as a descriptive label but as a decision-relevant legal criterion, capable of triggering differentiated procedural obligations without collapsing into generalised assumptions about childhood or social disadvantage.

In this study's context, the concept will be applied to a **permanent or relatively durable state or condition** that makes a child more susceptible to harm or disadvantage during participation in criminal proceedings as an accused person, victim, or witness, due to trial-related environmental or personal factors. This approach corresponds to doctrinal understandings of vulnerability as a structural and relational condition limiting one's

11 *Blokhin v Russia* App no 47152/06 (ECtHR, 23 March 2016) para 195 <https://hudoc.echr.coe.int/eng?i=001-161822> accessed 20 November 2025.

12 ibid; *V v the United Kingdom* App no 24888/94 (ECtHR, 16 December 1999) paras 86, 87 <https://hudoc.echr.coe.int/eng?i=001-58594> accessed 20 November 2025; *T v the United Kingdom* App no 24724/94 (ECtHR, 16 December 1999) paras 84, 85, 87 <https://hudoc.echr.coe.int/eng?i=001-58593> accessed 20 November 2025; *SC v the United Kingdom* App no 60958/20 (ECtHR, 15 June 2004) para 29 <https://hudoc.echr.coe.int/fre?i=001-61826> accessed 20 November 2025.

13 *T v the United Kingdom* (n 12) para 85.

14 Martha Albertson Fineman, *'The Vulnerable Subject: Anchoring Equality in the Human Condition'* (2008) 20(1) Yale Journal of Law and Feminism 1; Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Routledge 1999) doi:10.4324/9781003579427; Liefaard (n 4); Peroni and Timmer (n 5).

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ability to exercise rights.[15] Such a condition is tied to the child's developmental, physiological, psychological, social, or legal capacities. It can significantly affect the child's ability to participate in, understand, or cope with the justice process. Thus is the concept aligned to links drawn in the child-law context between immaturity and dependency on one hand and procedural environments tailored to children's evolving capacities, on the other.[16] It also aligns with doctrinal approaches that conceptualise children's vulnerability not as a deficit, but as a basis for enhanced procedural participation[17] and with the emerging interpretation of children's access to justice under the UN Convention on the Rights of the Child, which emphasises effective participation and remedies tailored to children's capacities and vulnerabilities.[18]

Not every personal or social disadvantage constitutes a vulnerability in this narrow, procedural sense.

The concept of vulnerability is distinct from that of a **risk factor**. Vulnerabilities are intrinsic or structural *conditions* which establish or increase susceptibility to harm or disadvantage and exist independently of whether such adverse events actually occur. A risk factor, in contrast, is a factual circumstance or a set of circumstances (forming a situation or environment) that increases the *probability* of an adverse event occurring, all other conditions being equal.[19] This event must be definable and manageable,- avoidable or reducible, through appropriate rational intervention.[20] Risk factors may be **procedural** (e.g., absence of interpreter), **contextual** (e.g., threatening environment), **situational,**[21] **or contingent,** but they do not alter the child's internal capacities, vulnerabilities included. Legal scholarship also cautions that situational disadvantage and structural vulnerability

15 Fineman (n 14); Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005); Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (European Communities 2008) doi:10.2767/56607.

16 Kilkelly, *Listening to Children about Justice* (n 3).

17 Liefaard (n 4).

18 UN, '*Draft General Comment No 27* (n 10).

19 The concept of risk factor is used within this meaning by all humanitarian sciences, see Patricia J Mrazek and Robert J Haggerty (eds), *Reducing Risks for Mental Disorders: Frontiers for Preventive Intervention Research* (National Academies Press 1994) 127, doi:10.17226/2139; Iva Pushkarova, 'Concept of Risk Factor' in Iva Pushkarova and others**,** *Risk Criminogenic and Victimogenic Factors in Children* (Union of Judges in Bulgaria 2009–2011) 50 *[in Bulgarian]*.

20 Stefan Popov, *Risk: Conceptual Framework* (New Bulgarian University 2022) 73 *[in Bulgarian]*; Iva Pushkarova**,** *Criminal-Law Policies as a Risk and as a Risk-Management Instrument* (RiskMonitor 2023) *[in Bulgarian]*.

21 For differentiations between enduring vulnerabilities and situational risk exposures, see David Finkelhor, *Childhood Victimization: Violence, Crime, and Abuse in the Lives of Young People* (OUP 2008) doi:10.1093/acprof:oso/9780195342857.001.0001; David P Farrington, Rolf Loeber and Maria M Ttofi, *'Risk and Protective Factors for Offending'* in Brandon C Welsh and David P Farrington (eds), *The Oxford Handbook of Crime Prevention* (OUP 2012) 46, doi:10.1093/oxfordhb/9780195398823.013.0003.

generate different types of procedural obligations for states.[22] The impact of the risk factor depends on both the underlying vulnerability and other external factors.

For example, a very young minor (vulnerability) may be **at high risk** of being manipulated during questioning if no protective factors intervene. Another example is school dropout; it reduces the child's capacity to understand and participate in the criminal procedure (vulnerability) but also exposes the child to higher risks of manipulation and abuse of rights during trial (risk factor). Parents' conflict is a typical example of a risk factor that can threaten parental support during questioning, when parents argue over who should be allowed to attend, and both exercise parental rights and the authority considers parental presence necessary.

For this study's purposes, **vulnerability is understood as a relatively stable personal or legally relevant condition** that systematically reduces a child's procedural capacity across one or more stages of the proceedings. **By contrast, a risk factor denotes a factual circumstance or situational configuration** that increases the probability of adverse procedural outcomes without, in itself, altering the child's intrinsic ability to understand, participate in, or self-protect. This distinction prevents conceptual inflation of vulnerability and preserves its function as a trigger for structured procedural safeguards rather than ad hoc corrective measures.

From a procedural perspective, **this distinction has concrete legal consequences**. Only procedurally relevant vulnerabilities justify stable, stage-spanning safeguards and adaptations that structure the child's participation throughout the proceedings. Risk factors, by contrast, require situational corrective measures – such as rescheduling, environmental adjustments, or targeted support – without altering the underlying procedural framework or necessitating differentiated procedural treatment. Treating risk factors as vulnerabilities risks over-formalisation, while ignoring durable vulnerabilities undermines effective participation and fairness. While risk factors may interact with vulnerabilities and exacerbate their effects, they remain analytically distinct because, in themselves they do not justify long-term procedural adaptation.

When such interaction occurs, it triggers **causal links:** vulnerability is the **condition**, and risk is the **probability** of a negative outcome due to that condition. A factor qualifies as vulnerability when it **reduces the child's intrinsic capacity** to cope, participate fairly, or self-protect in the criminal procedure. Factors that only increase the probability of harm without affecting intrinsic capacity are more accurately described as risk factors.[23]

Illustrative examples of distinctions between durable versus temporary conditions and their impact on the ability to procedurally self-protect are ECtHR decisions in *Blokhin*,

22 Suzan van der Aa, 'Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law' (2016) 7(1) *New Journal of European Criminal Law* 39, doi:10.1177/203228441600700104.

23 Pushkarova, *Criminal-Law Policies* (n 20).

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S.C. v. UK (durable, intrinsic) and *Panovits* (temporary, situational disadvantages).[24] They express a consistent concern with whether a child's personal characteristics amount to a structural impediment to effective participation. In *Blokhin*, the Court explicitly treated the twelve-year-old's ADHD. It associated behavioural and physiological impairments as durable conditions that structurally reduced the boy's capacity to understand and engage with the proceedings, thus making him 'particularly vulnerable' and requiring 'special protection' (§ 203). In *S.C. v. UK*, it likewise found that an eleven-year-old's inability to understand the proceedings stemmed from developmental immaturity rather than contextual pressures, thus constituting a stable impairment affecting fair trial rights. By contrast, in *Panovits,* the applicant's fatigue and emotional distress at the time of arrest were examined as situational factors relevant to the overall fairness of the trial, but not as indicators of a stable vulnerability requiring systemic procedural adaptation. This distinction illustrates the Court's functional, capacity-oriented approach and supports the boundary drawn in this study between procedurally relevant vulnerabilities and risk factors.

The adverse event associated with procedural vulnerability is most commonly a **procedural harm or disadvantage** – such as coerced confession, unreliable testimony, secondary victimisation, or a substantial violation of procedural rules leading to the exclusion of evidence or the reversal of judicial decisions.

Therefore, **procedurally relevant vulnerabilities must be distinguished from material vulnerabilities**, which may require consideration in the proper individualisation of criminal liability or for judicial decisions on criminal insanity or other substantive issues. Material vulnerabilities serve as mitigating or aggravating circumstances, grounds for exclusion or reduction of criminal liability, or factors relevant to judicial determinations of guilt or authorship.

When a specific condition has both procedural and material relevance, these two dimensions must be recognised and distinguished. A classic example concerns a juvenile offender with an intellectual disability insufficient to establish criminal insanity. The condition reduces the child's capacity to assess the criminal consequences of the act (material relevance) but also necessitates procedural adaptations to ensure understanding of the proceedings and effective participation (procedural aspect). In short, **procedural vulnerabilities concern fairness, effective participation, and the safeguarding of procedural rights**, while **material vulnerabilities concern culpability, guilt, and sentencing**.

To reach a level of intensity that increases susceptibility to adverse events, vulnerability should, at a minimum, **remain constant throughout the proceedings**. Temporary, external, context-dependent disadvantages arising from specific situations, environment, or

24 *Blokhin v Russia* (n 11) paras 141-8, 203; *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008) para 67 <https://hudoc.echr.coe.int/eng?i=001-90244> accessed 20 November 2025; *SC v the United Kingdom* (n 12) para 29.

procedural circumstances - but not from the child's intrinsic characteristics or not producing significant or durable impact on the child's capacities – do not constitute vulnerability. They may create or increase risks or constitute procedural rule violations, but do not reduce the child's internal resources. Examples include interrogations when the child is exhausted (e.g., late at night, immediately after long journey or demanding school day), questioning immediately after a shocking event, stressful environments (e.g., crowded courtroom, presence of intimidating adults), family crisis, unexpected confrontations ordered by the court, emotional overload during testimony, or temporary unavailability of a psychologist for a planned interrogation of a minor.

Vulnerabilities provide the **basis for procedural protections**, which guide the procedural treatment of the child throughout the trial or until they are no longer relevant. As a rule, they affect all stages of the proceedings. Situational disadvantages, by contrast, trigger **corrective and organisational adjustments** – such as modifying timing, location, or environmental conditions – and require continuous monitoring because they may appear and disappear dynamically. They typically affect only a single procedural action or a limited stage of the proceedings and do not create stable entitlements to long-term safeguards.

Therefore, the identification of procedurally relevant vulnerabilities is not an end in itself. Its legal significance lies in guiding the allocation, intensity, and limits of procedural safeguards, ensuring that differentiated treatment is justified by impaired procedural capacity rather than by generalised assumptions about childhood.

These distinctions provide the analytical basis for the interaction matrix developed in the following sections, where categories of procedurally relevant vulnerability are systematically mapped against applicable procedural responses.

3.2. Typology of Procedurally Relevant Vulnerabilities

Procedurally relevant vulnerabilities may be grouped according to the **source**, **domain**, or **factor** from which the child's susceptibility to harm or disadvantage originates, and which has a **direct impact on the child's procedural capacities**. The following categories are also grounded in the principal frameworks of Directive 2016/800/EU and Directive 2012/29/EU, and in CRC and ECtHR case law, which explicitly recognise that certain durable conditions impede fair participation and require procedural measures.

First, personal vulnerabilities arise from the child's developmental, psychological, or physiological characteristics. This may be generally subdivided into three categories:

- Developmental and cognitive vulnerabilities. They originate from age-related cognitive and emotional immaturity or from structural developmental impairments. Examples include very young age, intellectual disability, neurodevelopmental disorders such as autism spectrum disorder, learning disabilities such as dyslexia or dyscalculia, communication and

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speech impairments (e.g., stuttering, language processing disorders), and trauma-induced developmental regression.

The vulnerabilities of this subgroup are recognised by Directive (EU) 2016/800 and the CRC. The Directive acknowledges children's immaturity and vulnerability in Recital 27 and requires procedural treatment according to age and maturity (Articles 6(3)(c)–(d)) and an individual assessment of personality, maturity and specific needs (Article 7). The CRC similarly emphasises age and maturity as determinants of procedural capacity (Articles 12 and 40) and recognises the need to provide special protection for children with disabilities (Article 23).

Illustrative of young-age-related vulnerabilities are ECtHR cases of *Bouyid*[25] (age as a specific vulnerability in cases of police ill-treatment), *Salduz*[26] (young age requiring legal representation); *R.B. v. Estonia*[27] (very young age requiring protective procedural adaptations). Developmental and maturity-related vulnerabilities are discussed in *Blokhin* (attention-deficit/hyperactivity disorder, a disorder involving urinary incontinence); *S.C. v. UK* (learning difficulties and impaired reasoning skills); and *T. v. UK* [GC] (intellectual and emotional maturity). The decision in *V. v. UK* [GC] is illustrative of a combination of age, maturity, intellectual, and emotional capacities. In *Kuptsov and Kuptsova,*[28] specific age-related educational disadvantages are discussed as resulting from detention of a schoolboy. In *R.B. v. Estonia*, no procedural relevance is found to have been attributed by the national authorities to the 'particular vulnerability and corresponding needs' of a 4-year-old alleged victim of sexual crimes so as to afford her effective witness protection. The Court's approach in this line of cases reflects a coherent, though implicit, rationale: where young age or cognitive limitations affect comprehension or decision-making, assessment of effective participation shifts from formal to **substantive**. The Court has not articulated a unified doctrine of vulnerability, relying instead on case-specific assessments that leave significant discretion to national authorities. The judgments operationalise vulnerability through Article 6 fairness-test but do not define the concept, underlining the need for a more explicit conceptual framework.[29]

Such conditions may significantly affect comprehension of legal information, expressive and receptive communication, suggestibility, capacity for informed decision-making, and the

25 *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) paras 93, 110 <https://hudoc.echr.coe.int/eng?i=001-157670> accessed 20 November 2025.

26 *Salduz v Turkey* App no 36391/02 (ECHR, 27 November 2008) para 30 <https://hudoc.echr.coe.int/eng?i=001-89893> accessed 20 November 2025.

27 *RB v Estonia* App no 22597/16 (ECtHR, 22 June 2021) paras 102, 103 <https://hudoc.echr.coe.int/fre?i=001-210466> accessed 20 November 2025.

28 *Kuptsov and Kuptsova v Russia* App no 6110/03 (ECtHR, 3 March 2011) paras 71, 91, 94 <https://hudoc.echr.coe.int/eng?i=001-103636> accessed 20 November 2025.

29 FRA, *Handbook on European Law Relating to the Rights of the Child* (Publications Office of the EU 2022) doi:10.2811/079581.

reliability of statements. They also reduce understanding of procedural consequences and may limit the child's ability to follow procedural instructions, give coherent testimony, resist pressure during questioning, or meaningfully exercise due process rights.

- Physiological and medical vulnerabilities. They result from physical or medical conditions that limit the child's physiological ability to engage with the procedural environment. Examples include chronic illnesses that impair cognitive or emotional functioning, sensory (hearing or vision) disabilities, mobility limitations, and pregnancy when it affects stress tolerance or capacity to participate.

Such conditions are recognised in *S.C. v. the UK* (cognitive difficulties); *T.H. v. Bulgaria*[30] (hyperkinetic disorder as an educational vulnerability), *V.I. v. Moldova*[31] and *I.C. v. Romania*[32] (intellectual disability), as directly affecting capacity for effective participation and requiring corresponding procedural adaptations. In *Korneykova,*[33] poor health (tuberculosis and psychiatric disturbances) was considered a relatively durable condition susceptible to being aggravated by remand in custody in an adult-detention facility, thus further diminishing participation capacities. The Court consistently emphasises that such impairments heighten dependency, reduce autonomy in decision-making and increase susceptibility to pressure, thereby necessitating reinforced guarantees and tailored procedural support.

Their procedural relevance lies in reduced stamina, limited capacity to endure lengthy questioning, susceptibility to distress and misunderstanding during procedural actions, or need for physical accommodations. Appropriate responses involve adapted scheduling of investigative actions, shorter interview durations, medical supervision when necessary, and the use of special arrangements.

- Psychological and emotional vulnerabilities which originate from mental health status, trauma histories, or emotional instability. Examples include depression, anxiety disorders, post-traumatic stress disorder, attachment disorders (particularly among children from institutional or disrupted care), emotional regulation difficulties, and persistent effects of severe or repeated victimisation (e.g., domestic violence, trafficking, exploitation). Child substance abuse may also create a durable impairment of attention, memory, and judgment, while acute trauma reactions (shock, dissociation, intense fear), self-harm tendencies, or high suggestibility or compliance traits can temporarily affect the reliability of testimony if

30 *TH v Bulgaria* App no 46519/20 (ECtHR, 11 April 2023) para 23 <https://hudoc.echr.coe.int/?i=001-224076> accessed 20 November 2025.

31 *VI v the Republic of Moldova* App no 38963/18 (ECtHR, 26 March 2024) paras 174, 175 <https://hudoc.echr.coe.int/?i=001-231739> accessed 20 November 2025.

32 *IC v Romania* App no 36934/08 (ECtHR, 24 May 2016) para 56 <https://hudoc.echr.coe.int/eng?i=001-163103> accessed 20 November 2025.

33 *Korneykova v Ukraine* App no 39884/05 (ECtHR, 19 January 2012) paras 11, 41 <https://hudoc.echr.coe.int/fre?i=001-108654> accessed 20 November 2025.

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not properly managed. Similar categories of barriers to effective participation have been identified in doctrinal analyses.[34]

Directive 2012/29/EU expressly links trauma, fear, intimidation or emotional harm to specific-protection-need status (Article 22; Recitals 17, 38 and 56) and requires protection during interviews to avoid emotional harm (Articles 23–24).

ECtHR similarly recognises psychological trauma, exploitation, and coercive environments as conditions that **intensify susceptibility to secondary victimisation** and impair reliability or completeness of testimony. Such examples are *N.Ç. v. Turkey*[35] (forced prostitution), *T.V. v. Spain*[36] (human trafficking and psychological damage as extreme vulnerability), *M.G. v. Lithuania*[37] (emotional vulnerability as a result of sexual crime). In *B. v. Russia*,[38] extreme emotional trauma resulting from sexual violence is recognised as persisting during the whole procedure vulnerability, causing secondary victimisation via repeated, traumatic interrogations, confrontations and complete disregard for the child's suffering. In *R.R. and Others v. Hungary*,[39] the Court discusses durable characteristics resulting from refugee-related history and detention under degrading conditions, which substantially aggravated the disadvantages associated with detention. In *O.G. v. Latvia*,[40] episodic paranoid schizophrenia with increasing residual symptoms was found to have been sufficiently lasting to impair the detainee's rights to independently appeal detention. Again, this recognition is fragmented and case-specific. These factors are addressed indirectly, through the State's positive obligations or fairness tests, rather than within a unified concept of vulnerability.

These conditions heighten susceptibility to fear, intimidation, emotional overload, and secondary victimisation during testimonies. They may impair memory, concentration, resistance to pressure, and the ability to provide accurate and reliable statements. Their procedural relevance is substantial in decisions about interview strategies, number of interviews and medical examinations, assessment of reliability of statements, protective

34 Kilkelly, *Barriers to the Realisation* (n 3).

35 *NÇ v Turkey* App no 40591/11 (ECtHR, 9 February 2021) paras 69-71, 95, 101 <https://hudoc.echr.coe.int/eng?i=001-207811> accessed 20 November 2025.

36 *TV v Spain* App no 22512/21 (ECtHR, 10 October 2024) para 92 <https://hudoc.echr.coe.int/eng?i=001-236200> accessed 20 November 2025.

37 *MG v Lithuania* App no 6406/21 (ECtHR, 20 February 2024) paras 98-102 <https://hudoc.echr.coe.int/eng?i=001-231083> accessed 20 November 2025.

38 *B v Russia* App no 36328/20 (ECtHR, 7 February 2023) paras 53, 54, 68-71 <https://hudoc.echr.coe.int/eng?i=001-222872> accessed 20 November 2025.

39 *RR and Others v Hungary* App no 36037/17 (ECtHR, 2 March 2021) paras 49, 52, 58 <https://hudoc.echr.coe.int/fre?i=001-208406> accessed 20 November 2025.

40 *OG v Latvia* App no 66095/09 (ECtHR, 23 September 2014) para 63 <https://hudoc.echr.coe.int/eng?i=001-146409> accessed 20 November 2025.

measures during court participation, and length of the procedure. **Second, environment-related vulnerabilities,** which encompass the following two subcategories:

- **Social, socio-economic and environmental vulnerabilities**, which arise from structural or relational circumstances that create long-term disadvantage. Examples include lack of parents or unstable caregiving, parental absence or separation, single-parent households combined with other stressors, parental mental illness or substance abuse, parental criminality, exposure to domestic violence, long-term school dropout, markedly deficient education, institutionalisation (residential or closed care), homelessness, unstable housing and frequent displacement (where these create enduring developmental or educational deficits), social marginalization, early parenthoods when it imposes chronic responsibility burdens and developmental disruptions, and extreme poverty when it impairs cognitive, linguistic, or social functioning. Although most of these circumstances are often cited as social risks, they are also treated as long-term conditions requiring special measures in ECtHR case law.

Illustrative are ECtHR's decisions in *B. v. Russia,*[41] *V.I. v. Moldova* and *X. and Others v. Bulgaria*,[42] where institutionalisation and chronic deprivation of parental care are recognised as particular vulnerabilities – structural conditions that diminish a child's resilience, autonomy and ability to cope with procedural demands – rather than temporary disadvantages.

These vulnerabilities often increase dependence on adults, reinforce social isolation, intensify exposure to neglect, coercion, or manipulation, and reduce access to information and support. They weaken the child's ability to understand rights, follow procedural instructions and navigate procedural interactions coherently. Procedurally, they are relevant for evaluating a child's comprehension of rights, capacity to provide consistent testimony, or susceptibility to self-incrimination under pressure, and potential social inhibition or anxiety during questioning.

- **Cultural, language and other identity-related vulnerabilities,** which emerge from persistent language barriers, cultural differences, or identity-based factors that limit the child's engagement with the justice system. Examples include A lack of proficiency in the language of the proceedings, foreign nationality combined with unfamiliarity with the legal system, and cultural or ethnic minority status where long-term communication barriers or distrust of authorities exist.

Such conditions reduce understanding of procedural rights, discourage disclosure of sensitive information, impair communication with professionals, and may inhibit the child's ability to testify safely or accurately. Procedural relevance arises when these factors create

41 *B v Russia* (n 38) paras 50-71.

42 *X and Others v Bulgaria* App no 22457/16 (ECtHR, 2 February 2021) para 192 <https://hudoc.echr.coe.int/fre?i=001-207953> accessed 20 November 2025.

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enduring barriers rather than momentary misunderstandings, affecting comprehension or communication throughout the proceedings.[43]

In respect of Roma children, Bulgarian studies highlight the necessity to have the risk of cultural conflict always taken into consideration during questioning, regardless of the procedural role of the child—one of the major sources of tension concerns ethnonyms (terms used to designate the ethnic group). Ethnic subgroups often hold negative attitudes toward one another, and their members may object to being classified as belonging to a different subgroup. A child is frequently placed in a conflict of loyalties, where loyalties to the ethnic group and/or the family community can compete with the child's desire to cooperate with the investigation. Conflicting loyalties may also arise among different members of the ethnic group. The interaction of children from ethnic minorities with official state authorities is often influenced by the macro-stereotypes held by the minority about the state and its representatives.[44]

Third, legal vulnerabilities which result from legal status, which arise from the child's legal position or status or the legal conditions under which the child participates in proceedings, when such conditions generate durable procedural disadvantages. Examples include deprivation of liberty (particularly prolonged or repeated detention), detention during extradition or return procedures, and irregular or undocumented migration status. Unaccompanied foreign children also fall within this category, as their lack of legal guardianship and representation generates a durable procedural disadvantage.

Detention-related vulnerabilities are linked to isolation and coercion risks, while migration-related vulnerabilities increase susceptibility to language barriers, lack of guardianship, and limited knowledge of rights.

Both categories are mentioned in a variety of contexts in ECtHR decisions - *A.C. v. France*[45] and *Darboe & Camara v. Italy*[46] (unaccompanied minor asylum seeker); *R.R. and Others v.*

43 For general principles of the relevance of lack of language proficiency, see ECtHR cases *Vizgirda v Slovenia* App no 5190/16 (ECtHR, 28 August 2018) paras 75-9 <https://hudoc.echr.coe.int/eng?i=001-185306> accessed 20 November 2025; *Diallo v Sweden* App no 13205/07 (ECtHR, 5 January 2010) para 23 <https://hudoc.echr.coe.int/eng?i=001-96885> accessed 20 November 2025; *Öztürk v Germany* App no 8577/79 (ECtHR, 21 February 1984) paras 46-58 <https://hudoc.echr.coe.int/eng?i=001-57553> accessed 20 November 2025, among others. This study did not find ECtHR judgments explicitly on child language vulnerability.

44 More in Iva Pushkarova and others, *Children's Path: Guide for Professionals in Contact with Children at Risk of Violence, Victims, Witnesses or Offenders* (Kota 2023) *[in Bulgarian]*; A Kolev, *Handbook for Working with Ethno-Religious Communities on Public Order and Security in Bulgaria* (Institute of Psychology of the Ministry of Internal Affairs 2019) 21 *[in Bulgarian]*.

45 *AC v France* App no 15457/20 (ECtHR, 16 January 2025) Legal Summary <https://hudoc.echr.coe.int/eng?i=001-238825> accessed 20 November 2025.

46 *Darboe & Camara v Italy* App no 5797/17 (ECtHR, 21 October 2022) paras 123, 173, 180 <https://hudoc.echr.coe.int/fre?i=001-218424> accessed 20 November 2025.

Hungary (unlawful detention of repeat asylum seekers); *Khan v. France*[47] (unaccompanied foreign minor); *Blokhin* (young age and health-related vulnerabilities during detention). In *NN and Others v. Greece*,[48] a situation of homeless unaccompanied immigrant minors is recognised as extreme vulnerability. In *Boumar*,[49] young age, foreign status, and family-related vulnerabilities are found to have led to behavioural deviations resulting in detention without safeguards. In *Korneykova*,[50] there were no exceptional circumstances justifying remand in custody of a 14-year-old suffering from poor health. These decisions express the view that certain legal statuses create **inherent procedural disadvantages** – particularly in respect to access to counsel, understanding of rights, and resilience to coercive environments – but do not follow a systematic vulnerability typology.

Such factors may severely restrict the child's ability to understand and exercise rights (e.g., the right to counsel, the right to remain silent), impede autonomous decision-making, increase exposure to coercive environments, and heighten confusion or fear during proceedings, thereby undermining procedural fairness. Their procedural relevance lies in the need for adapted legal explanations and translations, strengthened access to specialised representation, and increased protection from coercive or intimidating procedural contexts.

These categories do not operate as fixed compartments. They may overlap when vulnerability is more complex and satisfies criteria under more than one subgroup.

This structured typology of vulnerabilities is methodologically important because it links the *source* of a child's susceptibility to harm with the *procedural safeguards* required to protect their rights in criminal proceedings. It does not aim to catalogue all possible forms of vulnerability exhaustively, nor to mechanise individual assessment. Its function is analytical and guiding rather than determinative. By distinguishing developmental, psychological, physiological, social and legal domains, the classification enables systematic and individualised assessment consistent with international standards on child-friendly and adapted justice. It enhances clarity and consistency in decision-making by providing practitioners with a transparent framework for identifying each child's specific needs and justifying the corresponding protective measures. Moreover, the typology facilitates the detection of cumulative or intersectional vulnerabilities, supports inter-agency coordination, and enables more precise analytical and policy evaluation. As such, it serves not only as a conceptual tool but also as a practical foundation for designing procedurally adapted responses for children who participate in criminal justice processes as offenders, victims, or witnesses. It does not replace individual assessment but structures it by

47 *Khan v France* App no 12267/20 (ECtHR, 28 February 2019) paras 74, 92 <https://hudoc.echr.coe.int/eng?i=001-191587> accessed 20 November 2025.

48 *NN and Others v Greece* App no 59319/19 and Others (ECtHR, 19 December 2024) para 11 <https://hudoc.echr.coe.int/?i=001-238569> accessed 20 November 2025.

49 *Boumar v Belgium* App no 9106/80 (ECtHR, 29 February 1988) paras 7, 52 <https://hudoc.echr.coe.int/eng?i=001-57445> accessed 20 November 2025.

50 *Korneykova v Ukraine* (n 33) paras 40-41, 44-47.

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identifying legally relevant impairment patterns that must be considered in determining appropriate procedural responses. Assessment of vulnerability remains context-sensitive and must be revisited where circumstances evolve. The typology is intended to enhance transparency and consistency in reasoning, not to replace professional judgment or individualised evaluation.

4 PROCEDURAL MODELS FOR CHILD PARTICIPATION

4.1. Adapted Criminal Procedure for Juvenile Offenders

The concept of an adapted criminal procedure for juvenile offenders emerged in the late Nineteenth Century, when the prevailing understanding shifted toward viewing juvenile delinquency as a consequence of criminogenic environmental influences rather than inherent criminality. This shift supported the idea that punitive repression is not always appropriate for children and that alternative, supportive, and pedagogically oriented measures should be preferred.[51]

Adapted procedure reflects this understanding by introducing modifications to the general criminal process to soften its stressful, formal, and potentially intimidating impact on a juvenile offender. The purpose is to create conditions in which the child feels sufficiently confident, secure, and supported to participate actively, effectively and personally in the proceedings and to exercise procedural rights fully. Thus, adapted procedures operationalise principles of effective participation, fairness, and respect for the best interests of the child within the juvenile justice context.

4.2. Friendly (Sensitive / Protected) Procedure for Underaged Victims and Witnesses

A child-sensitive criminal procedure is a refinement of the general criminal procedure, introducing elements designed to limit the adverse emotional and psychological impact on a child who is a victim or a witness of a crime. Child-sensitive justice seeks simultaneously to protect the child from unnecessary exposure to procedural structures and to safeguard the public interest in establishing the objective truth and resolving the case by a final judicial act.

Its purpose is to ensure conditions under which the child can provide full, reliable, and coherent testimony in an environment that is calm, safe, comprehensible, and responsive to their needs. These conditions must take into account age, maturity, views, needs, and concerns. By minimising intimidation, stress, and risks of secondary victimisation, this

51 Anton Girginov, 'Systems of Justice Concerning Minors' (1993) 5 *Contemporary Law [in Bulgarian]*. For detailed analysis of the adapted procedure, see Iva Pushkarova and Alexey Pamporov, *Themis Sees the Child* (Justice Development Foundation 2024) ch. 2, 22-100 *[in Bulgarian]*.

procedure encourages children to share information about relevant events as openly and accurately as possible.[52]

As a minimum standard, a procedure is child-sensitive when it is accessible, age-appropriate, adapted to and focused on the child's specific needs, timely, diligent, and conducted at least in compliance with the child's rights to a fair process, to participation and understanding of the proceedings, to respect for private and family life, and to dignity.[53]

4.3. General Comparative Description of the Structure of the Rights of the Child in Both Types of Procedures

Adapted and friendly procedures are **conceptually distinct**, emerging from different normative premises, as emphasised by child-rights literature.[54] They correspond to incompatible procedural roles, pursue different objectives, and cannot operate simultaneously in respect of the same child within the same procedural position. Despite surface similarities, they cannot be used interchangeably, applied by analogy, or merged. Transferring elements from one model to the other risks structural contradictions and rights violations. For example, measures designed to support an accused child's participation may constitute undue influence if applied to victims, while protections against self-incrimination for an accused conflict with friendly procedures, such as Barnahus models, encouraging a victim to disclose information in a safe, friendly and supportive environment. Likewise, minimising the number of interrogations, suitable for victims, may restrict the accused children's participation.

For these distinctions, it is irrelevant whether a child simultaneously bears characteristics associated with being a victim of abuse, violence, ill-treatment, or crime and of being a perpetrator of an offence, as a child cannot occupy the procedural positions of victim/witness and accused within the same criminal proceedings in respect of the same offence. Although such duality – typical in juvenile justice contexts[55] – may be relevant for decisions concerning protective, educational, parental care, risk management, or other preventive measures, it does not determine the procedurally applicable safeguards that follow from the child's procedural role. The same applies where a child occupies intersecting procedural positions over time: **procedural determination operates sequentially by role,**

52 For a detailed analysis of the friendly procedure see ibid.**,** ch. 3, 100-38. This model reflects principles operationalised in integrated frameworks such as the Barnahus model, widely regarded as best practice for minimising secondary victimisation of child victims, see '*About Barnahus*' *(Barnahus Network*, 2025) <https://barnahus.eu/barnahus/about-barnahus> accessed 20 November 2025.

53 Pushkarova and Pamporov (n 51) 103-5.

54 Lothar Krappmann, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)' (2010) 18(4) International Journal of Children's Rights 501, doi:10.1163/157181810X528021. On the incompatibility between adapted and friendly models. see further, *SC v the United Kingdom* (n 12) and *OG v Latvia* (n 40).

55 Extensively on the matter see: Pushkarova and others (n 44) *29-38.*

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with safeguards calibrated to the current procedural status to avoid undue influence while preserving fair-trial guarantees.[56]

There are **some systemic differences** between adapted and friendly procedures. Adapted procedures prioritise **fair-trial guarantees** and **defence rights**; emotional protection is instrumental to participation. The underlying logic is to **empower** the accused child to interact meaningfully and autonomously with the procedural environment. By contrast, friendly procedures prioritise **trauma-sensitive protections**, limiting exposure to stressful procedural interactions (interrogations, environment, audiovisual recording, avoidance of confrontation). Protection from secondary victimisation constitutes an **autonomous core purpose** of the friendly procedure. Empowerment and protection are thus distinct and sometimes conflicting rationales: the same procedural interaction cannot simultaneously be maximally empowering for an accused and maximally protective for a victim.[57]

Violations of procedural rules and rights **generate different consequences**. In adapted procedures, violations more frequently concern core rights and typically constitute **substantial procedural breaches**, usually resulting in the discontinuation of the proceedings, the exclusion of evidence, or the invalidation of the conviction. Under Article 348 (3) 1 of the Bulgarian CCP, a violation is substantial when it restricts a party's rights and remains unremedied. According to Article 249 (4) 1 of the Code, a violation affecting the accused person's ability to understand the accusation, provide explanations or remain silent, participate effectively, be assisted by counsel, or use an interpreter when not proficient in Bulgarian is substantial but remediable. If unremedied or irremediable, the procedural consequences are unavoidable.

In friendly procedures, violations primarily undermine **protection**, may cause secondary traumatisation, and can establish State liability for damages, but do not invariably meet the 'substantial violation' threshold. The reason is that, as parties to the procedure, victims have fewer core rights and, when only witnesses, are not even parties. Under Article 249 (4) 2 of the Code, a violation of the victim's rights is substantial and remediable when it affects the right to be notified of the initiation of proceedings, the right to information about the victim's rights and the right to participation, or the right to receive written translation of decisions on suspension or termination of proceedings when the victim is not proficient in Bulgarian. This set of rights is narrower than the due-process rights list granted to the accused.

Procedures combine **core rights, procedural safeguards, and discretionary options**.

56 In such an example, a juvenile witness makes self-incriminating accounts while being questioned as an alleged victim of the crime. Such complications may usually require interrogation techniques avoiding questions with potentially self-incriminating responses, switching to adapted procedures of questioning when questioning a child as a perpetrator, or other role-sensitive solutions which avoid merging of safeguards from both models.

57 For detailed analysis of the distinctions between both procedural models, see Kilkelly, *Listening to Children about Justice* (n 3); Pushkarova and Pamporov (n 51) chs 2-3, 22-143; Van der Aa (n 22).

Core rights are guaranteed to all children regardless of individual vulnerability and ensured automatically and uniformly in both procedures. As a rule, violations qualify as 'substantial'. Examples include the presumption of innocence, the right to silence, the right to legal counsel, and access to information.

Procedural safeguards are specialised protective measures triggered by the role of an accused/detainee, a victim, or a witness, or by individual vulnerabilities. They operationalise and reinforce core rights for children unable to fully exercise them due to age, development, language, disability, or trauma. As a rule, they are not mandatory, but authorities are generally required to state reasons for denying an application. Violations may amount to 'substantial'. They usually establish State liability, which may lead to disciplinary or other personal liability for responsible officials. Illustrative examples include parental accompaniment for accused children and assistance by a neutral professional (psychologist or pedagogue) during questioning for victims.

Discretionary options are available mechanisms which authorities may activate when circumstances justify it. Their scope differs substantially between adapted and friendly procedures, depending on legislative design and procedural roles. For victims, examples include limiting the number of interrogations or using the same interviewer; for accused children, accompaniment by a substitute adult in the absence of a parent and professional support during interrogation are optional.

This tripartite structure clarifies which elements are universal and mandatory, or conditional, or optional, enabling systematic comparison between the two procedural models.[58]

The adapted procedure is dominated by core rights that apply in their full scope. Examples include presumption of innocence, protection against self-incrimination, equality of arms, rights notification at first procedural contact, parental notification, legal counsel, legal aid, and specialised administration. Except for the presumption of innocence, most of these rights are **inapplicable** (such as the rights to silence and to have parental or substitute adults informed), **limited in scope, or optional** (e.g., the involvement of specialised bodies) for victims, who are less 'armed', especially regarding silence, parental involvement, and legal representation.

Bulgarian national law serves as an additional example. Protection against self-incrimination is narrower for witnesses who are generally required to disclose their knowledge truthfully and exhaustively (Article 120(1) CCP), unless the answer may incriminate them (Article 121(1) CCP). Minors under the age of 14 are instructed on the necessity of telling the truth (Article 140(4) CCP). Furthermore, access to a lawyer and legal aid is more restricted for victims. A child-victim has a **special representative** rather

58 For detailed analysis of the structure of rights, safeguards and options in both procedural models, see Pushkarova and Pamporov (n 51) chs 2-3, 22-143.

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than a defence counsel (Article 75(1) CCP). Unlike the latter, the special representative is not a party to the proceedings and thus is devoid of independent procedural rights. Special legal assistance is mandatory only when a conflict of interest between the child and parent is present. Legal aid is available under certain conditions, such as pregnancy, institutionalisation, foster care, established risks, domestic violence, sexual abuse, human trafficking, asylum-seeking or refugee status, or a foreign child is institutionalised (Article 22 of the Legal Aid Act). In contrast, it is always mandatory for the accused child (Article 94(1) CCP).

Both adapted and friendly procedures contain numerous safeguards, but they differ substantially. Adapted safeguards include the right to timely case handling and resolution ("reasonable time"), closed-door hearings, parental accompaniment during questioning, limitations on detention, alternatives to detention, special treatment and non-invasive medical examinations during detention. Most are **irrelevant** (e.g., detention-related protections) or **optional (**parental accompaniment or assistance by a neutral professional for adolescent witnesses when necessary) **for victims**.

Conversely, friendly-only safeguards include limiting private-life questioning, mandatory neutral professional assistance for minors under 14 years of age during questioning, an adapted environment, prompt questioning, audiovisual recording, protection from contact with the offender, and restricted repeated medical exams. None of these applies identically to accused children; identical safeguards include non-disclosure of the child's identity and presumption of minority.

In conclusion, both procedures depend on the authorities' practices in applying available protections. Although core rights seem to require the highest and strictest standards with an increasing margin of discretion when safeguards and options are concerned, the procedures are flexible as authorities are bound to operationalise them to secure the child's best interest.[59] ECtHR has repeatedly emphasised the need to adapt procedures to children's (and other vulnerable persons') individual situation. Its case law is highly contextual precisely because there are hardly any 'forever universal' prescriptions.[60]

Illustrative **examples from Bulgarian case law** are provided by two landmark 2012 decisions of the Supreme Court concerning questioning of vulnerable child victims. Both were delivered before the transposition of Directive 2012/29/EU in 2023 and therefore rely on general principles rather than codified safeguards or procedural options. Thus, they are indicative of how procedural rules may be tailored a child's individual needs. The cases concern minor victims of sexual assault who were found to qualify as "vulnerable" and, as such, entitled to "special protection", at a time when national law did not expressly define

59 *Adamkiewicz v Poland* App no 54729/00 (ECtHR, 2 March 2010) para 70 <https://hudoc.echr.coe.int/tkp197/view.asp?i=001-97477> accessed 20 November 2025.

60 ECtHR, *Guide on the Case-Law* (n 3); *AC v France* (n 45) and *Darboe & Camara v Italy* (n 46) (insufficient procedural safeguards in age-assessment).

the content of that protection. The Supreme Court held, in essence, that it is **the duty of the deciding courts to adjust the procedure in the manner most appropriate to the child's vulnerability, even in the absence of direct legal instructions**.

In the first decision, the Supreme Court expressly ruled that "the questioning of a child witness must always be adapted to his or her age and intellect, psychological maturity, and any possible dependence on the persons against whom the criminal proceedings are conducted, as such factors may contribute to feelings of intimidation and, while questioning must be sufficiently thorough to establish the objective truth, it must also be sufficiently protective to ensure a calm and secure environment." The Court treated these elements as sources of vulnerability and concluded that "the age, social status, and personal development of the minor in the present case indicate that he qualifies as a 'vulnerable victim' and is therefore entitled to special protection, with particular regard to personal dignity." It further held that judicial authorities "must afford special treatment due to vulnerability, meaning that questioning should take place only when and only as many times as truly necessary, and in a manner compatible with fundamental legal principles." The authorities retain **discretion as to how proceedings are adjusted**, but remain bound by the requirement to balance the interests of the victim and the defendant. In the case at hand, the minor victim was confronted by a defence witness in the absence of persons entitled to attend his questioning. The Supreme Court expressed doubts as to whether his answers could be considered sincere and uninfluenced, finding that the lower court had failed to strike the required balance by permitting a confrontation without adequate safeguards.[61]

The second decision concerned a girl who had been questioned four times during the pre-trial stage and once during the judicial phase. Although the defendant and defence counsel were present at the fifth questioning, they waived their right to ask questions. Before the Supreme Court, they complained that the appellate court had unlawfully refused their request for a confrontation. The Supreme Court upheld the refusal, reasoning that "the age of the victim, who was 13 at the relevant time, and the expert findings concerning her post-offence condition—persisting fear of renewed contact with the perpetrator, shame, and humiliation—clearly demonstrate that she qualifies as a 'vulnerable victim' entitled to special protection." Given the consistency of her testimony, a sixth interview in the form of a confrontation would have been inappropriate. The refusal, therefore, did not constitute a violation of procedural rules.[62]

61 Case No 3106/2011 Decision No 359/2012 [2012] Supreme Court of Cassation of Bulgaria; Case No 3106/2011 Decision № 55/2012 [2012] Supreme Court of Cassation of Bulgaria.

62 Case No 1144/2012 Decision No 359/2012 [2012] Supreme Court of Cassation of Bulgaria.

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5 MATRIX OF THE PROCEDURAL RELEVANCE OF CERTAIN VULNERABILITIES PER TYPE OF PROCEDURE

The matrix, presented in the table below, summarises typical procedural implications of the different categories of vulnerabilities across adapted and friendly procedures, highlighting points of convergence, divergence, and potential structural tension. Using examples of vulnerabilities, it illustrates the functional systemic asymmetry between the two procedural models. It was constructed by mapping each vulnerability category, identified above in relation to the child's procedural role, against legally available procedural responses within each model, distinguishing between core rights, safeguards, and discretionary options (Table 1).[63] The matrix visualises how identical vulnerabilities may generate different procedural consequences depending on whether the child participates as an accused, victim, or witness.

***Table* 1. Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models**

Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
Developmental and cognitive vulnerabilities (examples)			
Very young age	The borderline age of minority requires heightened attention to rights that ensure the child's effective participation, based on calmness, security, and understanding. These include the participation of a pedagogue/psychologist during interviews and rights briefings, the presence of a supportive parent or substitute adult, and similar safeguards. The decision-making authority's duty to monitor the quality of legal representation is also increasingly important.		Empirical research across EU Member States shows a minimal age threshold for interview at around 4-6 years of age[64]. Young minors whose capacity to testify has been confirmed should be interviewed after preliminary preparation via videoconference in a

63 The matrix is built upon previous research of the author, namely in Pushkarova and Pamporov (n 51), annex, 138-43.

64 ibid, ch. 3, 117; Korkman and others (n 5).

Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
			specialised room, with video recording of the questioning, to avoid multiple questioning and reduce procedural contact. A state-funded legal representative should also be considered.
Intellectual disabilities Not affecting criminal sanity or capacity to participate in the respective procedural role	The participation of a pedagogue/psychologist during the child's interview and when informing the child of their rights is essential. Compliance with rights related to parental accompaniment and notification is critical, and violations are often substantial. Video recording of interviews is strongly recommended, and an extended forensic psychological or psychiatric assessment may be required. Ensuring quality legal representation and the child's active participation are equally important. If the child is detained, adherence to rights-limiting detention, ensuring special treatment, and conducting medical examinations is crucial. Violations may compromise the child's right to a fair trial.		The participation of a pedagogue/psychologist during the child's questioning and when informing them of their rights is increasingly necessary, regardless of age. The significance of child-sensitive procedural rights increases, particularly for videoconference interrogation in a specialised facility, without contact with the accused, and with video recording. An extended forensic psychological or psychiatric assessment is required. A state-funded legal representative should also be considered.

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Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
Disability-causing illness	Heightened attention to the child's capacity to participate personally in the proceedings.	Complications regarding the right to special treatment and medical examination.	Right to legal aid potentially arises.
Drug / Alcohol abuse	Extended forensic psychological and psychiatric assessment. It may give rise to specific health-care needs, which are particularly significant in the context of detention.		An extended forensic psychological and psychiatric assessment is necessary. The participation of a specialised psychologist in the interview may be necessary. The importance of video-recording the interview is increased.
Psychological and emotional vulnerabilities (examples)			
Exploitation, prostitution, involvement in human trafficking (The child is normally considered '*at risk*' throughout EU jurisdictions)	These circumstances are usually materially linked to the offence for which the child is detained/charged, reflecting the immediate criminogenic and motivational environment. They may serve as mitigating factors. Cases should be referred promptly to competent child-protection authorities to end the abuse and address its consequences. Placement in an institution, crisis centre, or other protective care may serve as an alternative to detention.		Potential right to legal aid (includes free access to a state-funded legal representative) A child for whom these circumstances are present qualifies as a victim with special protection needs.

Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
Environment-related vulnerabilities (examples)			
Exposure to domestic violence among adults (The child is normally considered '*at risk*' throughout EU jurisdictions)	Its significance must be assessed on a case-by-case basis. It may: • be of no relevance if it does not impair parental capacity to support the child emotionally; • have a direct connection with the offence and require the child's removal from the family, as well as specific assessments regarding the parents' access to the proceedings; • give rise to specific health-care needs; • or otherwise, be relevant.		Potential right to legal aid. Exposure to domestic violence may give rise to special protection needs and grounds for appointing a special representative if the child has been the victim of a crime committed under conditions of domestic violence.
Lack of parents (orphan) (The child is normally considered '*at risk*' throughout EU jurisdictions)	Complications arise concerning the presence of a parent in the proceedings and the designation of an appropriate substitute adult. The participation of a neutral specialist during questioning is necessary. The obligation of the decision-making authority to monitor the quality of legal representation gains increasing importance.	Measures involving 'parental supervision' are inapplicable as alternatives to pre-trial detention. The right to alternatives to detention requires additional safeguarding efforts.	Potentially granted the right to legal aid. Complications arise regarding parental attendance during questioning. There is an increased need for the participation of a neutral specialist in interviews with juveniles
Absent parents (also due to conviction) (The child is normally considered '*at risk*' throughout EU jurisdictions)			

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Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
Unhealthy parent **Parental substance abuse**	Possible impact on the parents' ability to provide emotional support to the child. Potential conflict with the child's interests triggering authorities' involvement. The possibility that the child provides health care to the parent must be considered.		
Parental criminal influence	The issue and its significance are examined at the individual-assessment stage and may be irrelevant for procedural treatment. Criminal influence often constitutes dependencies that generate conflicts of interest between the child and parent, affecting authorities' discretion regarding the child's parent-related rights.		If the influence threatens the reliability of the testimony or the child's safety, appropriate measures are necessary. In other cases, the circumstance is usually irrelevant.
Early parentage (the child has parent responsibilities towards a very young child or a toddler)	The best interests of the child of the accused must be taken into account in its broadest meaning. Additional efforts are required to ensure the accused child's full and effective personal participation in the proceedings. Potential specific health-care needs. Possible impediment to the detention of the accused.		Potentially high relevance of right to legal aid.
Low education	The participation of a pedagogue during the interview and rights briefings is necessary. The importance of the decision-making authority's duty to monitor the quality of legal representation and the accused's personal participation in the proceedings increases.		It is necessary to have a pedagogue participating in the interrogation even when the child is above the age of 14.

Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
School dropout (The child is normally considered '*at risk*' throughout EU jurisdictions; *A factor for vulnerabilities related to deficient education*)			Right to legal aid – Free access to a state-funded legal representative regardless of other circumstances (Article 22, paragraph 1, item 5 of the Legal Aid Act)
Cultural, language and other identity-related vulnerabilities (examples)			
Lack of proficiency in the language in which the criminal procedure is conducted	The right to interpretation into a language the child understands is paramount in both procedures. It arises before all other rights, at the first contact with the proceedings. It increases the need for parental presence during questioning.		
	The importance of the decision-making authority's duties to monitor the quality of legal representation and the accused's personal participation in the proceedings grows. Rights related to involvement and informing parents and substitute adult are of high importance. Complications may arise regarding the right to special treatment during detention.		The participation of a supportive specialist and a parent during questioning may be necessary. The right to legal aid may apply. Options related to sensitive medical examinations, a limited number of interrogations and examinations, video recordings, and questioning in a special environment should be considered. Usually, the child qualifies as a victim with special needs.

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Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
The child belongs to a racial or ethnic minority	Practices ensuring protection against discrimination and equality of arms are increasingly important. An individual assessment should detail the child's personal, linguistic, cultural, and other relevant features affecting the child's exercise of rights and require competent authorities to be informed. Complications may arise regarding parental or adult involvement. Supportive specialists may need to participate, and video-recording of the interview is recommended.		
Vulnerabilities related to legal status (examples)			
Detention	N/A	Detainees enjoy more rights than an undetained accused	N/A
Child requested in EAW / return procedures	The status is identical to that of a detainee, but with language-related rights and safeguards, as often requested children in cases in which the child is a non-national.		N/A
Foreign status	Possible relevance of language-related rights and safeguards and procedural adjustments to cultural identity. Presumption of minority applies.		Some jurisdictions grant legal-aid rights to foreign child victims. A need for interpretation is likely. The participation of a supportive specialist and interpretation may be necessary during the interview of a juvenile child.
Illegal residence **Asylum seeker** **Unaccompanied foreign child** (*these situations describe multiple vulnerability*)	Heightened attention is required to rights, ensuring the child's effective participation, based on calmness, safety, and comprehension—such as interpretation, participation of a pedagogue during interviews and rights briefings, presence of a parent or substitute adult, and similar protections.	Detention is likely. Presumption of minor age applies. Detention is likely. Complications arise when there is no parental or other	An unaccompanied child lacks legal representation and adult caregiving, which necessitates the appointment of a legal-aid representative.

Interaction Between Vulnerability Categories and Procedural Safeguards Under the Two Models			
vulnerability	**ADAPTED CRIMINAL PROCEDURE**		**FRIENDLY PROCEDURE**
	Child as Accused	**Child as Detainee**	**Child as Victim or Witness**
	Unaccompanied children lack a legal representative, making the authority's duty to monitor legal assistance more relevant. Presumption of minority applies.	permanent legal representative. Presumption of minor age applies.	The importance of a child-sensitive manner of questioning increases. Presumption of minor age applies.

The matrix presented here is conceived as a general template. When applied within a specific national legal context, it requires adaptation to reflect how supranational standards are incorporated into the domestic legal system and the procedural consequences that national law attaches to violations under each procedural model. In particular, certain core rights may not have been fully transposed, some safeguards may have been elevated to the level of rights, or specific discretionary options may function in practice as safeguards or rights. Specific practices – such as participation of neutral specialists or parental figures during the questioning of child witnesses – may be mandatory regardless of age in some systems. In contrast, others they remain optional or contingent on individual assessment. National law may also differentiate the legal response to procedural violations according to their severity, remediability, or the procedural model within which they occur. The matrix may also reflect national best-practice approaches promoted by judicial authorities.

6 CONCLUSIONS

Procedurally relevant vulnerabilities – defined as durable conditions that impede a child's understanding, participation, or capacity to cope with the justice process due to increased susceptibility to procedural harm or disadvantage – form a coherent analytical basis for determining the scope and design of the applicable protective measures in both adapted and friendly procedural models.

The proposed typology of vulnerabilities – personal, environment-related, and legal – captures the main domains in which intrinsic limitations or structural disadvantages may affect a child's procedural capacity. It is also compatible with recent Council of Europe tools

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that translate child-friendly justice standards into assessable procedural indicators.[65] This framework aligns with EU secondary law, the UN CRC and the jurisprudence of the European Court of Human Rights, which consistently recognise the heightened vulnerability of children and the need for adapted procedural guarantees to secure effective participation and, in case of victims, prevent secondary victimisation and optimise evidence gathering. Victim-friendly measures also favour the interests of the accused in being protected from false or unsubstantiated accusations.

The analysis has demonstrated that adapted procedures for juvenile offenders and friendly procedures for victims and witnesses are conceptually distinct, serve different purposes, and rely on different combinations of core rights, safeguards, and procedural possibilities. While adapted procedures prioritise defence rights and effective participation, friendly procedures emphasise protection from intimidation, trauma, and repeated exposure to the criminal process. Treating the two models as interchangeable risks structural contradictions, and violations of fundamental rights.

Methodologically, a matrix-based analytical tool enhances transparency and consistency in vulnerability-informed procedural decision-making without replacing individualised assessment.

Overall, the study concludes that a vulnerability-informed approach provides a consistent, legally grounded framework for structuring procedural responses to children in criminal proceedings. Such an approach enhances coherence and supports consistent, and legally sound decision-making in practice, enabling authorities to tailor procedural responses to children's specific capacities while maintaining compliance with EU law and ECHR standards.

REFERENCES

1. Farrington DP, Loeber R and Ttofi MM, *'Risk and Protective Factors for Offending'* in Welsh BC and Farrington DP (eds), *The Oxford Handbook of Crime Prevention* (OUP 2012) 46, doi:10.1093/oxfordhb/9780195398823.013.0003
2. Fineman MA, *'The Vulnerable Subject: Anchoring Equality in the Human Condition'* (2008) 20(1) Yale Journal of Law and Feminism 1
3. Finkelhor D, *Childhood Victimization: Violence, Crime, and Abuse in the Lives of Young People* (OUP 2008) doi:10.1093/acprof:oso/9780195342857.001.0001
4. Girginov A, 'Systems of Justice Concerning Minors' (1993) 5 *Contemporary Law [in Bulgarian]*

65 Lambe and others (n 10).

5. Kilkelly U, *Barriers to the Realisation of Children's Rights in Ireland* (Office for the Ombudsman for Children 2007)

6. Kilkelly U, *Listening to Children about Justice: Report of the Council of Europe's Consultation with Children on Child-Friendly Justice* (Council of Europe Publishing 2010)

7. Kilkelly U, *The Child and the European Convention on Human Rights* (Routledge 1999) doi:10.4324/9781003579427

8. Kolev A, *Handbook for Working with Ethno-Religious Communities on Public Order and Security in Bulgaria* (Institute of Psychology of the Ministry of Internal Affairs, 2019) *[in Bulgarian]*

9. Korkman J and others, *'White Paper on Forensic Child Interviewing: Research-Based Recommendations by the European Association of Psychology and Law'* (2024) 31(8) Psychology, Crime & Law 987, doi:10.1080/1068316X.2024.2324098

10. Krappmann L, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)' (2010) 18(4) International Journal of Children's Rights 501, doi:10.1163/157181810X528021

11. Lambe S and others, *Child-Friendly Justice Assessment Tool* (Child-friendly Justice Project, Council of Europe 2025)

12. Liefaard T, 'Access to Justice for Children: Towards an International Standard?' (2019) 27(2) *The International Journal of Children's Rights* 195, doi:10.1163/15718182-02702002

13. Mrazek PJ and Haggerty RJ (eds), *Reducing Risks for Mental Disorders: Frontiers for Preventive Intervention Research* (National Academies Press, 1994) doi:10.17226/2139

14. Peroni L and Timmer A, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, doi:10.1093/icon/mot042

15. Popov S, *Risk: Conceptual Framework* (New Bulgarian University 2022) *[in Bulgarian]*

16. Pushkarova I, 'Concept of Risk Factor' in Iva Pushkarova and others, *Risk Criminogenic and Victimogenic Factors in Children* (Union of Judges in Bulgaria 2009–2011) 50 *[in Bulgarian]*

17. Pushkarova I, *Criminal-Law Policies as a Risk and as a Risk-Management Instrument* (RiskMonitor 2023) *[in Bulgarian]*

18. Pushkarova I and others, *Children's Path: Guide for Professionals in Contact with Children at Risk of Violence, Victims, Witnesses or Offenders* (Kota 2023) *[in Bulgarian]*

19. Pushkarova I and Pamporov A, *Themis Sees the Child* (Justice Development Foundation 2024) *[in Bulgarian]*

20. Tobler C, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005)

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21. Tobler C, *Limits and Potential of the Concept of Indirect Discrimination* (European Communities 2008) doi:10.2767/56607

22. van der Aa S, 'Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law' (2016) 7(1) *New Journal of European Criminal Law* 39, doi:10.1177/203228441600700104

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Keywords: *procedural vulnerability; child participation in criminal proceedings; juvenile justice; child-sensitive justice; adapted criminal procedure; procedural safeguards.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРОЦЕСУАЛЬНІ ОСОБЛИВОСТІ УЧАСТІ ДІТЕЙ ЯК ОКРЕМОЇ КАТЕГОРІЇ ВРАЗЛИВИХ ГРУП В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ: АДАПТОВАНІ ТА ЧУТЛИВІ ДО ПОТРЕБ ДІТЕЙ ПРОЦЕСУАЛЬНІ МОДЕЛІ

Іва Пушкарова

АНОТАЦІЯ

Вступ. *Забезпечення ефективної участі дітей у кримінальному провадженні є серйозним викликом для європейських систем правосуддя, які дедалі більше визнають, що особливості розвитку, психологічні, соціальні та інші характеристики дітей можуть зумовлювати їхню вразливість в межах кримінального провадження. Однак наявні рекомендації є фрагментарними та недостатньо впорядкованими. У цій статті розглядається структура та функція процесуального захисту, що застосовується до дітей, які беруть участь у кримінальному провадженні як правопорушники, жертви або свідки. Вона зосереджена на концепції процесуальних особливостей окремої категорії вразливих груп, які розуміються як стійкі внутрішні умови, що погіршують здатність дитини розуміти кримінальне провадження, брати в ньому участь або справлятися з ним, збільшуючи схильність до виникнення процесуальних недоліків.*

Методи. *Це дослідження використовує доктринальний аналіз права ЄС, Конвенції ООН про права дитини та судову практику Європейського суду з прав людини для розробки аналітичної структури, що ґрунтується на концепції процесуальних особливостей окремої категорії вразливих груп. У ньому пропонується функціональна типологія аспектів вразливості та оцінюються її процесуальні наслідки. Розглядаються дві процесуальні моделі – адаптовані процедури для неповнолітніх правопорушників та процедури, що враховують інтереси дітей, для жертв та свідків – через структуру основних прав, процесуальних гарантій та процесуальних можливостей.*

Результати та висновки. *Ці дві моделі мають різну мету та спираються на різні, хоча й гнучкі та адаптовані до конкретних справ, підходи до категорії вразливих груп, щоб забезпечити справедливість, захист та ефективну участь. Запропонована структура зміцнює узгодженість та передбачуваність процесуальної практики, пов'язаної з дітьми, та пропонує концептуальну основу для судового керівництва та потенційної гармонізації в межах європейського кримінального правосуддя, що стосується дітей. Запропоновано три основні внески: (1) оперативне визначення процесуальних особливостей окремої категорії вразливих груп; (2) принципове розділення адаптованих та зручних для дітей процесуальних моделей; та (3) матричний інструмент для відображення процесуальних заходів, що зважають на інтереси дітей, у всіх їхніх процесуальних ролях.*

Ключові слова. *Процесуальна вразливість; участь дитини у кримінальному провадженні; ювенальна юстиція; правосуддя, що зважає на інтереси дитини; адаптований кримінальний процес; процесуальні гарантії.*

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REVIEW ARTICLE

Review Article

EXCEPTIONAL COMPENSATION FOR NUCLEAR DAMAGE: COMPARATIVE INSIGHTS FROM INTERNATIONAL NUCLEAR LIABILITY REGIMES AND THE LAWS OF UKRAINE AND SAUDI ARABIA

Salih Luhaibi*, Maamar Bentria, Adnan Ibrahim Sarhan and Mourad Benseghir

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ABSTRACT

Background: *International nuclear liability conventions, particularly the Paris Convention of 1960 and the Vienna Convention of 1963, as amended in 1997, establish the principle of exclusive operator liability, under which the licensed nuclear operator bears sole responsibility for compensating for damage resulting from a nuclear incident. In practice, however, this principle encounters significant limitations in situations where operator liability cannot be effectively enforced, such as insolvency, armed conflict, force majeure, or insufficient financial guarantees. These exceptional circumstances raise questions regarding the role of the state in ensuring adequate compensation for victims of nuclear damage.*

Methods: *The study employs a combination of doctrinal, analytical, comparative, descriptive, and statistical research methods. International nuclear liability treaties are examined alongside national legislation, particularly Ukrainian Law No. 2893 of 2001 and Saudi Law No. M/81 of 2018. The comparative method is used to assess how each legal system addresses exceptional state intervention and compensation mechanisms, while descriptive and statistical analyses draw on international practice and comparative data on operator liability limits and financial security arrangements.*

Results and Conclusions: *The analysis demonstrates that both Ukraine and Saudi Arabia recognise the possibility of state intervention when operator-based compensation proves inadequate. However, Ukraine provides a more explicit and structured statutory framework for governmental liability and supplementary compensation mechanisms, whereas Saudi Arabia adopts a more conditional and subsidiary approach. The study concludes that clearer institutional arrangements and designated state compensation mechanisms are necessary, particularly in Saudi Arabia, to enhance alignment with international standards and ensure effective protection of victims of nuclear incidents.*

1 INTRODUCTION

The peaceful use of nuclear energy has become an increasingly significant component of modern energy policy. Its primary application lies in electricity generation, where relatively small quantities of nuclear fuel can produce energy equivalent to thousands of litres of petroleum or tons of coal, while also offering advantages in transportability and long-term energy security.[1] Beyond power generation, nuclear energy is used in maritime transport, industrial processes, scientific research, and, more recently, has been discussed as a potential alternative energy source for certain types of vehicles.[2] These developments reflect a growing global reliance on nuclear technology as part of the transition to diversified and sustainable energy systems.

Despite its economic and technological benefits, nuclear energy entails exceptional risks. Nuclear installations involve radioactive materials and complex reactions that may cause severe harm to individuals, property, and the environment. Such damage is often transboundary, extending beyond the state's territory where the nuclear facility is located. Traditional civil liability rules are inadequate to address these risks, particularly given the scale, latency, and geographic spread of nuclear damage. In response, states have developed a special legal regime for nuclear liability through regional and international agreements designed to ensure prompt, fair, and adequate compensation for victims.

1 Mervat Al-Bardawi, *Legal Framework for Dealing with Nuclear and Radiological Accidents and Compensating for Their Damages* (Dar Al-Nahda Al-Arabiya 2012) [in Arabic].

2 Mahmoud Khairy Bennouna, *International Law and the Use of Nuclear Energy* (Dar Al-Shaab Foundation 1969) 7-8 [in Arabic].

This special regime is primarily embodied in international instruments such as the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, as amended by its subsequent protocols,[3] and the Vienna Convention on Civil Liability for Nuclear Damage of 1963, as amended by the 1997 Protocol.[4] These conventions establish the principle of strict and exclusive operator liability, under which the licensed nuclear operator bears sole responsibility for compensating for nuclear damage. However, practical experience has revealed significant gaps in situations where operator liability cannot be effectively enforced, including cases of insolvency, armed conflict, force majeure, or insufficient financial security. These gaps raise fundamental questions about the state's role as a residual guarantor of compensation.

In Ukraine, the principal legal framework governing nuclear liability is Law No. 2893-III of 2001 on Civil Liability for Nuclear Damage and Its Financial Provision, as last amended in 2024.[5] This framework operates alongside the Law on the Use of Nuclear Energy and Radiation Safety of 1995,[6] which places full responsibility on the nuclear operator as the beneficiary of the facility and defines a broad operational scope covering the planning, construction, operation, decommissioning, and regulation of nuclear activities. The Ukrainian system has been further strengthened by Law No. 1909-IX of 2021 on Insurance,[7] which classifies civil liability insurance for nuclear damage as compulsory and operationalises the financial security obligations imposed on operators. Together, these laws form an integrated system in which substantive liability rules are complemented by mandatory insurance mechanisms, in line with Ukraine's international commitments.[8] Recent reforms, including the adoption of new regulations establishing a Nuclear Insurance Pool, signal a move toward a more robust, institutionally coordinated financial security structure.

3 *Paris Convention on Third Party Liability in the Field of Nuclear Energy: Consolidated Text and Exposé des Motifs* (OECD Publishing 2024) <https://www.oecd-nea.org/jcms/pl_79139/paris-convention-consolidated?preview=true> accessed 10 May 2025.

4 *Vienna Convention on Civil Liability for Nuclear Damage* (text and current status, OECD Publishing 2002) <https://www.iaea.org/topics/nuclear-liability-conventions/vienna-convention-on-civil-liability-for-nuclear-damage> accessed 10 May 2025.

5 Law of Ukraine No 2893-III of 13 December 2001 'On Civil Liability for Nuclear Damage and its Financial Provision' (amended 1 January 2024) [in Ukrainian] <https://zakon.rada.gov.ua/laws/show/en/2893-14?lang=uk#Text> accessed 10 May 2025.

6 Law of Ukraine No 39/95-BP of 8 February 1995 'On the Use of Nuclear Energy and Radiation Safety' (amended 1 January 2025) [in Ukrainian] <https://zakon.rada.gov.ua/laws/show/39/95-%D0%B2%D1%80> accessed 10 May 2025.

7 Law of Ukraine No 1909-IX of 18 November 2021 'On Insurance' (amended 1 January 2025) [in Ukrainian] <https://zakon.rada.gov.ua/laws/show/1909-20#top> accessed 10 May 2025.

8 Resolution of the Cabinet of Ministers of Ukraine No 1276 of 8 October 2025 'On approval of the Regulations on the Nuclear Insurance Pool' [2025] Official Gazette of Ukraine 87/6050 [in Ukrainian].

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Saudi Arabia has likewise adopted a specialised framework through Law No. M/81 of 2018 on Civil Liability for Nuclear Damage,[9] which incorporates the Vienna Convention and its 1997 Protocol. The law regulates operator liability, compensation limits, and financial guarantees, reflecting the Kingdom's growing engagement with nuclear energy for peaceful purposes. Nevertheless, the extent and modalities of government responsibility for compensating nuclear damage remain less explicit, particularly in exceptional situations where operator-based compensation proves inadequate.

This study examines the concept of exceptional compensation for nuclear damage, focusing on the circumstances under which the state may intervene to compensate victims when the operator is unable to do so. It analyses the legal bases for such intervention under international nuclear liability conventions and compares their implementation in Ukrainian and Saudi legislation. Particular attention is given to unresolved issues regarding the scope of government liability, the types of compensable damages, the rights of victims' heirs, and the roles of national and supplementary compensation funds.

The significance of this research lies in the unique nature of nuclear damage, characterised by its severity, potential transboundary effects, and delayed manifestation. These features justify the development of an exceptional liability regime based on strict liability and supplementary state intervention. By drawing on comparative international experience, this study seeks to refine compensation mechanisms and advance the emerging legal doctrine of state liability for nuclear damage, particularly within Arab legal scholarship.

2 METHODOLOGY

This study employs a structured combination of doctrinal, analytical, comparative, descriptive, and statistical research methods, each applied to a specific research task to ensure methodological clarity and academic rigour.

The doctrinal method is used to examine the legal texts governing civil liability for nuclear damage. The study systematically analyses the provisions of key international instruments, including the *Paris Convention of 1960*, the *Vienna Convention of 1963 and its 1997 Protocol*, and the *Brussels Convention of 1962*. It also applies doctrinal analysis to national legislation, namely, *Ukrainian Law No. 2893-III (2001)* and its amendments, and *Saudi Law M/No. 81 (2018)*, to clarify the legal concepts, the scope of liability, and the obligations imposed on operators and states.

The analytical method is employed to interpret and break down the legal rules into their constituent elements, with particular focus on the mechanisms of state intervention,

9 Royal Decree of the Kingdom of Saudi Arabia **No** M/81 of 11 April 2018 'Law of Civil Liability for Nuclear Damage' <https://qanoniah.com/en/File/4Kx25lPrOwnKgYGn8R3mJZMQE-Law-of-Civil-Liability-for-Nuclear-Damage> accessed 10 May 2025.

operator liability limits, and compensation pathways. This includes assessing how each legal system addresses exceptional cases such as operator insolvency, exemption scenarios, and claims exceeding liability ceilings.

The study employs a comparative analysis to identify key similarities and differences between Ukrainian, Saudi, and international regimes concerning exceptional state liability and compensation funds. This method allows an assessment of how closely national frameworks align with international standards and the degree to which each system ensures adequate protection for victims of nuclear damage.

The choice of Ukraine and Saudi Arabia reflects two distinct regulatory models: Ukraine represents a jurisdiction with an operational nuclear sector and a mature liability regime aligned with the Vienna Convention, while Saudi Arabia exemplifies an emerging nuclear jurisdiction still developing its legislative architecture. This contrast facilitates the identification of regulatory gaps, strengths, and best practices across systems, without implying any direct legal or institutional relationship between the two states.

The descriptive method is employed when examining practical experiences and illustrative cases from legal practice, outlining the operation of state-backed compensation mechanisms in jurisdictions such as Japan, the United States, Germany, and Switzerland, as well as describing landmark nuclear incidents including Fukushima (2011), Chernobyl (1986), and Three Mile Island (1979).

To strengthen the comparative analysis, the study incorporates a statistical examination of operator liability limits and financial security levels across selected nuclear jurisdictions, drawing on data published by the *OECD Nuclear Energy Agency (NEA)*. These empirical indicators serve as a contextual benchmark for understanding where Ukraine and Saudi Arabia stand relative to other nuclear states in terms of financial protection for victims. The statistical method supports the study's findings by revealing disparities in operator liability ceilings, the presence or absence of state-backed tiers, and the overall maturity of compensation systems.

3 SOURCES REVIEW

Iyad Jadalhaq and Enas Alqodsi (2021)[10] focused on the liability regime for nuclear operators in the United Arab Emirates (UAE) under Federal Decree Law No. 4 of 2012 and the 1997 Vienna Convention. The study compared this regime with general civil liability rules under the UAE Civil Transactions Law to determine the legal nature of nuclear operator liability and assess the protection provided to individuals, property, and

10 Iyad Mohammad Jadalhaq and Enas Mohammad Alqodsi, 'Tort Law Makes a Quantum Leap: A Review of the Civil Liability Regime for Nuclear Operators in UAE Law' (2021) 13(1) Journal of Property, Planning and Environmental Law 17. doi:10.1108/JPPEL-05-2020-0023.

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natural resources in the event of a nuclear accident. It also outlined the conditions for entitlement to compensation for nuclear damage. Using a comparative analytical method, the study concluded that specialised liability law offers greater protection to victims of nuclear accidents than general rules, through exceptions introduced by the legislature that narrow the substantive scope of liability. Our study differs by focusing on compensation mechanisms and guarantees of victim recovery, including recourse to insurance companies or the state.

Jiu Liu et al. (2018)[11] examined Chinese legislation on civil liability for nuclear damage, considering the significance of China's civilian nuclear industry in improving environmental sustainability and energy security while also confronting nuclear accident risks. The study highlighted the need for a legal system for nuclear damage compensation and noted that Chinese law contains only two preliminary articles on the subject. It noted that the current legal system lacks coherence, detail, and flexibility. By analysing existing Chinese laws and regulations, the study identified shortcomings and recommended the creation of a comprehensive legal framework for nuclear damage compensation. This framework should include clear objectives, a precise definition of nuclear damage, principles of strict operator liability, appropriate compensation amounts, and a reliable financial guarantee. Our study differs by focusing on exceptional compensation methods, whether through direct government intervention or state-administered compensation funds.

Jonathan Bellamy (2019)[12] analysed the legal framework of operator civil liability for nuclear damage and assessed whether insurance coverage is sufficient to meet such liability. The study emphasised the operator's central role in nuclear programs and the need for adequate insurance commensurate with the operator's legal obligations within the relevant jurisdiction. It also mapped the scope and distribution of new nuclear construction programmes globally, focusing on established nuclear states and new entrants. The study noted that potential civil liabilities arise under both international and national law and compared various international liability regimes (Vienna, Paris, Brussels, and IAEA Conventions). It placed special emphasis on the Brussels Convention and the feasibility of establishing a global liability system, comparing these frameworks with national laws in countries like the United States, China, Russia, India, the United Kingdom, and the UAE. Our study is distinct in its emphasis on exceptional state-based compensation when victims are unable to claim damages from the operator under comparative legal systems.

Marchenko (2024)[13] explored the legal nature and conceptual foundations of civil liability insurance contracts for nuclear damage within the Ukrainian context. His analysis

11 Jiu Liu, Bingyu Liu and Dantao Chen, 'Legislative Study on China's Compensation for Nuclear Damage Liability' (2018) 10(7) Sustainability 2222. doi:10.3390/su10072222.

12 Jonathan Bellamy, 'Civil Liability for Nuclear Damage in Countries Developing Nuclear New Build Programmers' (2019) 12(1) Journal of World Energy Law and Business 108. doi:10.1093/jwelb/jwy036.

13 Mykola Marchenko, 'The Concept and Legal Nature of a Civil Liability Insurance Contract for Nuclear Damage' (2024) 5 New Ukrainian Law *113*. doi:10.51989/NUL.2024.5.16 [in Ukrainian].

highlights the essential role of insurance as a financial guarantee mechanism within the broader nuclear liability regime. This work supports the present study by illustrating how insurance is intended to serve as the primary compensation mechanism, thereby framing the legal and practical limitations that justify exceptional state intervention when insurance coverage is insufficient or inapplicable.

Iryna Les (2024)[14] examined international legal mechanisms governing liability for nuclear damage and assessed their implementation in Ukraine. Her study underscores the challenges Ukraine faces in harmonising domestic law with international standards, particularly in conditions of armed conflict, and identifies gaps in ensuring adequate compensation for victims. Her findings align closely with this study's focus on state liability in exemption scenarios and the need for clearer statutory mechanisms for government-funded compensation.

4 THE EXTENT OF GOVERNMENT LIABILITY FOR NUCLEAR DAMAGE

To contextualise the discussion on the extent of government liability, it is essential to examine how different nuclear jurisdictions' structure operator liability limits and financial security requirements.

The comparative statistical data presented in the table below are not intended to provide a detailed analysis of each listed jurisdiction. Rather, they serve as benchmarking indicators that illustrate the range of liability ceilings and financial models applied internationally, helping situate the Ukrainian and Saudi frameworks within broader international practice.

***Table* 1. Comparative Liability and Financial Security Limits in Selected Nuclear Jurisdictions**[15]

Jurisdiction Category	Country	Operator Liability	Financial Security	Relevance to the Study
High Liability	United States	USD 11.9 billion	USD 300 million insurance + USD 11.6 billion federal indemnification	Demonstrates a strong state-backed tiered model, illustrating how public authorities ensure comprehensive compensation beyond operator limits.

14 Iryna Les, 'International Legal Mechanisms of Liability for Nuclear Damage' (2024) 3 Visegrad Journal on Human Rights 45. doi:10.61345/1339-7915.2024.3.19.

15 OECD Nuclear Energy Agency, *Nuclear Operator Liability Amounts & Financial Security Limits, as of June 2011* (NEA 2011) <https://www.oecd-nea.org/law/2011-table-liability-coverage-limits.pdf> accessed 10 May 2025.

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Jurisdiction Category	Country	Operator Liability	Financial Security	Relevance to the Study
	Germany	Unlimited liability	EUR 2.5 billion financial security	Shows implementation of unlimited operator liability; provides a benchmark for expanding liability in Ukraine or Saudi Arabia.
	Japan	Unlimited liability (major reactors)	JPY 120 billion (≈ EUR 920.3 million)	Example of a hybrid system where the operator is unlimited but supported by state-backed financial guarantees, relevant to exceptional state liability.
Medium Liability	France	EUR 91.5 million	Special Drawing Rights 125 million (international tier)	Reflects a traditional Paris–Vienna model combining national and international financial layers.
	Belgium	EUR 297.4 million	EUR 324 million indexed insurance	Demonstrates a balanced liability structure supported by strong insurance requirements.
Lower Liability	Indonesia	IDR 4 trillion (≈ EUR 291.8 million; USD 424 million)	Not specified	Useful for benchmarking; shows mid-range liability compared to European and OECD nuclear states.

The general principle in nuclear damage and its compensation is that the operator is the first and last party responsible, with this liability being exclusively attributed to the operator. However, despite this principle, there are instances in which the state may bear secondary liability. The state may also be held liable for decisions it issues, or even strictly liable for damages resulting from the operation of nuclear installations.[16]

16 Mohamed Abdel Latif, *Encyclopedia of Nuclear Law* (Dar Al-Fikr wa Al-Qanun 2019) [in Arabic].

Before delving into the matter, it is necessary to examine the scope and limits of operator liability under Saudi law. The law sets the operator's liability at 300 million Special Drawing Rights (SDRs) for each nuclear incident. The government may issue operating licenses for some low-risk nuclear installations, requiring the operator to provide financial security amounting to 5 million SDRs.[17]

The Ukrainian law on civil liability for nuclear damage and its financial provision (Law No. 2893-III, adopted on December 13, 2001), Article 6 provides that the operator's liability for nuclear damage is limited to the equivalent of 150 million SDRs in Ukrainian currency per nuclear incident. Furthermore, liability for death is limited to an amount equal to 2,000 times the official non-taxable minimum income at the time of the court ruling. Compensation for health-related damage is limited to 5,000 times the non-taxable minimum income at the time of the court ruling or agreement, without exceeding the actual damage caused.[18]

State intervention in the nuclear field to compensate those harmed by nuclear activity or accident has raised controversy between supporters and opponents. We will review the opinions of both groups.

4.1. In Support of Government Intervention to Compensate for Nuclear Damage

Although the general rule of nuclear civil liability is founded on the principle of exclusive operator responsibility, the question of state liability for compensating nuclear damage has long been the subject of legal and doctrinal debate. During the negotiations leading to the 1997 Protocol amending the Vienna Convention, proposals were advanced to introduce provisions establishing state liability as a substitute for operator liability in exceptional circumstances. Despite the seriousness of these discussions, they did not result in a modification of the Convention's core structure, which continues to prioritise operator liability as the primary rule.[19]

Nevertheless, strong doctrinal arguments support the state's intervention as a compensating authority when operator-based mechanisms prove inadequate. From a practical perspective, the scale of damage caused by nuclear accidents often exceeds the financial capacity of operators and their insurers, rendering state financial resources the only viable means of ensuring effective compensation, as demonstrated by historical catastrophes such as Chernobyl.[20] Beyond financial capacity, state intervention is also justified by the collective

17 Royal Decree of the Kingdom of Saudi Arabia No M/81 of 2018 (n 9) arts 21, 22

18 Law of Ukraine No 2893-III (n 5) art 18.

19 In this sense, Adnan Sarhan, 'Civil Liability of the Nuclear Facility Operator Under UAE Federal Decree-Law No 4 of 2012 on Civil Liability for Nuclear Damage' (2013) 13(2) *Journal of Sharia and Law* 122 [in Arabic].

20 IAEA, *Environmental Consequences of the Chernobyl Accident and Their Remediation: Twenty Years of Experience* (Radiological Assessment Reports Series, IAEA 2006).

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nature of the benefits derived from nuclear energy. Nuclear activities serve broad societal interests by contributing to energy security and economic development, with advantages extending to both present and future generations. It is therefore reasonable that society, represented by the state, assumes part of the associated risks.[21]

International nuclear liability instruments, while preserving the principle of operator liability,[22] implicitly acknowledge the necessity of state involvement. The Paris Convention of 1960 envisages state action when the operator is not liable, though it does not specify the precise form of such intervention. The Brussels Supplementary Convention of 1962 further institutionalised this approach by introducing additional compensation tiers funded by the installation state and other contracting states, thereby reinforcing the role of public authorities. Similarly, Article 7(1) of the Vienna Convention obliges the installation state to ensure the availability of compensation by providing public funds where insurance or other financial security proves insufficient, within the established liability limits. Collectively, these mechanisms reflect an understanding of state liability as a supplementary guarantee designed to protect victims rather than to replace operator responsibility.[23]

Finally, analogies may be drawn with other areas of high-risk activity regulated under international law, such as space activities, where states bear international responsibility for damage caused by objects launched under their jurisdiction.[24] Coupled with the state's superior financial solvency and its capacity to mobilise public resources rapidly, these considerations confirm that state intervention plays a critical and complementary role in ensuring effective compensation for nuclear damage, particularly in exceptional circumstances where operator liability cannot be enforced.

In terms of national legislation, most countries include provisions obligating the state to provide compensation when the operator is unable to do so, either due to natural disasters or armed conflict. The state may also be required to compensate for delayed damages if the claim is filed after any statutory limitation period has expired. However, in all these cases, the state's liability is supplementary rather than primary. For instance, Egyptian law mandates government intervention when the operator cannot pay.[25] Article 90 of Law No. 7 of 2010 concerning the regulation of nuclear and radiological activities states: "The operator shall be liable for the execution of judgments issued against him for compensation, even if

21 Mohamed Hussein Abdel Aal, *The Legal System of Civil Nuclear Liability* (Dar Al-Nahda Al-Arabiya 2008) [in Arabic].

22 Ahmad Ibrahim Al-Hayari, 'Guaranteeing Compensation for Damage Resulting from Nuclear Accidents' (2017) 20(4) Kuwait International Law College Journal 117 [in Arabic].

23 Liu, Liu, and Chen (n 11).

24 Wael Abo Taha, 'Nuclear Damage (Definition and Conditions of Occurrence): A Comparative Study between International Conventions and National Legislation' (2016) 13(2) University of Sharjah Journal of Sharia and Law Sciences 89 [in Arabic].

25 Mohamed Amin Youssef Abdel Latif, *State Liability for Environmental Nuclear and Radiological Pollution Damage* (National Center for Legal Publications 2016) [in Arabic].

the compensation exceeds the value of the insurance or guarantee. In the event of proven inability to pay the excess, the state shall cover the shortfall, without prejudice to its right of recourse against the operator."[26]

Similarly, the Ukrainian legislator adopted the same approach in Law No. 2893-III (December 13, 2001), supporting state liability for nuclear damage. *Under Article 10, state intervention is envisaged if the nuclear operator lacks sufficient enforceable assets to satisfy compensation claims, in which case the government may assume responsibility for covering the resulting shortfall.*[27]

This provision can also be interpreted to apply in cases of the operator's bankruptcy. Nevertheless, the procedural requirements outlined in this article must be fulfilled to complete the compensation claim. In our view, the scope of state intervention in compensating nuclear damage should be expanded, particularly in cases where the operator's liability limit is exceeded. This is a critical issue that the Ukrainian legislator has overlooked, and it is important and beneficial to victims to explicitly address such scenarios in legislation.

The Saudi legislator adopted a similar approach in Law No. M/81 of 2018 concerning civil liability for nuclear damage. The law affirms the principle of government intervention in cases where the operator is unable to cover nuclear damage, within the maximum limit of their nuclear civil liability. Article 10 of the Saudi law states: "The amount borne by the government under any of its obligations for the purpose of compensating for nuclear damage involving the liability of more than one operator shall be limited to the difference between the total amounts of liability referred to in Article 8 of the law and the liability amount mentioned in Article 21 of the law, on the basis that each nuclear incident is considered separately, regardless of the number of liable operators." [28]

From the foregoing, it is evident that under Saudi legislation, government liability for nuclear damage compensation is considered supplementary or secondary. The primary liability rests with the operator of the nuclear facility. However, the government may still intervene to provide compensation, even when where the operator's liability is not limited.

4.2. Opposition to Government Intervention in Nuclear Damage Compensation

In contrast, a second strand of legal scholarship rejects the notion that the government should be legally obliged to compensate for nuclear damage. Proponents of this view argue, first, that the hazardous nature of nuclear installations does not, of itself, justify state intervention, since comparable levels of risk exist in other industrial sectors such as explosives manufacturing or gas production, where governments are not expected to

26 Law of the Arab Republic of Egypt No 7 of 2010 'Law Regulating Nuclear and Radiological Activities', art 90 <https://manshurat.org/node/7754> accessed 10 May 2025.

27 Law of Ukraine No 2893-III (n 5) art 10.

28 Royal Decree of the Kingdom of Saudi Arabia No M/81 of 2018 (n 9) arts 10, 21

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compensate victims directly. From this perspective, nuclear risk does not warrant exceptional treatment.[29]

It is further argued that the state's role in authorising and supervising nuclear activities cannot serve as a legal basis for compensation obligations. The issuance of licenses and the establishment of safety standards are considered expressions of regulatory authority rather than grounds for assuming financial responsibility after an accident. According to this view, effective regulatory control and preventive oversight are more appropriate responses to nuclear risks than ex post state compensation.[30]

Some scholars acknowledge that governments may provide assistance to victims of large-scale disasters as part of their broader social responsibility. However, they emphasise that such assistance should not be interpreted as creating a binding legal obligation toward affected individuals, but rather as a discretionary policy choice grounded in solidarity. In addition, alternatives to direct state compensation have been proposed, such as imposing special taxes or fees on the nuclear industry proportionate to the financial burdens potentially borne by the state.[31] Nevertheless, this approach remains largely theoretical, lacking sufficient empirical and economic analysis to determine appropriate contribution levels.

Despite these objections, the balance of legal and practical considerations suggests that the arguments supporting state intervention are more persuasive. Given the scale, complexity, and potentially catastrophic consequences of nuclear damage, exclusive reliance on operator-based compensation mechanisms may prove insufficient. Accordingly, it appears necessary to recognise a legal obligation on the state to provide supplementary compensation, subject to a right of recourse against the operator. Such state liability should remain secondary and complementary, operating only within the remaining portion of the maximum liability limit and only after the operator's financial resources have been exhausted.[32] This approach is consistent with both international nuclear liability conventions and prevailing national legislative models, which will be examined in greater detail in the following sections.

4.3. Illustrative Examples from Legal Practice on Compensation for Nuclear Damage

Comparative practice shows that even jurisdictions with strong operator liability frameworks rely on state intervention when damages exceed financial security limits. Ukraine's and Saudi Arabia's legal reforms should, therefore, integrate clear mechanisms

29 Abdel Latif (n 25).

30 Al-Bardawi (n 1) 115.

31 Medhat Saleh Ghaib, 'Insurance for Nuclear Damage' (2016) 3(29) Tikrit University Journal of Law 372 [in Arabic].

32 Al-Shahabi Ibrahim Al-Sharqawi, 'Civil Liability for Nuclear Damage in UAE Law in the Light of Libity's General Rules' (2015) 24(1) Police Thought 67 [in Arabic]; Al-Saghir Mohamed Khader Mahdi, 'Civil Liability of the Nuclear Facility Operator: An Analytical Study under Law No 7 of 2010' (2019) 92(2) Journal of Law and Economics 331. doi:10.21608/mle.2019.110494 [in Arabic].

inspired by international experience. Numerous international experiences in this context demonstrate how nuclear liability rules operate in practice and highlight the importance of clearly defining state intervention in exceptional situations.

Following *the Fukushima Daiichi* accident in 2011, the Japanese operator TEPCO was financially unable to cover the full scope of compensation. Japan's legal regime imposes strict, unlimited liability on nuclear operators, although it is subject to unlimited liability. Consequently, the Japanese government established a state-backed compensation fund exceeding JPY 9 trillion, demonstrating the practical functioning of a tiered operator-state liability model.[33]

Similarly, the *Chernobyl* disaster in 1986, although occurring under the Soviet Union, remains one of the clearest historical examples of how the scale of nuclear damage can far exceed any operator-based liability model. The catastrophic nature of the event revealed the practical impossibility of relying solely on operator responsibility to compensate victims and address long-term environmental harm. Following independence, Ukraine incorporated these lessons into its domestic legal framework through *Law No. 2893-III on Civil Liability for Nuclear Damage*, which expressly provides for state participation in compensation when operator resources are insufficient or unavailable. The law also establishes mechanisms for long-term remediation of health, environmental, and socio-economic impacts, reflecting a recognition that nuclear incidents have consequences that extend over decades. This experience is directly relevant to the present study, as it demonstrates how Ukrainian legislation evolved in response to the inadequacies exposed by the Chernobyl accident and highlights the legal justification for exceptional governmental intervention within Ukraine's current nuclear liability regime.[34]

Another illustrative example is the Three Mile Island (TMI) accident in the United States in 1979, which provides a significant practical example of how a *tiered nuclear liability system* operates in reality. It was the first major incident to test the *Price–Anderson Act*, a legal framework that combines mandatory operator insurance with a substantial federal indemnification layer financed by the U.S. government. Although the reactor meltdown caused limited off-site radiological consequences, more than *USD 70 million* in compensation claims were processed through a hybrid mechanism involving private insurer payouts and federally backed funds. This incident demonstrated the effectiveness of a graduated compensation system, where the operator's primary financial responsibility is complemented by state-supported coverage to ensure timely and adequate compensation for affected individuals. The TMI experience is highly relevant to the present study, as it illustrates how a structured operator, state liability model can function in practice,

33 OECD Nuclear Energy Agency**.** *Japan's Compensation System for Nuclear Damage: As Related to the TEPCO Fukushima Daiichi Nuclear Accident* **(**OECD Publishing **2012) <**https://www.oecd.org/en/publications/japan-s-compensation-system-for-nuclear-damage_9789264992009-en.html**>** accessed 10 May 2025.

34 IAEA (n 20).

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providing a useful comparative reference for both Ukraine and Saudi Arabia, whose legal systems lack similarly refined multi-tiered compensation architectures.[35]

Collectively, these examples reveal that in severe nuclear incidents, state participation becomes indispensable even in systems formally based on exclusive operator liability. They, therefore, support this study's conclusion that both Ukraine and Saudi Arabia should adopt clearer statutory mechanisms to regulate governmental intervention when operator-based compensation proves inadequate.

5 CASES OF DIRECT GOVERNMENT INTERVENTION TO COMPENSATE FOR NUCLEAR DAMAGE

A nuclear incident constitutes a serious threat to public safety, environmental integrity, and social stability, thereby necessitating government intervention to mitigate its consequences. Such intervention is grounded in the state's fundamental public responsibilities rather than merely in the fact that nuclear activities are subject to governmental licensing. Licensing alone cannot justify a general obligation of state compensation, as many licensed economic activities do not entail governmental responsibility for resulting damages. Likewise, general notions of disaster relief or humanitarian assistance are insufficient to establish a binding legal obligation on the state to compensate for nuclear damage. Government intervention within the nuclear liability framework is confined to specific, legally defined situations in which operator-based liability mechanisms prove inadequate or inapplicable[36].

5.1. Government Intervention Where Operator-Based Compensation Is Insufficient

The first category of state intervention arises when the nuclear operator, although legally liable for the nuclear incident, is unable to fully compensate victims. This situation may result from the operator's insolvency or bankruptcy, insufficient insurance or financial guarantees, or damage exceeding the operator's statutory liability ceiling. As a commercial entity, the nuclear operator may be subject to national insolvency laws, and international nuclear liability conventions do not regulate such situations in detail. In practice, the operator's assets are often insufficient to cover the full extent of nuclear damage.[37]

In these circumstances, government intervention becomes necessary to ensure effective victim compensation, with the state assuming a guarantor or supplementary role within the framework established by national law. Ukrainian legislation explicitly recognises this

35 Jeffrey C Dobbins, 'Promise, Peril, and Procedure: The Price-Anderson Nuclear Liability Act' (2019) 70(2) Hastings Law Journal 331.

36 Al-Sharqawi (n 32); Mahdi (n 32).

37 Omar Faris, 'The New UAE Bankruptcy System: Incomplete Radical Amendments' (2022) 36 Journal Sharia and Law 162 [in Arabic].

situation, under the Law on the Use of Nuclear Energy and Radiation Safety (1995), which provides for state participation when the operator lacks sufficient financial resources.[38] Similarly, Saudi Law No. M/81 of 2018 contemplates governmental intervention where multiple nuclear facilities are involved in a single incident, and the operator's liability limits are exhausted, allowing the state, subject to its obligations, to cover the excess damage beyond the operator's ceiling.[39]

In this category, state intervention is complementary rather than initial. The operator and its insurer remain the primary guarantors, and governmental funds are mobilised only when these private mechanisms are exhausted. The state may subsequently exercise a right of recourse against the operator, as recognised under Article 7(1) of the 1963 Vienna Convention[40] and Article 3(2) of the 1962 Brussels Convention.[41] Although certain national laws, such as the Saudi framework, characterise such intervention as conditional, international practice demonstrates that political, social, and diplomatic pressures frequently compel host states to intervene to ensure adequate compensation for victims. This model of tiered liability, combining operator responsibility with supplementary public funding, is expressly reflected in the Brussels Convention and the 1997 Convention on Supplementary Compensation for Nuclear Damage.[42]

5.2. Government Intervention Where Operator Liability Is Excluded or Fully Exhausted

The second category of direct government intervention arises when operator liability is excluded or exhausted, and no further compensation can be obtained through private or statutory liability mechanisms. This includes cases where nuclear damage exceeds the combined compensation capacity of all designated tiers, namely the operator, its insurer, state liability ceilings, and any available compensation funds, as well as situations in which the operator is exempted from civil liability under international nuclear liability conventions.[43]

38 Consider also, Agreement between the Ministry of Emergency Situations and Population Protection of Ukraine from the Consequences of the Chernobyl Disaster and the Commission for Atomic Energy and Alternative Energies of the French Republic of 15 October 2010 'On Technical Assistance Aimed at Improving the Conditions for Handling Spent Radioactive Sources and Highly Radioactive Waste in Ukraine' [2010] Official Gazette of Ukraine 82/2913 [in Ukrainian].

39 Royal Decree of the Kingdom of Saudi Arabia No M/81 of 2018 (n 9) arts 11, 21, 22.

40 *Vienna Convention (n 4)* art 7(1).

41 Convention on the Liability of Operators of Nuclear Ship (adopted 25 May 1962) art 3(2) <https://inis.iaea.org/records/jrq3h-rjc68> accessed 10 May 2025.

42 Convention on Supplementary Compensation for Nuclear Damage (adopted 12 September 1997) <https://www.iaea.org/topics/nuclear-liability-conventions/convention-supplementary-compensation-nuclear-damage> accessed 10 May 2025.

43 Adnan Ibrahim Sarhan, *Non-voluntary Sources of Obligation in the UAE Civil Transactions Law According to its Principles of Islamic Jurisprudence* (University Library, Ithraa Publishing and Distribution 2010) 188 [in Arabic].

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In the first scenario, where all legally established compensation mechanisms are depleted and residual damage remains uncompensated, the state may be compelled to intervene as a last resort.[44] Such intervention is driven primarily by considerations of public order, social stability, and political accountability rather than by strict nuclear liability rules. It remains discretionary and dependent on the state's financial capacity and socio-economic conditions. Ukrainian law reflects this approach, under Article 12, as amended by Law No. 4717-VI dated May 17, 2012, by permitting compensation for socio-economic risks associated with nuclear and radioactive waste facilities through dedicated state funds administered by executive authorities.[45]

In the second scenario, where the operator is exempted from liability due to circumstances such as armed conflict, civil war, insurrection, or exceptional natural disasters, state intervention becomes mandatory. The exemption of the operator necessarily shifts responsibility to the state, which becomes solely responsible for compensating victims. Where national legislation expressly provides for such state liability, compensation is granted within the liability limits otherwise applicable to the operator. Where domestic law remains silent, as is currently the case under Saudi nuclear legislation, the state remains obligated to intervene on the basis of general public-law principles and its duty to protect individuals and ensure public safety. This residual responsibility is recognised in Article 8(1) of the 1997 Vienna Convention, which allows states to determine compensation levels in accordance with their legal and financial capacity.[46]

It must be emphasised that the exemption of the operator from civil nuclear liability in situations of armed conflict operates strictly within the civil liability regime and does not preclude the application of criminal law or international humanitarian law. As several Ukrainian scholars emphasise, the civil liability rules under *Law No. 2893-III* cease to apply under wartime conditions, yet this does not diminish the relevance of *Article 438 of the Criminal Code of Ukraine*, which incorporates the protections found in *Article 56 of Additional Protocol I*, prohibiting attacks on installations containing dangerous forces, including nuclear power stations.[47]

44 Les (n 14).

45 Law of Ukraine No 39/95-BP (n 6) art 12; Law No 4717-VI of 17 May 2012 'On amendments to the Law of Ukraine "On the Use of Nuclear Energy and Radiation Safety" Regarding the Improvement of the Mechanism of Social Protection of the Population Living in the Territory of the Surveillance Zone' [2012] Official Gazette of Ukraine 45/1736.

46 Artem Nazarko, 'Legal Tug-of-War: The Institutional Challenges of the Domestic Prosecution of War Crimes in Ukraine' (2023) 6 *Analytical and Comparative Jurisprudence* 697. doi:10.24144/2788-6018.2023.06.120.

47 Criminal Code of Ukraine No 2341-III of 5 April 2001 (amended 9 May 2025) art 438 [in Ukrainian] <https://zakon.rada.gov.ua/laws/show/2341-14/ed20250717#Text> accessed 10 May 2025; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977) UNTS 1125/3, art 56; Law of Ukraine No 2893-III (n 5).

These analyses confirm that while the nuclear operator is relieved of civil liability during hostilities, state responsibility or individual criminal liability under international humanitarian law and Ukrainian criminal law may still arise for acts that endanger nuclear safety in the context of armed aggression.

When the operator is exempted from liability, the government becomes solely responsible to all victims, and such state liability becomes mandatory. This situation arises when one of the exemption grounds recognised under international nuclear liability conventions is present, for example, armed conflict, rebellion, civil war, insurrection, or exceptional natural disasters. In such cases, the operator's exemption triggers the subsidiary liability of the nuclear State, which must compensate for the damage resulting from the nuclear incident. Two scenarios of state intervention can be distinguished.[48]

6 COMPENSATION FUNDS AND OPERATOR POOL MECHANISMS IN COMPARATIVE PERSPECTIVE

In the United States, compensation for nuclear damage is governed by the Atomic Energy Act of 1954,[49] which establishes a two-tier liability system for nuclear operators. The first tier consists of direct operator liability covered through mandatory primary insurance. The second tier requires operators to participate in a collective compensation mechanism, commonly referred to as an operator pool, which functions as a secondary financial layer. Notably, operators are not required to pay advance premiums into this pool; financial contributions are triggered only if a nuclear incident occurs. This structure allows operators to participate without the burden of immobilising capital in advance, while ensuring the availability of substantial compensation resources when needed. Although formally based on private participation, this arrangement reflects indirect state involvement, as it is mandated by federal legislation and supported by a statutory liability framework.[50]

In Switzerland, nuclear damage compensation is addressed through a dedicated public mechanism established under the Swiss Nuclear Law of 2003.[51] Initially, the compensation fund became liable only after the victim's right to claim against the operator had lapsed, provided that the claim was filed within two years from the moment the victim became aware of both the damage and the responsible party, and that a causal link between the nuclear incident and the damage was established. This mechanism was originally known as the Delayed Damage Compensation Fund. Subsequent legislative

48 Al-Shahabi Ibrahim Al-Sharqawi, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (University Library 2012) 136 [in Arabic].

49 Atomic Energy Act of 1954, 42 USC §§ 2011–2021, 2022-2286i, 2296a-2297h-13.

50 Mohamed Abu Zaid, 'Insights on the Decree Concerning Civil Liability for Nuclear Damage in the UAE' (2013) 3(2) Dubai Judicial Institute Journal 121 [in Arabic].

51 Nuclear Energy Act (NEA) of 21 March 2003 (RS 732.1) <https://www.fedlex.admin.ch/eli/cc/2004/723/en> accessed 10 May 2025.

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reforms significantly extended the limitation period, allowing victims to seek compensation from either the operator or the fund for up to thirty years, after which the mechanism was renamed the Nuclear Damage Compensation Fund. These developments reflect a growing recognition of the long-term nature of nuclear harm and the need for durable compensation structures.[52]

Germany offers a further illustration of operator-based collective financial guarantees. Discussions on establishing a nuclear operator pool began in the 1970s, with the objective of securing a financial guarantee of 500 million Deutsche Marks. Under the initial arrangement, operators were required to obtain civil liability insurance coverage of 200 million DM, while the remaining 300 million DM was guaranteed through a pool jointly supported by insurers and nuclear operators. Following successive legislative reforms to the German Atomic Energy Act,[53] culminating in amendments adopted in 2002, the required financial guarantee was significantly increased. In response, German energy companies concluded a civil-law solidarity agreement establishing an operator pool designed to provide the required coverage, currently set at 2.5 billion euros. Contributions to the pool are calculated according to a formula based on each facility's nuclear capacity, ensuring proportional participation among operators.[54]

These examples demonstrate that governments have indirectly supported such compensation mechanisms primarily through legislative mandates and, in some cases, financial backing. In line with this approach, this study supports calls for the establishment of stable compensation funds based on mandatory, cost-free membership expressly provided for by legislation. The implementation of such a model would require amendments to the 1963 Brussels Supplementary Convention and the 1997 Convention on Supplementary Compensation for Nuclear Damage, followed by a corresponding obligation on signatory states, including Saudi Arabia and the United Arab Emirates, to incorporate these provisions into their domestic legal frameworks.

7 CONCLUSIONS

The comparative analysis demonstrates that international conventions, Ukrainian legislation, and Saudi legislation adopt the foundational principle of operator liability, but differ in their implementation and mechanisms for ensuring financial security and state intervention.

Firstly, at the international level, nuclear liability conventions provide a tiered compensation model that envisages state participation when operator liability is

52 Abo Taha (n 24).

53 Law on the Peaceful Use of Nuclear Energy and Protection Against its Dangers (Atomgesetz – AtG) of 23 December 1959 (amended 2025) <https://www.gesetze-im-internet.de/atg/BJNR008140959.html> accessed 10 May 2025.

54 Al-Hayari (n 22).

insufficient, whether due to insolvency, liability caps, or exemptions such as those for armed conflict.

Secondly, in Ukraine, the statutory framework is more developed and structured. Law No. 2893-III and its implementing regulations establish clear mechanisms for financial security, including mandatory insurance and state participation when operator assets are inadequate. Recently, the Government of Ukraine approved new Regulations on the Nuclear Insurance Pool, formalising the status, objectives, membership procedures, and insurance and reinsurance rules for a collective pool of licensed insurers responsible for underwriting nuclear liability coverage. This reform strengthens the financial capacity of the nuclear civil liability insurance system, supports compliance with Ukraine's international obligations, and enhances cooperation between state institutions and private insurers. The updated pool provisions replace earlier regulations and mark a shift toward a more robust financial security structure aligned with international standards.

In contrast, Saudi nuclear legislation recognises the principle of operator liability but offers a more limited framework for state intervention and insurance mechanisms. It does not provide detailed institutional arrangements comparable to Ukraine's model, such as a designated insurance pool or clearly defined rules for collective risk sharing.

Overall, both Ukraine and Saudi Arabia adhere in principle to supplementary state intervention, but the depth and clarity of their frameworks differ. Ukraine's approach is more institutionalised, particularly with the recent establishment of the Nuclear Insurance Pool, while Saudi legislation leaves several operational aspects undefined. This comparative synthesis highlights regulatory gaps and best practices for developing insurance capacity and state-backed mechanisms that ensure effective compensation and alignment with international nuclear liability norms.

The following recommendations are proposed for Ukraine**:**

The Ukrainian legislator is encouraged to establish dedicated compensation funds or to require nuclear operators to participate in appropriately structured compensation pools to strengthen the financial guarantees available to victims of nuclear incidents.

They should consider increasing the operator's liability limit from the current 150 million SDRs to 300 million SDRs. Since most nuclear jurisdictions applying the revised Vienna and Paris Convention regimes adopt operator-liability limits between 250 and 350 million SDRs, this limit will represent a proportionate, internationally consistent, and financially feasible enhancement of Ukraine's civil nuclear liability regime.

For Saudi Arabia, we would like to generalise the following recommendations:

The Saudi legislator is encouraged to expressly incorporate the exemption scenarios listed in the 1997 Vienna Convention, such as civil war, armed conflict, hostile acts, and civil unrest, so that state liability is clearly activated when operator liability is excluded under these circumstances.

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A clear mechanism should be established for claiming state-funded compensation. This should include the designation of the competent authority responsible for disbursing compensation (for example, the Ministry of Finance or the National Atomic Energy Agency) together with explicit guarantees ensuring the timely and effective payment of compensation whenever operator-based compensation is unavailable or insufficient.

Finally, for all emerging nuclear jurisdictions, including Saudi Arabia**,** participation in national or international nuclear compensation funds should be mandated, with clear statutory provisions governing the percentage and structure of state contributions. Such funds are essential, as nuclear incidents may generate compensation demands far exceeding the financial capacity of both operators and their insurers.

REFERENCES

1. Abdel Aal MH, *The Legal System of Civil Nuclear Liability* (Dar Al-Nahda Al-Arabiya 2008) [in Arabic]
2. Abdel Latif M, *Encyclopedia of Nuclear Law* (Dar Al-Fikr wa Al-Qanun 2019) [in Arabic]
3. Abdel Latif MAY, *State Liability for Environmental Nuclear and Radiological Pollution Damage* (National Center for Legal Publications 2016) [in Arabic]
4. Abo Taha W, 'Nuclear Damage (Definition and Conditions of Occurrence): A Comparative Study Between International Conventions and National Legislation' (2016) 13(2) University of Sharjah Journal of Sharia and Law Sciences 89 [in Arabic]
5. Abu Zaid M, 'Insights on the Decree Concerning Civil Liability for Nuclear Damage in the UAE' (2013) 3(2) Dubai Judicial Institute Journal 121 [in Arabic]
6. Al-Bardawi M, *Legal Framework for Dealing with Nuclear and Radiological Accidents and Compensating for Their Damages* (Dar Al-Nahda Al-Arabiya 2012) [in Arabic]
7. Al-Hayari AI, 'Guaranteeing Compensation for Damage Resulting from Nuclear Accidents' (2017) 20(4) Kuwait International Law College Journal 117 [in Arabic]
8. Al-Sharqawi ASI, 'Civil Liability for Nuclear Damage in UAE Law in the Light of Libity's General Rules' (2015) 24(1) Police Thought 67 [in Arabic]
9. Al-Sharqawi ASI, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (University Library 2012) [in Arabic]
10. Bellamy J, 'Civil Liability for Nuclear Damage in Countries Developing Nuclear New Build Programmers' (2019) 12(1) Journal of World Energy Law and Business 108. doi:10.1093/jwelb/jwy036
11. Bennouna MK, *International Law and the Use of Nuclear Energy* (Dar Al-Shaab Foundation 1969) [in Arabic]

12. Dobbins JC, 'Promise, Peril, and Procedure: The Price-Anderson Nuclear Liability Act' (2019) 70(2) Hastings Law Journal 331

13. Faris O, 'The New UAE Bankruptcy System: Incomplete Radical Amendments' (2022) 36 Journal Sharia and Law 143 [in Arabic]

14. Ghaib MS, 'Insurance for Nuclear Damage' (2016) 3(29) Tikrit University Journal of Law 372 [in Arabic]

15. Jadalhaq IM and Alqodsi EM, 'Tort Law Makes a Quantum Leap: A Review of the Civil Liability Regime for Nuclear Operators in UAE Law' (2021) 13(1) Journal of Property, Planning and Environmental Law 17. doi:10.1108/JPPEL-05-2020-0023

16. Les I, '*International Legal Mechanisms of Liability for Nuclear Damage*' (2024) 3 Visegrad Journal on Human Rights 45. doi:10.61345/1339-7915.2024.3.19

17. Liu J, Liu B and Chen D, 'Legislative Study on China's Compensation for Nuclear Damage Liability' (2018) 10(7) Sustainability 2222. doi:10.3390/su10072222

18. Mahdi ASMK, 'Civil Liability of the Nuclear Facility Operator: An Analytical Study under Law No 7 of 2010' (2019) 92(2) Journal of Law and Economics 331. doi:10.21608/mle.2019.110494 [in Arabic]

19. Marchenko M, 'The Concept and Legal Nature of a Civil Liability Insurance Contract for Nuclear Damage' (2024) 5 New Ukrainian Law 113. doi:10.51989/NUL.2024.5.16 [in Ukrainian]

20. Nazarko A, 'Legal Tug-of-War: The Institutional Challenges of the Domestic Prosecution of War Crimes in Ukraine' (2023) 6 Analytical and Comparative Jurisprudence 697. doi:10.24144/2788-6018.2023.06.120

21. Sarhan A, 'Civil Liability of the Nuclear Facility Operator Under UAE Federal Decree-Law No 4 of 2012 on Civil Liability for Nuclear Damage' (2013) 13(2) Journal of Sharia and Law 122 [in Arabic]

22. Sarhan AI, *Non-voluntary Sources of Obligation in the UAE Civil Transactions Law According to its Principles of Islamic Jurisprudence* (University Library, Ithraa Publishing and Distribution 2010) [in Arabic]

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ВИНЯТКОВА КОМПЕНСАЦІЯ ЗА ЯДЕРНУ ШКОДУ: ПОРІВНЯЛЬНИЙ АНАЛІЗ МІЖНАРОДНИХ РЕЖИМІВ ВІДПОВІДАЛЬНОСТІ ЗА ЯДЕРНУ ЕНЕРГІЮ З ЗАКОНОДАВСТВОМ УКРАЇНИ ТА САУДІВСЬКОЇ АРАВІЇ

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АНОТАЦІЯ

Вступ. *Міжнародні конвенції про ядерну безпеку, зокрема Паризька конвенція 1960 року та Віденська конвенція 1963 року, з поправками 1997 року, встановлюють принцип виключної відповідальності оператора, згідно з яким ліцензований оператор ядерної енергетики несе виключну відповідальність за компенсацію шкоди, завданої внаслідок ядерних інцидентів. Однак на практиці цей принцип стикається зі значними обмеженнями в ситуаціях, коли відповідальність оператора не може бути ефективно забезпечена, таких як неплатоспроможність, збройний конфлікт, форс-мажор або недостатні фінансові гарантії. Ці виняткові обставини порушують питання щодо ролі держави у забезпеченні належної компенсації жертвам ядерної шкоди.*

Методи. *У дослідженні використовується поєднання доктринальних, аналітичних, порівняльних, описових та статистичних методів дослідження. Міжнародні договори про ядерну відповідальність розглядаються разом із національним законодавством, зокрема Законом України № 2893 від 2001 року та Законом Саудівської Аравії № M/81 від 2018 року. Порівняльний метод використовується для оцінки того, як кожна правова система розглядає виключні втручання держави та механізми компенсації, тоді як описовий та статистичний аналіз спирається на міжнародну практику та порівняльні дані щодо обмежень відповідальності оператора та механізмів забезпечення фінансових зобов'язань.*

Результати та висновки. *Аналіз демонструє, що як Україна, так і Саудівська Аравія визнають можливість державного втручання, коли компенсація з боку оператора виявляється недостатньою. Однак Україна забезпечує більш чітку та структуровану законодавчу базу щодо відповідальності, яку несе держава, та додаткових механізмів компенсації, тоді як Саудівська Аравія застосовує більш умовний та субсидіарний підхід. У дослідженні було зроблено висновок, що для покращення відповідності міжнародним стандартам та забезпечення ефективного захисту жертв ядерних інцидентів необхідні більш чіткі інституційні механізми та визначені державні механізми компенсації, особливо в Саудівській Аравії.*

Ключові слова. *Виняткова відповідальність держави; ядерна шкода; відповідальність оператора; компенсаційні фонди; міжнародні конвенції про ядерну безпеку; законодавство України; законодавство Саудівської Аравії.*

ABSTRACT IN ARABIC

مقالة مراجعة

التعويض الاستثنائي عن الأضرار النووية: دراسة تحليلية مقارنة للاتفاقيات الدولية والتشريعين الأوكراني والسعودي

صالح لهيبي*، معمر بن تريا، عدنان إبراهيم سرحان، مراد بن صغيّر

الملخص

الخلفية: تُرسّخ اتفاقيات المسؤولية النووية الدولية، ولا سيما اتفاقية باريس لعام 1960 واتفاقية فيينا لعام 1963 بصيغتها المعدّلة عام 1997، مبدأ المسؤولية الحصرية للمشغّل النووي، والذي يقضي بأن **يتحمل** المشغّل النووي المرخّص وحده المسؤولية الكاملة عن تعويض الأضرار الناشئة عن أي حادث نووي. غير **أن** التطبيق العملي لهذا المبدأ يواجه قيوداً جوهرية في الحالات التي يتعذر فيها إنفاذ مسؤولية المشغّل بفعالية، مثل حالات الإعسار المالي، أو النزاعات المسلحة، أو القوة القاهرة، أو عدم كفاية الضمانات المالية. وتثير هذه الظروف الاستثنائية تساؤلات قانونية مهمة حول دور الدولة في **ضمان** توفير تعويض كافٍ لضحايا الأضرار النووية.

المنهجية: تعتمد الدراسة على مزيج من المناهج البحثية الفقهية والتحليلية والمقارنة والوصفية والإحصائية. وتم تحليل اتفاقيات المسؤولية النووية الدولية جنباً إلى جنب مع التشريعات الوطنية، ولا سيما **القانون** الأوكراني رقم 2893 لسنة 2001، **والقانون** السعودي رقم م/81 لسنة 2018. واستُخدم المنهج **المقارن** لتقييم كيفية معالجة كل نظام قانوني لمسائل تدخل الدولة الاستثنائي وآليات التعويض، في حين استند التحليل الوصفي والإحصائي إلى الممارسات الدولية والبيانات المقارنة المتعلقة بحدود مسؤولية المشغّلين وترتيبات **الضمان** المالي.

النتائج والاستنتاجات: تُظهر نتائج التحليل **أن** كلاً من أوكرانيا والمملكة العربية السعودية **تعترفان** بإمكانية تدخل الدولة عندما يثبت عدم كفاية التعويض القائم على مسؤولية المشغّل. غير **أن** أوكرانيا توفر إطاراً تشريعياً أكثر وضوحاً وتنظيماً لمسؤولية الدولة وآليات التعويض التكميلي، في حين تتبنى المملكة العربية السعودية نهجاً أكثر حزماً في هذا **الشأن**. وتخلص الدراسة إلى **أن** وجود ترتيبات مؤسسية أكثر وضوحاً، وآليات تعويض حكومية محددة، يُعد أمراً ضرورياً، ولا سيما في المملكة العربية السعودية؛ لتعزيز التوافق مع المعايير الدولية **وضمان** حماية فعّالة لضحايا الحوادث النووية.

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Reform Forum's Note

ARTICLES 7 AND 8 OF THE PROPOSED DIRECTIVE ON COMBATING CORRUPTION AND THEIR APPLICABILITY IN VIEW OF THE ROMANIAN LEGISLATION

Cătălin Constantinescu-Mărunțel* and Teodor Manea-Săbău

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ABSTRACT

Background: *This paper analyses the proposed Directive of the European Parliament and the Council aimed at combating corruption, within the context of Romanian legislation, with special focus placed on the provisions of Articles 7 and 8 of the proposed Directive. Even if this phenomenon still lacks a unanimously accepted definition, corruption remains a pervasive challenge across various sectors in Romania, necessitating a comprehensive legislative framework to strengthen anti-corruption measures and fortify the rule of law. The proposed directive reflects the European Union (EU)'s proactive stance in addressing systemic corruption, with a particular focus on the Romanian legal landscape.*

The research delves into the substantive changes outlined by the proposed provisions of the directive in reference to the phenomenon of bribery, analyzing its potential implications for the existing anti-corruption framework in Romania in view of

the interplay between anti-corruption efforts and the broader legal framework, assessing how the proposed changes may contribute to a more transparent, accountable, and resilient legal system.

Method: *Using a comparative approach, the authors analyze the provisions of Articles 7 and 8 of the proposed Directive in light of the relevant provisions of Romanian criminal law. At the same time, the authors argue that, given the institutional framework of Romanian anti-corruption efforts, the aforementioned regulation does not provide a clear advantage.*

Results and conclusions: *While acknowledging the multifaceted nature of anti-corruption endeavors, the authors conclude that the proposed versions of Articles 7 and 8 of the Anticorruption Directive will not have a significant impact on the corresponding norms of the Romanian Criminal law, while explaining why this could be viewed as both a positive and a negative fact.*

1 INTRODUCTION

In early May 2023, the European Commission introduced to the public an anti-corruption initiative consisting of a joint communication,[1] a new EU Directive on combating corruption,[2] which shall be the focus of this research, and the announcement of a new anti-corruption EU sanctions regulation.

While the Directive openly acknowledges that there is no universally accepted definition of corruption, it uses the decades-old approach to identify which facets of corruption have such a negative impact on society that they warrant criminalization. In this sense, pursuant to Articles 7 to 13 of the Directive, the multiple typologies of acts of corruption may constitute offences. All of these are already criminalized under the provisions of the Romanian Criminal Code of 2014.[3]

If one understands corruption as encompassing the previously mentioned offences, the cumulative costs are staggering: corruption is estimated to cost the European Union hundreds of billions of euros per year. The toll on persons is even higher, as it places them in a position of questioning their commitment to the rule of law, as the 2025 Corruption Eurobarometer Survey demonstrates, finding that over-two thirds of Europeans fear that corruption is widespread. In comparison with 2022, one notices an increase of 1 point.[4]

1 European Commission, 'Joint Communication to the European Parliament, The Council and The European Economic and Social Committee on the Fight Against Corruption' (JOIN (2023) 12 final, 3 May 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023JC0012> accessed 7 November 2025.

2 Hereinafter also referred to as "the Directive" or "the Anticorruption Directive".

3 Law of Romania No 289/2009 'Criminal Code' (into force 1 February 2014) [2009] Monitorul Oficial 510.

4 European Commission, 'Citizens' Attitudes Towards Corruption in the EU in 2025' (*European Union*, July 2025) <https://europa.eu/eurobarometer/surveys/detail/3361?etrans=sk> accessed 25 January 2026.

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That being said, the need to effectively combat corruption stems, in part, from the business sector's view that corruption is a widespread problem in doing business, with 63% of respondents stating that it is .[5]

At the same time, it remains unclear, even in light of the explanations provided by the Directive, how much the private sector, especially the corporate one, contributes to the phenomenon of corruption. The authors would like to highlight that, criminologically speaking, the relationship between corruption, corporations, and State agents, while widely understood as part of the umbrella term "white-collar crime," remains fundamentally misunderstood.[6]

As the Directives of the European Union are considered indirect sources of Romanian Criminal Law,[7] the authors propose a detailed comparative analysis of the provisions of Articles. 7 and 8 of the Directive, which provide the proposed definitions for bribery in the public and private sectors, respectively, in reference to the relevant Romanian similar provisions, to see if the regulations proposed by the European Union will significantly improve or not the anticorruption efforts in Romania, as well as if the implementation of the former provisions will be an easy process or not.

This paper begins with a first section dedicated to a brief introduction to the notion of corruption, as presented by the Anticorruption Directive and as understood in the Romanian legal literature and praxis. The authors also included brief remarks on the role of the European Union in developing and promoting legal instruments that proved crucial to anticorruption efforts across the continent.

The second section was designed to provide the reader with key points of comparison between the definitions of active and passive bribery in the European Directive and their Romanian law counterparts. As this is an introductory paper on the subject, the authors limited the scope of their analysis to a few examples. As shown below, such a comparison should allow the reader to understand whether the implementation process, from this point of view, will be easy or complicated.

This study offers a nuanced understanding of the proposed directive's transformative potential within the Romanian legal context. This research contributes to the ongoing discourse on anti-corruption initiatives, with implications extending beyond Romania to inform broader discussions on the efficacy of anti-corruption directives within the European Union.

5 European Commission, 'Businesses Attitudes Towards Corruption in the EU and in Selected Enlargement Countries' (*European Union*, July 2025) <https://europa.eu/eurobarometer/surveys/detail/3382> accessed 25 January 2026.

6 Graham Brooks, *Criminology of Corruption: Theoretical Approaches* (Palgrave Macmillan 2016) 27-8.

7 Constantin Mitrache and Cristian Mitrache, *Drept Penal Român: Partea Generală* (5th edn, Universul Juridic 2023) 61.

2 OBJECTIVES AND METHODOLOGY

The authors are aware of the breadth of the subject introduced previously and of the spatial constraints inherent to such a paper. Studying national and international efforts to combat corruption may prove to be a task of a lifetime. However, by narrowing the scope of the analysis to only two Articles from the proposed Directive and to only one national criminal legislation, such an endeavor becomes possible and suitable for answering two main questions.

Firstly, if these proposed European norms are necessary in the larger context of corruption. Secondly, if they provide the national legislator and implementing authorities with innovative solutions, they will mark an important step forward in the fight against corruption.

The methods used naturally derive from the aforementioned objectives. Two methods, specific to the comparative approach, will be used primarily: the law-in-context and the functional methods. The context will be introduced first, thereby acknowledging the problems caused by this criminal phenomenon. The analysis will then shift to the functional method, as the authors try to compare how Articles 7 and 8 of the proposed Directive, on the one hand, and Romanian Criminal Law, on the other hand, address these problems.

In the following section, the authors propose a brief introduction to the phenomenon of corruption in the understanding of the European Union.

3 THE PROBLEM OF CORRUPTION

The domain of corruption does not exist in a vacuum, as it is linked to global environmental degradation,[8] international security,[9] policy,[10] funding,[11] waste disposal,[12] biodiversity,[13] global finance[14], and social struggles[15].

8 Muhammad Haseeb and Muhammad Azam, 'Dynamic Nexus Among Tourism, Corruption, Democracy, and Environmental Degradation: A Panel Data Investigation' (2021) 23(4) Environment, Development and Sustainability 5557, doi:10.1007/s10668-020-00832-9.

9 Mark V Vlasic and Jenae N Noell, 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems' (2010) 5(2) Yale Journal of International Affairs 106.

10 Susan Rose-Ackerman and Rory Truex, 'Corruption and Policy Reform' (2012) 444 Yale Law & Economics Research Paper, doi:10.2139/ssrn.2007152.

11 Ilaria De Angelis, Guido De Blasio and Lucia Rizzica, 'Lost in Corruption: Evidence from EU Funding to Southern Italy' (2020) 6 Italian Economic Journal 355, doi:10.1007/s40797-020-00123-2.

12 Berardino Cesi, Alessio D'Amato and Mariangela Zoli, 'Corruption in Environmental Policy: The Case of Waste' (2019) 36(1) Economia Politica 65, doi:10.1007/s40888-017-0087-x.

13 William F Laurance, 'The Perils of Payoff: Corruption as a Threat to Global Biodiversity' (2004) 19(8) Trends in Ecology and Evolution 399, doi:10.1016/j.tree.2004.06.001.

14 Stephen P Ferris, Jan Hanousek and Jiri Tresl, 'Corporate Profitability and the Global Persistance of Corruption' (2021) 66 Journal of Corporate Finance 101855, doi:10.1016/j.jcorpfin.2020.101855.

15 Michael Johnston, 'Fighting Systemic Corruption: Social Foundations for Institutional Reform' (1998) 10 The European Journal of Development Research 85, doi:10.1080/09578819808426703.

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Still, there is no denying that despite an advance in the legislation concerning corruption, for example, the 1997 Convention on Fighting Corruption involving officials of the EU or officials of EU Member States,[16] the 2008 Council Decision on a contact-point network against corruption,[17] the 2003 Council Framework Decision on Combating Corruption in the Private Sector, which criminalizes both active and passive bribery[18] and the Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law[19] (the "PIF Directive") it is still necessary to adopt a package of anti-corruption legislation at the EU level for several reasons.

Shortcomings in the anti-corruption efforts at the EU level were observed, and public opinion has been made aware of the need for augmentation through prominent cases such as "Qatargate".[20] In 2022, Eurojust published its first report on corruption, which registered more than 500 corruption cases in six years compared with seventy-eight in 2016, and identified the top five member states involved in corruption cases registered at Eurojust, which are Member States with differences in terms in geographic, population size, social, and economic issues that are considered risks. The countries present in the top five, as ranked by Eurojust using statistics, were Greece, Germany, Romania, Italy, and Spain.[21]

The proposal reflects the shortcomings observed in EU member states, which are present across the entire geographical space of the EU.

First, the basic storyline is to protect society against corrupt elites who have hijacked society to take money out of the pockets of hardworking people and to reward cronies.[22]

Secondly, the need comes from the fact that corruption has a cross-border characteristic, that was already understood by the U.S.A. through the creation of the Foreign Corruption Practices Act (FCPA) in 1977,[23] the OCDE through the 2007 Convention on Combating

16 Convention was Drawn up on the Basis of Article K.3 (2) (c) of the Treaty on European Union on the fight Against Corruption Involving Officials of the European Communities or officials of the Member States of the European Union [1997] OJ C 195/2.

17 Council Decision 2008/852/JHA of 24 October 2008 'On a Contact-Point Network Against Corruption' [2008] OJ L 301/38.

18 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, 54, https://eur-lex.europa.eu/eli/dec_framw/2003/568/oj/eng.

19 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'on the fight against fraud to the Union's financial interests by means of criminal law' [2017] OJ L 198/29.

20 Sven Hegewald and Dominik Schraff, 'Corruption and Trust in the European Parliament: Quasi-Experimental Evidence from the Qatargate Scandal' (2024) 63(4) European Journal of Political Research 1674, doi:10.1111/1475-6765.12654.

21 Eurojust, *Eurojust Casework on Corruption: 2016-2021 insights* (Criminal justice across borders, Eurojust 2022) doi:10.2812/29787.

22 Zephyr Teachout, 'The Anti-Corruption Principles' (2009) 94 Cornell Law Review 341.

23 Foreign Corrupt Practices Act of 1977 (FCPA) <https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act> accessed 7 November 2025.

Bribery of Foreign Public Officials in International Business Transactions[24], and the UN through the United Nations Convention Against Corruption (UNCAC)[25] ratified by Romanian through Law no. 365/2004.[26]

As time went on, though, it became hard to ignore that some of the troubling impulses driving the corruption movement needed to be tackled through an EU cross-border legislative initiative that, once deployed, ought to mobilize a strong EU following, a strong civic participation, to manage and represent a cure for much of the corruption risks that ail our EU community. At this point, knowing that there is this asymmetry between the EU, the USA, and the international community regarding compliance and the fight against corruption, one understands that there is a need to reset the corruption debate in the EU via a piece of legislation that would deliver not only symmetry, but something sturdier, namely, a determination to see the job through. This asymmetry is also present within the EU among Member States.

One of the main premises of this discussion is that the mechanisms of judicial cooperation may only work efficiently if the Member States of the European Union harmonize their criminal law norms. The European Commission indicated that while bribery (both in the public and the private sectors), embezzlement (both in the public and the private sectors), abuse of functions, and obstruction of justice are incriminated in all of the twenty-five States that participated in the study,[27] trading of influence was incriminated in twenty-three States and illicit enrichment was incriminated by only eight States.[28] Therefore, it is implicitly and explicitly acknowledged by the European authorities that a need for a unified definition of corruption exists and should be adopted in the near future.

Moreover, the literature acknowledged that the accession phase of an EU candidate is a great opportunity for the organization to further develop mechanisms for the prevention and management of corruption. This was the case of Romania, the context in which the CVM was developed, which, in turn, provided the necessary framework for developing the Report for all member states.[29]

24 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD/LEGAL/0293, OECD 2025).

25 United Nations Convention Against Corruption (adopted 31 October 2003 UNGA Res 58/4) [2007] UNTS 2349/41.

26 Law of Romania No 365/2004 of 15 September 2004 for the Ratification of the United Nations Convention Against Corruption, New York, 31 October 2003 [2004] Monitorul Oficial 903.

27 Bulgaria and Denmark did not respond.

28 Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council (COM/2023/234 final, 3 May 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0234> accessed 7 November 2025. Hereinafter also *The Proposal for a Directive on combating corruption.*

29 Andi Hoxhaj, *The EU Anti-Corruption Report: A Reflexive Governance Approach* (Routledge 2020) 3.

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Thirdly, anti-corruption legislation would be in perfect harmony with a context in which EU interests in public discourse on competitiveness[30] spiked sharply, as it would support an agenda focused on creating the conditions for fair economic competition to guarantee sustainable economic growth. Legislation focused on tackling corruption as a cross-border problem would be conducive to high-minded policy considerations. As stated in the Romanian literature, corruption negatively impacts the efficiency and professionalism of public authorities, especially in the delivery of public-interest services, an aspect that in turn, generates public mistrust in the State's capacity to manage social relations.[31]

Fourthly, the stakes are high, the problems knotty, but it represents a historic opportunity to protect an economic and social model that would help us grow more comfortable with the aim of sustainable growth. Connections that once were opaque can now become more obvious, such as the fact that respecting ethical values, promoting sustainable growth, and allocating public money can contribute to social balance, democratic institutions, and the fight against poverty and organized crime.

Given the importance of the field and the high expectations this Directive must meet, as highlighted in the previous paragraphs, the authors conclude that its implementation should reflect both its innovative character and the previous advances it builds upon. This said, in the following section, the authors will compare the definitions of active and passive bribery used in the European Directive and in Romanian law.

4 ARTICLES 7 AND 8 OF THE DIRECTIVE IN LIGHT OF THE ROMANIAN CRIMINAL LAW

The reality of corruption is predictable only to a certain degree, and to prepare for different aspects of the future, one needs varying degrees of reliability and precision. Yet the coping strategies outlined in the proposed EU Directive constitute only one part of the solution.

Romania has been one of the primary beneficiaries of the Cooperation and Verification Mechanism (CVM); however, it is public knowledge that it faced multiple challenges in demonstrating, in a timely manner, its usefulness to the public and policymakers. Even so, the authors would argue that it played a major role in keeping Romania on the right, European-facing track. Under these circumstances, while the importance of the C.V.M. cannot be overstated when one considers how anticorruption efforts progressed in

30 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Long-term competitiveness of the EU: Looking Beyond 2030' (COM (2023) 168 final, 16 March 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023DC0168> accessed 7 November 2025.

31 Teodor Manea, *Drept Penal: Partea Specială: Infracțiuni contra autorității, contra înfăptuirii justiției, de corupție și de serviciu, de fals în înscrisuri, contra siguranței circulației pe drumurile publice, contra familiei* (Hamangiu 2024)160.

Romania, it is rarely cited as a significant instrument in shaping the evolution of the relevant national criminal law provisions. A process that is far from being completed, even if these norms have been improved every year, both by adjustments made by the national legislator and by means of interpretation provided by the High Court of Cassation and Justice. As it was already pointed out in the Romanian literature, these norms are still raising major legal debates in relation to:

- the qualification process of the necessary qualities of the perpetrator of some of the related offences, including passive bribery;
- the legal qualifications of the criminal conduct of those persons who intermediate acts of corruption, including in relation to both active and passive bribery;
- if the legal person may commit acts of passive bribery;
- ascertaining the mental state accompanying the act of corruption.[32]

The authors suggest that such theoretical and practical points of debate prove two things. Firstly, these are problems of nuance, which (mostly) do not hinder or prevent the practical use of these texts. When discovered, bribery, be it passive or active, will not go unpunished, if it can be proved in front of a court of law. However, secondly, these problems may affect the courts' capacity to adopt a unitary approach to cetain forms of bribery, thereby creating discriminatory situations for the perpetrators of corruption. The Romanian definitions of bribery must evolve, or at least their interpretation in relation to specific key issues.

The proposal for a new EU Directive on Combating Corruption introduces fresh perspectives on this danger, and this paper shall focus on provisions in nexus with criminal law.

The authors of the proposals acknowledged from the start that a universally accepted definition does not exist at this point in history.[33] Moreover, if one were to split the phenomenon of corruption into two categories, active corruption and passive corruption, various forms of the latter aren't even incriminated against in multiple countries of the European Union.[34] This is a serious obstacle, as the phenomenon of passive corruption (which includes acts of abuse of office for one's own interest),[35] is often much more discrete than its active counterpart.

This approach is not new and has already been validated in international specialized literature. As one author suggested, even if the traditional manner of defining corruption is being consistently used in relation to the public sector, it is perfectly applicable for the private sector as well.[36]

32 Georgina Bodoroncea, *Corupția: Infracțiuni de corupție. Infracțiuni Asimilate Corupției* (CH Beck 2022) 450.

33 The Proposal for a Directive on combating Corruption (n 28).

34 ibid

35 Brooks (n 6) 28.

36 ibid 19.

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The authors believe the novelty of this proposal lies in its grounding in well-supported facts that describe both the social and legislative realities. It would also appear that the efforts of the European Commission to present a unified public discourse on the matter are increasingly more visible, as it has emphasized in a recent study that corruption, as a cross-border problem, develops by taking advantage of a lack of a coherent EU framework.[37]

From this point of view, the definitions provided by Article 2 of the proposed Directive are crucial, as they are primarily responsible for unifying general criminal law norms, without which the definitions of the offences cannot be effective. For example, the notions of public official, legal person, and high-level official, provided by Article 2, parts 3, 7, and 8 of the Directive, are of crucial importance.

These provisions should not be a complete surprise to national legislators, as they reflect a common understanding of the term 'public official.' For example, pursuant to the provisions of Article 175 of the Romanian Criminal Code, the notion of public official has a truly inclusive scope. Most European Members' legislators have adopted a similar approach, as it was necessary to design a much larger scope for the notion of public official for the purposes of criminal law, than for other branches of the law (ex. administrative law), on the one hand because one had to include those public positions usually occupied by politicians (ex. members of the Parliament, ministers, Presidents of the Republic etc.), and on the other hand, because it also had to include those categories of persons who are delegated by the public authorities to wield some form of public authority in the name of the State, while retaining their private status (ex. public notaries or even lawyers in some very specific cases).[38]

One other similarity is that it would appear that, at least pursuant to the corroborative interpretation of the provisions of Articles 3 to 8 of the Directive, a legal person may not be considered an official of any type (public official, trade union official, national official, or high-level official). While the authors acknowledge that this possibility remains a highly debated topic, they would like to highlight that, at this point in history, given the common ground laboriously found by the European Union Member States, it is unnecessary to spark another heated diplomatic contest by stating otherwise. One should remember that Germany adopted the *Verbandssanktionengesetz* only in 2020, and that this was only one step in an otherwise long and very debated normative journey towards the possibility of holding legal persons criminally responsible.[39] The same may be said about Greece and Turkey, for example. Under these circumstances, the Directive will not contradict the

37 Ilia Gaglio and others, *Strengthening The Fight Against Corruption: Assessing the EU Legislative and Policy Framework: Final Report for Acceptance* (Publications Office of the EU 2023) doi:10.2837/22427.

38 Lavinia Valeria Lefterache, 'Art 175 Funcționar Public' in Georgina Bodoroncea and others, *Codul Penal: Comentariu pe Articole* (CH Beck 2014) 365.

39 Andra-Roxana Trandafir, *Răspunderea Penală a Persoanei Juridice* (CH Beck 2023) 32.

philosophy of the Romanian in-effect Criminal Code, as it does not challenge what is already understood as the perpetrator of passive bribery in this national legal system.

All this being said, one has to acknowledge that a "*transcontinental*" set of norms in this domain has to be designed in such a way as to provide a list of offences, defined in such a manner as to allow the EU Member States to make the necessary legal adjustments without major social and cultural reforms.

While it would be extremely interesting to compare all the definitions provided by Articles 7 to 13 of the Directive with their in-effect Romanian counterparts, the spatial limits of this paper would not allow for it. Therefore, in the following paragraphs, the authors would like to explore the notion of bribery.

The definition of active bribery, pursuant to Article 7 (a) of the Anticorruption Directive, should not raise any legal debate when compared to the Romanian definition of active bribery, the latter came into effect in 2014, being included among the provisions of Article 290 of the Romanian Criminal Code. [40]

Defining passive bribery as the European legislator wants to do, pursuant to Article 7 (b) of the Anticorruption Directive does not conflict with the normative solution adopted by the Romanian legislator in 2014 when the provisions of Article 289 of the Romanian Criminal Code came into effect.

However, it should be noted that the European definitions, pursuant to Articles 7 (a) and (b) of the Anticorruption Directive, use the expression "to act or refrain from acting in accordance with his duty or in the exercise of that official's functions". The Romanian legislator chose a more detailed approach to incrimination, stipulating that the public official (in Romanian, functionarul public) must comit the illicit act in specific contexts, and providing clear examples of typologies.

On the subject of active or passive bribery in the public sector, given what is presented above, the Anticorruption Directive does not conflict with the preexisting definitions of bribery in the Romanian Criminal Law. However, if one considers the previously indicated national debates, which remain active in relation to the Romanian relevant definition, the authorsmust conclude that the Directive does not represent a step forward, as it does not appear to provide any answers. One could argue that the implementation process would rekindle these questions, making the process of harmonizing European national norms in this field even more difficult.

As for the notion of bribery in the private sector, the European authors of the draft used the same dual approach, splitting the definition into two, one for active bribery and one for passive bribery. However, when comparing the definitions proposed by Article 7, with those proposed by Article 8 of the European Directive, two main differences appear. Firstly, as

40 Law of Romania No 289/2009 (n 3).

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expected, Article 8 does not use the term 'public official'. While it is completely understandable why the European text seeks to establish a framework within which a specific offence may be committed, one may legitimately ask whether this enumeration of categories is the best solution, as none of these four types of activities has a legal autonomous definition within the meaning of the Anticorruption Directive.

It is quite easy to derive their meanings by referencing other EU normative acts; the mere act of referencing creates an opportunity for practitioners, especially defense attorneys, to interpret them narrowly, in accordance with their clients' interests. Such a praxis is not only expected but also desired especially if one accepts that the process of interpreting the law is fundamentally a creative process that directly influences the evolution of the substantive norms.[41]

As shown below, Romanian criminal law does not introduce such a limitation, opting for broader incrimination in the context of private sector-related bribery.

One could notice, under these circumstances, that the Anticorruption Directive does not explain how to include the phenomenon of bribery, whether active or passive, when such acts are committed by agents of national or international NGOs.

There are many cases in which an NGO volunteer or employee may take a bribe to refrain from acting in accordance with their duty, regardless of whether the activity is economic, financial, business, or commercial.

The second main difference is that Article 8 stipulates that the illicit conduct must occur while the perpetrator acts "in any capacity directing or working for a private-sector entity" and must mean that they "act or refrain from acting, in breach of that person's duties". For comparison, Article 308, paragraph 1 of the Romanian Criminal Code stipulates that one may commit active or passive bribery (in reference to Articles 289 and 290 of the same act) when one acts in any manner in the interest of any private entity. In the Romanian literature, such a perpetrator is included in the category of "private servants."

Taking both differences into account, it is clear that the phrasing and terminology used in Article 8 of the Anticorruption Directive may require some Member States, such as Romania, to limit the scope of their national norms. Such a limitation would not occur because of the imperative character of the norms of the Anticorruption Directive, nor because of how the subsidiarity rules function, but because the Member States, in the process of uniformization of the anticorruption criminal norms adopted throughout the European Union, might feel obligated to adapt their national texts of incrimination to a common denominator.

41 Cristina Tomulet, *Interpretarea în Dreptul Penal* (Universul Juridic 2023) 94.

Having a common European legislation is most certainly an important step forward; one should consider that such a limitation might, arguably, hinder anticorruption efforts in States where they are still needed.

However, one should also consider these texts from the perspective of their practical usefulness. It should be noted that the proposal is directly in line with facts with which practitioners are familiar. This was necessary to predict which instruments were required.

The instruments arising from the discussion on the new EU Directive on combating corruption include measures to prevent corruption, specialized bodies, and the provision of the necessary resources to competent authorities. The emergence of a knowledge-based perspective on the construction of an EU directive meant to combat corruption is implied , as time has shown that the legislator can learn from the experience of an authority that investigates corruption offenses. A corruption offense is not impervious to analysis once the facts are discovered through an efficient investigation that has used proper legislative and policy instruments.

Therefore, the authors would like to acknowledge the benefits of creating specific obligations for the Member States, pursuant to the provisions of Articles 4, 5, and 6 of the Directive. However, one could argue that implementing said norms will be difficult in those States that lack specialized authorities in this field.

The National Anticorruption Directorate is a Romanian body specialized in the repression of corruption, known not only to the Romanian public but also to the EU public, and is one of the most important resources to consider when approaching any analysis of this topic. The authors consider the proposal to establish specialized bodies for prevention and combating corruption as an efficient instrument. Romania's experience is valuable because such an organization exists, namely the National Anticorruption Directorate. Within this institution, it has been established that prosecutors' priority is to conduct criminal investigations into all offenses within their jurisdiction. It is noteworthy that the special competence of the National Anticorruption Directorate is strictly determined by corruption offenses, offenses related to corruption offenses, and offenses assimilated to corruption offenses. The focus is on categories of offenses related to active and passive corruption, as well as corruption in public or private law. The territorial competence is a national one. The National Anticorruption Directorate covers the entire country. Due to this attribute, it may be considered a central body for criminal investigations. The competence to investigate offenses committed in Romanian territory is established on the basis several successively-appreciated criteria, pursuant to Article 8 of the 2014 Criminal Code.

Given the fact that Romania invested both national and European funds to train, equip and man the National Anticorruption Directorate, as well as other similar institutions (like the General Anticorruption Direction, which is a part of the Ministry of Internal Affairs), the authors would argue that, given the time and resources, implementing the higher standard required by the Directive should not prove to be a difficult process.

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5 CONCLUSIONS

The proposed Directive reflects the European Union (EU)'s proactive stance in addressing systemic corruption, with a particular focus on the Romanian legal landscape. As was clearly stated, legislative efforts must be made continuously to address corruption efficiently and in a timely manner, a problem that evolves and shifts focus continuously alongside European culture and society.

It could be argued that the proposal for an EU directive on combating corruption takes this reality into account and represents the latest stage of the European effort to build a comprehensive instrument. As previously indicated, there is a specific need for a definition that unifies the various understandings of corruption proposed by the Member States.

However, from a functional point of view, without reiterating the main ideas of the previous section, the authors would like to highlight the fact that the proposed versions of Articles 7 and 8 of the Anticorruption Directive will not have any significant impact on the corresponding norms of the Romanian Criminal Law.

This could be a positive aspect, as one might conclude that the Romanian definitions of active and passive bribery are already as modern and efficient as they need to be.

However, the Romanian definitions of these two offences are not perfect and continue to raise issues in the praxis of the Romanian courts, while also sparking theoretical debates in the specialized literature. Moreover, one could argue that, given the fact that the Romanian texts came into effect in 2014 and undergone only minor adjustments since then, the definitions proposed by the Directive almost a decade later should constitute a significant update, especially if one takes into accountArticles 7 and 8 of the Directive are the product of the collective knowledge of the relevant public authorities from all the European Union Member States. Viewed from this angle, the fact that it could be easily implemented in Romania is unfortunate, as this 'easiness' stems from the lack of solutions to the aforementioned problems, and from their presence.

REFERENCES

1. Bodoroncea G, *Corupția: Infracțiuni de corupție. Infracțiuni Asimilate Corupției* (CH Beck 2022)
2. Brooks G, *Criminology of Corruption: Theoretical Approaches* (Palgrave Macmillan 2016)
3. Cesi B, D'Amato A and Zoli M, 'Corruption in Environmental Policy: The Case of Waste' (2019) 36(1) Economia Politica 65, doi:10.1007/s40888-017-0087-x
4. De Angelis I, De Blasio G and Rizzica L, 'Lost in Corruption: Evidence from EU Funding to Southern Italy' (2020) 6 Italian Economic Journal 355, doi:10.1007/s40797-020-00123-2

5. Ferris SP, Hanousek J and Tresl J, 'Corporate Profitability and the Global Persistance of Corruption' (2021) 66 Journal of Corporate Finance 101855, doi:10.1016/j.jcorpfin.2020.101855
6. Gaglio I and others, *Strengthening the Fight Against Corruption: Assessing the EU Legislative and Policy Framework: Final Report for Acceptance* (Publications Office of the EU 2023) doi:10.2837/22427.
7. Haseeb M and Azam M, 'Dynamic Nexus Among Tourism, Corruption, Democracy, and Environmental Degradation: A Panel Data Investigation' (2021) 23(4) Environment, Development and Sustainability 5557, doi:10.1007/s10668-020-00832-9
8. Hegewald S and Schraff D, 'Corruption and Trust in the European Parliament: Quasi-Experimental Evidence from the Qatargate Scandal' (2024) 63(4) European Journal of Political Research 1674, doi:10.1111/1475-6765.12654
9. Hoxhaj A, *The EU Anti-Corruption Report: A Reflexive Governance Approach* (Routledge 2020)
10. Johnston M, 'Fighting Systemic Corruption: Social Foundations for Institutional Reform' (1998) 10 The European Journal of Development Research 85, doi:10.1080/09578819808426703
11. Laurance WF, 'The Perils of Payoff: Corruption as a Threat to Global Biodiversity' (2004) 19(8) Trends in Ecology and Evolution 399, doi:10.1016/j.tree.2004.06.001
12. Lefterache LV, 'Art 175 Funcționar Public' in Georgina Bodoroncea and others, *Codul Penal: Comentariu pe Articole* (CH Beck 2014) 365
13. Manea T, *Drept penal: Partea Specială: Infracțiuni contra autorității, contra înfăptuirii justiției, de corupție și de serviciu, de fals în înscrisuri, contra siguranței circulației pe drumurile publice, contra familiei* (Hamangiu 2024)
14. Mitrache C and Mitrache C, *Drept Penal Român: Partea Generală* (5th edn, Universul Juridic 2023)
15. Rose-Ackerman S and Truex R, 'Corruption and Policy Reform' (2012) 444 Yale Law & Economics Research Paper, doi:10.2139/ssrn.2007152
16. Teachout Z, 'The Anti-Corruption Principles' (2009) 94 Cornell Law Review 341
17. Tomulet C, *Interpretarea în Dreptul Penal* (Universul Juridic 2023)
18. Trandafir AR, *Răspunderea Penală a Persoanei Juridice* (CH Beck 2023)
19. Vlasic MV and Noell JN, 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems' (2010) 5(2) Yale Journal of International Affairs 106

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Обговорення реформи у галузі

СТАТТІ 7 ТА 8 ПРОПОНОВАНОЇ ДИРЕКТИВИ ПРО БОРОТЬБУ З КОРУПЦІЄЮ ТА ЇХ ЗАСТОСОВУВАННЯ З ОГЛЯДУ НА ЗАКОНОДАВСТВО РУМУНІЇ

Каталін Константінеску-Марунцел* та Теодор Манеа-Сабау

АНОТАЦІЯ

Вступ. *У цій статті аналізується запропонована Директива Європейського Парламенту та Ради, спрямована на боротьбу з корупцією, у контексті законодавства Румунії, з особливою увагою до положень статей 7 та 8 запропонованої Директиви. Незважаючи на*

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те, що це явище досі не має одностайно прийнятого визначення, корупція залишається поширеною проблемою в різних секторах Румунії, що вимагає створення комплексної законодавчої бази для посилення антикорупційних заходів та зміцнення верховенства права. Запропонована Директива відображає проактивну позицію Європейського Союзу (ЄС) у боротьбі з системною корупцією, з наголосом на правовому полі Румунії. Дослідження присвячене суттєвим змінам, що окреслені запропонованими положеннями Директиви щодо явища хабарництва. У статті було проведено аналіз потенційних наслідків для наявної антикорупційної системи в Румунії з огляду на взаємодію між антикорупційними заходами та ширшою правовою основою, а також здійснено оцінку того, як запропоновані зміни можуть сприяти створенню більш прозорої, підзвітної та стійкої правової системи.

Методи. *Використовуючи порівняльний підхід, автори аналізують положення статей 7 та 8 запропонованої Директиви у світлі відповідних положень румунського кримінального законодавства. Водночас автори стверджують, що, з огляду на інституційну основу антикорупційних заходів Румунії, вищезгадане регулювання не забезпечує чіткої переваги.*

Результати та висновки. *Визнаючи багатогранний характер антикорупційних заходів, автори роблять висновок, що запропоновані версії статей 7 та 8 Антикорупційної директиви не матимуть суттєвого впливу на відповідні норми румунського кримінального законодавства, пояснюючи, чому це можна розглядати як позитивний, так і негативний факт.*

Ключові слова. *Антикорупційні заходи в Румунії, антикорупційна директива, східноєвропейське законодавство, гармонізація, наближення законів, єврозлочинність, верховенство права.*

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CASE STUDY

Case Study

LEGAL CHALLENGES IN EASTERN EUROPEAN FOOTBALL: LEX SPORTIVA AND ITS REGIONAL SPECIFICITIES

Marina Kamenecka-Usova*, Maxym Tkalych and Elina Greine

ABSTRACT

Background: *Eastern European football faces unique legal challenges arising from the intersection of international sports law, club governance, and cross-border disputes. Despite the growing importance of regional leagues, the legal framework for resolving conflicts, especially in transfers, sporting succession, and contractual enforcement, remains underexplored. This study addresses the gap by systematically analysing how recent Court of Arbitration for Sport (CAS) decisions and national federation regulations shape dispute resolution in Eastern European football and assessing the extent to which these structures protect clubs, players, and federations in practice.*

Method: *The paper employs a doctrinal-comparative legal methodology, reviewing primary sources (CAS arbitral awards, national and EU legislation, and federation rules) and secondary literature (scholarly articles and reports). A purposive case-study approach examines selected landmark CAS awards in the region (e.g. Karpaty FC v FIFA, Valmiera FC v LFF) to unpack judicial reasoning and legal principles. Comparative analysis contrasts legal doctrines across jurisdictions, and qualitative synthesis identifies recurring trends, gaps, and legal risks.*

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Results and Conclusions: *The analysis reveals several key findings. First, CAS jurisprudence increasingly applies the doctrine of sporting succession in ways that impose heavy financial liabilities on acquiring clubs, often without adequate procedural safeguards. Second, enforcement of CAS awards in domestic courts is uneven across Eastern Europe, with divergent interpretations of jurisdiction, public policy, and res judicata. Third, national association rules often lack clarity in dispute-resolution pathways, leaving ambiguities in appeal rights and remedial mechanisms. Fourth, despite EU instruments (e.g. Regulation 1215/2012, Rome I), their use in sports-related contract disputes is marginal due to the perceived autonomy of sports law. These findings point to obstacles in predictability, transparency, and enforceability.*

1 INTRODUCTION

Sport, especially football, occupies a unique position at the intersection of commercial, legal, and social dynamics. According to the Study on the Economic Impact of Sport by the European Commission (2018), sport-related activities account for 2.12% of the European Union's Gross Domestic Product, totalling €279.7 billion. In addition, sport-related employment represents 2.72% of total EU employment, corresponding to approximately 5,666,195 jobs. Sport involves a wide array of interactions, ranging from athlete-coach and club-agent to national federation-club relationships, where disagreements and disputes are highly probable.[1]

A "sports dispute" might be defined as any disagreement or conflict that arises within the context of sports activities or relationships, involving any parties connected to the sports industry, such as athletes, coaches, agents, clubs, federations, supporters, or commercial partners.

As per Godin, sports disputes can be broadly categorised as follows:[2]

- *Contractual disputes*: relating to player contracts, sponsorship agreements, or commercial rights;
- *Regulatory disputes*: involving compliance with the rules of federations or governing bodies;
- *Disciplinary disputes*: typically arising from alleged breaches of conduct, anti-doping violations, or match-fixing allegations;

1 Ian Blackshaw, 'The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively "Within the Family of Sport"' (2003) 2(2) Entertainment and Sports Law Journal 4. doi:10.16997/eslj.139; Neil Goodrum, 'Mediation in Sports Disputes: Lessons from the UK' (*LS LawInSport*, 4 July 2013) <https://www.lawinsport.com/topics/regulation-a-governance/item/mediation-in-sports-disputes-lessons-from-the-uk> accessed 25 September 2025.

2 Paul Denis Godin, 'Sport Mediation: Mediating High-Performance Sports Disputes' (2017) 33(1) Negotiation Journal 25. doi:10.1111/nejo.12172.

- *Commercial disputes*: related to broadcasting, merchandising, and intellectual property;
- *Organisational disputes*: between clubs, federations, or between athletes and their governing bodies;
- *Eligibility disputes*: Team selection disputes, e.g. one or more athletes claiming they were wrongly excluded from a national team, as in the case of *Sieracki and Lindland v. America Wrestling Association*.[3]

In the context of this classification, it is important to clarify the distinction between contractual and commercial disputes, as they arise from different legal relationships within the sports industry. Contractual disputes concern obligations deriving directly from sports-specific agreements, such as employment contracts between players and clubs, representation agreements with agents, or transfer and training compensation arrangements between clubs. These disputes are inherently tied to the internal regulatory framework of sport and are, therefore, typically resolved through specialised mechanisms such as the Court of Arbitration for Sport (CAS), the FIFA Dispute Resolution Chamber, or national federation bodies. By contrast, commercial disputes arise from the broader economic activity surrounding sport, including sponsorship agreements, broadcasting rights, merchandising contracts, infrastructure services, and other business transactions. These disputes involve commercial actors operating in the general marketplace and are more likely to be governed by ordinary commercial law and resolved in general commercial arbitration or in civil courts. Recognising this distinction is essential, as it determines the applicable legal framework and identifies the competent forum for dispute resolution.

Given the specific nature and supranational context of sports relationships, traditional court proceedings are often not optimal for resolving sports disputes. The main mechanisms for resolving sports disputes include:

1. Arbitration is the most common method for resolving sports disputes, especially those of an international nature. Disputes are typically referred to arbitration tribunals, such as the Court of Arbitration for Sport (CAS), or to external committees of national or international federations, such as the FIFA Dispute Resolution Chamber or the Players' Status Committee.[4] The advantages of arbitration include confidentiality, arbitrators' expertise in sports law, and the potential for faster resolution than in public courts. However, arbitration can still be time-consuming and costly, and the process is decided by a third party, which may not always be satisfactory to all stakeholders.

3 Review of the case *Sieracki and Lindland v. America Wrestling Association,* see: Jay E Grening, 'Arbitration of Olympic Eligibility Disputes: Fair Play and the Right to be Heard' (2001) 12(1) Marquette Sports Law Review 261.

4 Volker Hesse, 'Is Mediation Suitable to Resolve Sports Related Disputes?' (*LS LawInSport*, 5 November 2014) <https://www.lawinsport.com/topics/item/is-mediation-a-suitable-to-resolve-sports-related-disputes> accessed 25 September 2025.

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2. Alternative Dispute Resolution (ADR), including mediation and negotiation, is increasingly used in sports to achieve peaceful, fast, and confidential resolutions. Mediation, in particular, facilitates dialogue between parties and seeks mutually acceptable solutions, creating preconditions for ongoing cooperation or competition. Unlike litigation or arbitration, mediation does not directly address jurisdiction or applicable law: it focuses instead on the parties' interests.

The use of ADR in sports is supported by international and national sports organisations, with some, such as National Olympic Committees and sports arbitration courts, successfully implementing mediation processes. ADR methods are often preferred for their potential to yield amicable, non-aggressive, and confidential outcomes, particularly valued in the sports industry.[5]

3. While *public courts* remain an option, they are generally considered less suitable for sports disputes due to issues such as: jurisdictional complexities, especially in international disputes; application of foreign laws if parties have not agreed on applicable law; high costs, publicity, and uncertainty of outcomes; and the supranational nature of many sporting competitions (Regulation (EC) No. 593/2008; Regulation (EU) No. 1215/2012).[6]

The international sports community, reflecting former IOC President Juan Antonio Samaranch's appeal to resolve disputes "within the family of sport", regards arbitration before CAS as the most appropriate and effective mechanism for settling sports-related disputes.[7]

At the national level, approaches to regulating sports disputes vary significantly across Eastern Europe. In Latvia, the regulatory framework remains underdeveloped. Latvian legislation does not define the concept of a *sports dispute*, nor does the Sports Law provide dedicated procedures for their resolution, apart from doping-related matters. Although certain sports federations, most notably the football federation, maintain internal dispute-resolution mechanisms within their organisational statutes, a systematic examination of those internal procedures and their jurisprudence is beyond the scope of this article. The absence of a clear statutory definition and a unified domestic system for adjudicating sports disputes continues to hinder the coherent development of Latvian sports law. Introducing a legally grounded concept of "sports dispute" and establishing specialised domestic adjudicatory bodies would enhance legal certainty, support institutional capacity-building, and align national practice with EU good-governance standards.

5 Ian Blackshaw, *Mediating Sports Disputes: National and International Perspectives* (ASSER International Sports Law Series, Springer 2002).

6 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6; 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 [2012] OJ L 351/1.

7 Ian Blackshaw, 'Introductory Remarks' in Alexander Wild (ed), *CAS and Football: Landmark Cases* (ASSER International Sports Law Series, Springer 2011). doi:10.1007/978-90-6704-808-8_2.

By contrast, Ukraine operates a more structured and multilayered system for sports dispute resolution. Ukrainian law combines the jurisdiction of internal federation bodies with the functions of the national Court of Arbitration for Sport at the National Olympic Committee, although this institution does not yet operate at full capacity, and preserves the possibility of review by state courts in contractual, labour, and civil matters. Doping cases are handled by the National Anti-Doping Center, with further appeals to CAS. While Ukraine does not have a single codified "Sports Disputes Act", its legal framework is comparatively more developed, institutionally embedded, and aligned with international standards. Together, these national contexts provide an essential backdrop for understanding how football-related disputes from Latvia and Ukraine escalate to CAS and how *lex sportiva* interacts with uneven domestic legal infrastructures in the region.

This article examines the sports disputes and their legal challenges confronting football clubs in Eastern Europe, particularly in Latvia and Ukraine, with attention to recent *lex sportiva* from the CAS and the Swiss Federal Tribunal (SFT).

Lex sportiva, being the evolving body of legal principles and jurisprudence governing international sports, is shaped by the CAS and global sports institutions. It addresses issues such as doping, athlete-federation disputes, and regulatory enforcement. Combining elements of international and domestic law, *lex sportiva* serves as a transnational legal order imposing binding norms on the global sports community, particularly within the Olympic movement.[8]

To contextualise the analysis, it is worth noting that the Ukrainian Premier Liga - home to reigning champion Dynamo Kyiv and comprising sixteen teams, has a total market value of approximately €414.80 million as of the 2025 season (Transfermarkt, data on Premier Liga, 2025).[9] In comparison, Latvia's top-tier league, the Virslīga, featuring ten clubs including reigning champion FK RFS, has a total market value of €49.20 million (Transfermarkt, data on Virsīga, 2025).[10] Clubs across the region, especially in the Baltic states, must operate within a complex legal environment shaped by supranational regulations, financial volatility, and evolving models of sports governance. Within this framework, legal disputes involving clubs, national federations, and international governing bodies have become not only common but increasingly consequential, exposing deeper structural issues in the regional football ecosystem. Ukrainian football, in turn, is also compelled to operate under challenging geopolitical circumstances due to the ongoing war within the country.

8 Marina Kamenecka-Usova and others, 'Research Patterns in Sports Law and Sports Governance: A Scopus Bibliometric Study' (2025) 7 Frontiers in Sports and Active Living 1590858. doi:10.3389/fspor.2025.159085.

9 'Premier Liga: Ukraine' (*Transfermarkt*, 2025) <https://www.transfermarkt.com/premierliga/startseite/wettbewerb/UKR1> accessed 25 September 2025.

10 'Virslīga: Latvia' (*Transfermarkt*, 2025) <https://www.transfermarkt.com/virsliga/startseite/wettbewerb/LET1> accessed 25 September 2025.

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By analysing cases involving Latvian and Ukrainian clubs, as well as landmark decisions such as Webster,[11] Matuzalem,[12] and Olympique Lyonnais,[13] the article aims to identify procedural and substantive patterns in dispute resolution. Comparative elements with clubs from other jurisdictions are also explored to contextualise the unique issues faced by Eastern European football. The findings highlight recurring themes such as football reaction to geopolitics, financial instability, contractual non-compliance, and the importance of procedural fairness, which are discussed in detail in the subsequent chapters. The article further examines the precedential value of these cases for sports law in the region, with particular attention to player mobility, youth development funding, and the enforcement of financial obligations.

2 METHODOLOGY

This research adopts a qualitative, case-law-based approach to examine legal challenges in Eastern European football, with a particular focus on recent decisions by the CAS and the SFT. The methodology consists of the following key steps:

Document Analysis: The study systematically reviews CAS case law, SFT decisions, and FIFA regulatory documents, with a focus on disputes involving Latvian clubs (Valmiera FC and FK Liepāja) and Ukrainian clubs (Tymoshchuk, Karpaty, and Durai cases), as well as comparative cases from other jurisdictions.

Comparative Case Study: Cases are selected based on their relevance to key legal issues in Eastern European football, such as contractual compliance, licensing, procedural fairness, and financial obligations. Landmark cases (e.g., Webster, Matuzalem, Olympique Lyonnais) are included to provide a broader context and highlight precedential trends.

Thematic Analysis: Legal questions, procedural and substantive challenges, and outcomes are identified and categorised. Patterns and recurring themes, such as financial instability, regulatory enforcement, and the role of arbitration, are extracted from the case summaries and judicial reasoning.

Comparative Evaluation: Some cases are compared with similar disputes from other countries, as reported in CAS Quarterly Reports and SFT judgments, to highlight both

11 CAS 2007/A/1298 *Wigan Athletic FC v Heart of Midlothian*, and CAS 2007/A/1299 *Heart of Midlothian v Webster & Wigan Athletic FC*, and CAS 2007/A/1300 *Webster v Heart of Midlothian* (Court of Arbitration for Sport, 24 July 2007).

12 CAS 2008/A/1519 *FC Shakhtar Donetsk (Ukraine) v Mr Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*, and CAS 2008/A/1520 *Mr Matuzalem Francelino da Silva & Real Zaragoza SAD v FC Shakhtar Donetsk & FIFA* (Court of Arbitration for Sport, 19 May 2009).

13 CAS 2015/A/4137 *Olympique Lyonnais v AS Roma, Arbitration* (Court of Arbitration for Sport, 16 November 2015).

unique and common issues. This comparative perspective is used to assess the alignment of Eastern European practice with broader international trends.

Synthesis and Discussion: The findings are combined to draw conclusions about the implications of recent case law for sports law and governance in Eastern Europe, paying particular attention to procedural safeguards, contractual stability, and the redistribution of financial resources.

Data sources include CAS and SFT case reports, FIFA annual and quarterly reports, relevant academic literature, and regulatory texts. The research is primarily doctrinal, relying on legal analysis and interpretation, but is informed by empirical data on club histories and outcomes where relevant.

Within this methodological framework, the study intentionally confines its analytical focus to the jurisprudence of CAS and related decisions of the SFT, as these bodies constitute the primary generators of *lex sportiva* applicable to Eastern European football. Although sports disputes are also adjudicated within the internal regulatory structures of FIFA, UEFA and national federations, a systematic examination of those institutional processes and their full corpus of organisational acts falls outside the scope of this article. This limitation reflects the study's design, which prioritises supranational arbitral reasoning to identify doctrinal trends and interpretive patterns, while recognising that a comprehensive assessment of national-level adjudication and federation-specific procedures would require a separate and more extensive inquiry.

Accordingly, Section 3 incorporates selected landmark CAS cases because, as elements of *lex sportiva*, they form part of the transnational doctrinal framework that guides the interpretation of disputes occurring in Latvia and Ukraine, even though they are not formally integrated into national legislation.

3 ANALYSIS OF RECENT CAS AND SFT CASES INVOLVING LATVIAN CLUBS

This section examines key arbitration and judicial proceedings involving Latvian football clubs that have shaped the application of *lex sportiva* in the region, with particular focus on *Valmiera FC v. Latvian Football Federation* (CAS 2024/A/10627) and *FK Liepāja v. FIFA / SFT*. These cases, summarised in FIFA's Quarterly CAS Report (January - March 2025),[14] illustrate how the principles of procedural fairness, contractual compliance, and institutional deference are interpreted by the Court of Arbitration for Sport (CAS) and the Swiss Federal Tribunal (SFT) in the context of Eastern European football governance.

14 FIFA, 'Quarterly Report on CAS Football Awards' (*Inside FIFA*, January - March 2025) <https://inside.fifa.com/legal/court-of-arbitration-for-sport/reports> accessed 25 September 2025.

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3.1. CAS 2024/A/10627 Valmiera FC v. Latvian Football Federation

Valmiera FC, established in 1996 as Valmieras FK, is a Latvian football club based in Valmiera. It succeeded FK Gauja (1978–1993), the Soviet-era Latvian champions in 1990. The club initially competed in the Latvian First League before earning promotion to the Virslīga, Latvia's top division. Rebranded as Valmiera Glass/VIA in 2016 and later as Valmiera FC in 2020, the club experienced steady growth under head coach Tamaz Pertia. In 2022, Valmiera FC captured its first Latvian Higher League title, marking a historic milestone. The club has also participated in UEFA competitions, including the Europa League and the Conference League qualifiers. Despite these sporting achievements, financial instability emerged in 2025, leading to the loss of its Virslīga licence and relegation to the third tier. Valmiera FC is widely recognised for its strong youth development system and its contributions to the Latvian national team.[15]

Among the recent Latvian cases examined, the first - *Valmiera FC v. Latvian Football Federation (CAS 2024/A/10627)*[16] arose when Valmiera FC appealed a decision by the Latvian Football Federation (LFF), challenging a licensing or eligibility ruling related to domestic competitions. The central legal issue was whether the LFF had correctly applied its licensing or registration regulations and respected the club's procedural rights during disciplinary or administrative proceedings.

This case illustrates how *lex sportiva* principles, as defined by CAS jurisprudence, are being operationalised within the unique financial and governance environment of Eastern European football. Specifically, it highlights the intersection between supranational legal norms and local regulatory enforcement discussed earlier.

The CAS panel dismissed Valmiera's appeal, upholding the decision of the Latvian Football Federation. This case is particularly noteworthy for illustrating CAS's approach to reviewing decisions of national associations and the degree of deference it grants to domestic regulatory frameworks, especially in when a national club escalates a local dispute to international arbitration.

3.2. The FK Liepāja cases SFT 4A_608/2024, SFT 4A_612/2024, and SFT 4A_614/2024

Founded in 2014 following the dissolution of FK Liepājas Metalurgs, FK Liepāja is a professional football club based in Liepāja, Latvia. The club quickly established itself in the Virslīga, winning the Latvian championship in 2015 and claiming the Latvian Football Cup in 2017 and 2020. Home matches are played at Daugava Stadium, reflecting the club's strong local support base. FK Liepāja has remained consistently competitive in domestic

15 *Valmiera FC* <https://valmierafc.com/lv> accessed 25 September 2025.

16 CAS 2024/A/10627 *Valmiera FC v Latvian Football Federation (LFF)* (Court of Arbitration for Sport, 3 March 2025).

competitions and has qualified for UEFA competitions.[17] However, the club has recently faced legal challenges, including multiple appeals to SFT in 2025 concerning disciplinary sanctions imposed by FIFA. These disputes reflect broader issues surrounding contractual compliance and regulatory enforcement in Eastern European football. FK Liepāja continues to play a significant role in Latvian football, not only for its rapid sporting achievements but also for its involvement in legal precedents that contribute to the professionalisation of the regional football landscape.

Between January and March 2025, the Swiss Federal Tribunal ruled on three separate, but closely related, appeals filed by FK Liepāja against FIFA and CAS.[18] Each case arose from disciplinary actions by FIFA against FK Liepāja for failing to pay overdue sums owed to players or other parties under contractual agreements. FIFA imposed sanctions following its non-compliance with financial obligations under FIFA Regulations on the Status and Transfer of Players (RSTP). The core legal question in each appeal was whether the CAS panels had violated procedural rights or Swiss public policy, grounds that represent the only basis for a successful appeal before the SFT in CAS-related matters.

In all three decisions, the Swiss Federal Tribunal dismissed FK Liepāja's appeals, confirming that the CAS decisions were procedurally sound and that FIFA had acted within its regulatory authority. The Tribunal concluded that none of the CAS awards violated Swiss public policy or breached due process under Swiss law, which governs CAS arbitration proceedings.

These cases are notable as the repetition of identical appeals by the same club highlights a pattern of regulatory non-compliance by FK Liepāja, potentially indicative of deeper financial instability within the club's operations.

3.3. Comparative and Doctrinal Observations

Taken together, the Valmiera FC and FK Liepāja proceedings illustrate how CAS and the STF balance respect for domestic regulatory autonomy with the need to safeguard due process guarantees under *lex sportiva* and Swiss arbitral law. Both sets of disputes confirm that while Latvian football bodies exercise primary jurisdiction over licensing and disciplinary matters, their decisions remain subject to procedural scrutiny within the international arbitration framework.

A consistent judicial pattern emerges. First, clubs rarely succeed in appeals that merely contest the substantive assessment of domestic regulations, whether relating to licensing, eligibility, or contractual compliance. Second, both CAS and SFT display marked reluctance to intervene unless a breach of fundamental procedural guarantees (impartiality, the right

17 *FK Liepāja* <https://fkliepaja.lv/lv> accessed 25 September 2025.

18 SFT 4A_608/2024, SFT 4A_612/2024, and SFT 4A_614/2024 *FK Liepāja v Fédération Internationale de Football Association (FIFA)* (Swiss Federal Supreme Court, 22 January 2025).

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to be heard, or proportionality) is clearly established. Third, the repeated litigation by FK Liepāja highlights the structural vulnerability of financially unstable clubs, where regulatory non-compliance often recurs despite prior sanctions, revealing systemic weaknesses in national-level enforcement.

These outcomes collectively demonstrate the interaction between domestic self-governance and supranational oversight in football regulation. CAS jurisprudence affirms that national federations retain broad discretion in implementing FIFA and UEFA frameworks, yet that discretion derives legitimacy only through consistent adherence to procedural fairness. In Latvia's case, the decisions underscore a maturing yet still fragile legal ecosystem, in which institutional capacity, transparency in licensing decisions, and financial discipline remain central to aligning national practice with international standards.

Viewed in a broader Eastern European context, the issues in the Latvian cases are also evident in Ukraine. The same judicial logic, deference coupled with procedural oversight, reappears in CAS rulings involving Ukrainian clubs, suggesting a region-wide trend toward formal alignment with lex sportiva but uneven domestic implementation.

Comparative elements with other clubs from the same report:[19]

The case, CAS 2024/A/10627 *Valmiera FC v Latvian Football Federation*[20], can be compared with other CAS football-licensing disputes in which clubs challenged national federation decisions. For instance, CAS has repeatedly dismissed challenges to federations' regulatory autonomy, underscoring that procedural fairness does not necessarily require overturning licensing or eligibility decisions absent manifest procedural violations.[21] This reflects a broader trend in CAS jurisprudence in which clubs frequently dispute administrative decisions but rarely succeed unless they identify significant procedural irregularities, reinforcing federations' discretion in domestic regulatory matters.

Similarly, FK Liepāja's CAS-related appeals to the SFT (SFT 4A_608/2024, SFT 4A_612/2024, SFT 4A_614/2024) may be compared to cases such as CAS 2019/A/6345 *Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA)*[22] and CAS 2017/A/5312 *José Carlos Ferreira Alves v. Al Ahli Saudi Club*.[23] In each instance, the clubs were sanctioned by FIFA for non-payment of financial obligations and later contested the procedural validity of the CAS decisions at the Swiss Federal Tribunal.

19 FIFA (n 14).

20 CAS 2024/A/10627 (n 16).

21 Madalina Diaconu, Surbhi Kuwelkar and André Kuhn, 'The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update' (2021) 21 The International Sports Law Journal 33-6. doi.org/10.1007/s40318-021-00181-3.

22 CAS 2019/A/6345 *Club Raja Casablanca v Fédération Internationale de Football Association (FIFA)* (Court of Arbitration for Sport, 16 December 2019).

23 CAS 2017/A/5312 *José Carlos Ferreira Alves v Al Ahli Saudi Club* (Court of Arbitration for Sport, 23 April 2018).

The Swiss Federal Tribunal rejected the appeals in all these cases, reaffirming the authority of CAS and the legitimacy of FIFA's disciplinary mechanisms. A clear judicial pattern emerges. Clubs that default on their financial obligations often pursue procedural appeals but rarely succeed unless they can demonstrate a violation of fundamental rights.

While the report in question does not explicitly list examples of successful appeals on these grounds, earlier decisions illustrate the rare circumstances in which appeals have been upheld. These include serious breaches such as denial of the right to be heard, conflicts of interest in tribunal composition, or enforcement of contracts in violation of national or EU public policy.

4 ANALYSIS OF RECENT CAS CASES INVOLVING UKRAINIAN CLUBS AND PLAYERS

This section examines the growing body of lex sportiva arising from disputes involving Ukrainian football stakeholders since 2022. Against the backdrop of ongoing institutional and political instability, several recent CAS awards demonstrate how the principles of legality, proportionality, and contractual continuity are applied in the region. Three cases, *Anatoliy Tymoshchuk v. Ukrainian Association of Football (UAF)*, *Karpaty FC v. UAF and FIFA*, and *Durai v. Karpaty FC*, highlight distinct but interrelated governance challenges: disciplinary autonomy, recognition of sporting succession, and evidentiary standards.

4.1. CAS 2023/A/9443 Anatoliy Tymoshchuk v. Ukrainian Association of Football (UAF)[24]

In the case CAS 2023/A/9443, Anatoliy Tymoshchuk challenged the Ukrainian Association of Football's (UAF) decision to revoke his coaching licence, strip his national titles, and impose a lifetime ban from football-related activities in Ukraine. The sanctions followed his continued work with Russian club Zenit St. Petersburg and his failure to publicly condemn Russia's invasion of Ukraine.

The dispute centred on the legality and procedural validity of UAF's actions, the existence of any legal link between Tymoshchuk and UAF at the time, and the legitimacy of retroactively withdrawing titles earned years earlier. CAS examined whether UAF had acted within its authority and complied with procedural and legal standards under Ukrainian and international sports law.

CAS found that by March 2022, Tymoshchuk had no contractual or regulatory relationship with UAF and holding a UEFA Pro coaching licence did not create a sufficient legal link to justify sanctions. It further ruled that the revocation of titles earned through sporting merit was unlawful, as there were no allegations of misconduct tied to their award.

24 CAS 2023/A/9443 *Anatoliy Tymoshchuk v Ukrainian Association of Football (UAF)* (Court of Arbitration for Sport, 18 November 2024).

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Adopting a strict legal approach, CAS concluded that moral or political expectations, such as the duty to condemn Russia's actions, could not serve as a disciplinary basis in the absence of explicit legal provisions. The panel also found no evidence that Tymoshchuk's conduct had caused reputational harm to Ukrainian football under the applicable rules.

On 18th of November 2024, CAS annulled all sanctions, reinstating Tymoshchuk's licence and honours. The tribunal reminded federations that disciplinary measures must be grounded in codified law and due process, rather than in moral outrage or public pressure. Though UAF publicly rejected the ruling, it remains binding under international sports law.

CAS 2023/A/9443 stands as a pivotal affirmation of the rule of law in sports governance, demonstrating that even amid political upheaval, formal legal principles must prevail over emotional or symbolic considerations.

4.2. CAS 2023/A/10091 Karpaty FC LLC v FIFA & HNK Cibalia Vinkovci & FC Karpaty Halych[25]

On 17th of May 2023, the FIFA Dispute Resolution Chamber made a decision ordering CPF Karpaty Ltd to pay EUR 48,986 in training compensation to HNK Cibalia Vinkovci. Upon non-payment, and at the request of HNK Cibalia, FIFA imposed a player registration ban on Karpaty FC LLC, a successor entity that had assumed the sporting identity of the original club. On 31 October 2023, Karpaty filed a Statement of Appeal with the CAS in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration against the Respondents. HNK Cibalia.

The principal issues examined by the CAS were:

- whether Karpaty FC LLC constitutes the sporting successor of CPF Karpaty Ltd, thus inheriting its financial obligations; and
- whether the registration ban imposed by FIFA on that successor entity was lawful under the FIFA Disciplinary Code and proportionate as a sanction for non-payment.

The CAS unanimously concluded that Karpaty FC LLC is indeed the sporting successor of CPF Karpaty Ltd. This determination was grounded in the continuation of identity, operational structure, branding, and integration into the relevant football infrastructure, even though legal restructuring had occurred. As such, Karpaty FC LLC was held liable for the outstanding training compensation debt of EUR 48,986 owed to HNK Cibalia. Regarding the FIFA registration ban, the CAS upheld it as both lawful and proportionate, affirming that FIFA's enforcement measures comply with the Disciplinary Code and are justified where a successor entity fails to satisfy inherited debts. The award confirmed Karpaty FC LLC's obligation to reimburse EUR 48,986 to HNK Cibalia Vinkovci. It also endorsed the validity of FIFA's preventive enforcement mechanism, namely the registration ban.

25 CAS 2023/A/10091 *Karpaty FC LLC v FIFA & HNK Cibalia Vinkovci & FC Karpaty Halych* (Court of Arbitration for Sport, 27 March 2025).

In sum, CAS 2023/A/10091 affirms that sports governing bodies and arbitrators will look beyond legal formalities to the continuity of sporting operation and identity when assigning responsibility for financial obligations. This decision reinforces a key jurisprudential principle: sporting succession is determined by substantive continuity of sporting identity, not merely by formal corporate reorganisations. Consequently, newly structured entities may assume predecessor liabilities even when legal formalities have changed. The case thus contributes significantly to CAS jurisprudence on sporting succession within FIFA's regulatory framework.

4.3. CAS 2021/A/7866 Taras Durai v. Ukrainian Association of Football[26]

The case CAS 2021/A/7866 concerned Ukrainian footballer Taras Durai, who appealed a three-year ban imposed by the Ukrainian Association of Football (UAF) for alleged involvement in match-fixing while playing for FC Sumy. The case raised key issues regarding the evidentiary threshold in integrity-related cases, respect for due process, and the proportionality of disciplinary sanctions.

The UAF's Control and Disciplinary Committee found Durai guilty based on circumstantial evidence arising from an internal investigation into FC Sumy, a club suspected of systematic manipulation. Although no direct proof was presented, the UAF relied on behavioural and contextual indicators to conclude that there had been a breach of integrity provisions, a decision later upheld by its Appeals Committee.

Before CAS, Durai argued that the evidence was insufficient to meet the required standard of proof and that procedural guarantees, such as proper notice, the right to be heard, and impartial adjudication, had been violated.

The CAS panel, chaired by Espen Auberg, applied the "comfortable satisfaction" standard of proof, confirming that circumstantial evidence could meet this threshold in integrity cases. CAS ruled that the UAF's process respected minimum due process standards and that the three-year sanction was proportionate given the seriousness of the offence and the need to protect the integrity of competition. Consequently, the appeal was dismissed, and the ban was upheld.

The decision reflects CAS's consistent stance in supporting governing bodies' efforts against corruption and match-fixing, recognising that indirect evidence can suffice if it convincingly demonstrates misconduct. It also emphasises players' personal responsibility to avoid and report manipulation.

In sum, CAS 2021/A/7866 reinforces the principle that safeguarding sporting integrity justifies firm disciplinary action based on well-substantiated circumstantial evidence, provided procedural fairness is duly observed.

26 CAS 2021/A/7866 *Taras Durai v Ukrainian Association of Football* (Court of Arbitration for Sport, 18 April 2023).

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4.4. Comparative and Doctrinal Observations

The trilogy of recent CAS cases involving Ukrainian football stakeholders reveals a significant evolution in the regional lex sportiva, demonstrating how international sports law principles operate amid national instability and geopolitical disruption. Collectively, these decisions illuminate a core doctrinal tension between the autonomy of sports governance and the constraints of legality, procedural fairness, and proportionality that underpin the global regulatory framework.

In *Tymoshchuk v. UAF*, CAS reaffirmed that disciplinary autonomy cannot extend beyond the written law. The tribunal's approach demonstrates that, even in extraordinary moral or political circumstances, sanctions must rest on clear normative foundations rather than on ethical expectations or public sentiment. This judgment reinforces the centrality of the principle of legality (nulla poena sine lege) within sports disciplinary proceedings. It also underscores that due process is not merely a procedural formality but a structural safeguard against the instrumentalisation of sport for political purposes.

By contrast, *Karpaty FC LLC v. FIFA & others* illustrates how CAS relies on substantive continuity and economic reality to define obligations under the concept of sporting succession. The decision reflects a functionalist interpretation of sporting identity: formal corporate separation cannot be used to evade liabilities that persist through organisational or commercial continuity. In this sense, the award contributes to the consolidation of CAS jurisprudence treating football clubs as socio-economic entities bound by their sporting lineage rather than merely by legal incorporation.

Meanwhile, *Durai v. UAF* reaffirms the legitimacy of robust disciplinary enforcement when grounded in adequate evidence and procedural fairness. The tribunal's deference to the national association's findings, while confirming that the evidentiary standard of "comfortable satisfaction" was met, illustrates CAS's dual commitment to fighting corruption in sport and preserving procedural balance between national autonomy and international oversight.

Taken together, these awards illustrate how CAS jurisprudence continues to mediate between federative sovereignty and universal legal standards, ensuring that national associations remain both autonomous and accountable. In the Ukrainian context, they demonstrate that the resilience of sports law lies not in political conformity but in its fidelity to principles of legality, fairness, and institutional continuity, even amidst war and structural uncertainty.

All the above cases highlight several challenges that are particularly relevant to Ukrainian football governance and its interaction with international legal standards. First, there is a clear tension between the federations' practical need to protect the integrity of football and the legal obligation to act strictly within the limits of due process and clearly defined rules. The case of Anatoliy Tymoshchuk vividly illustrates the tension between the practical need

of sports federations to uphold the moral and reputational integrity of sport and the fundamental legal requirement that any disciplinary measures be implemented in strict accordance with procedural due process and clearly articulated legal bases. While the UAF sought to defend national values and public sentiment in a time of war, the CAS emphasised that even in exceptional circumstances, moral or political imperatives cannot override codified legal norms. This decision thus reaffirms that the legitimacy of sports governance depends on adherence to law, not on the intensity of public emotion. Second, Ukrainian clubs and institutions frequently face challenges related to financial instability and organisational restructuring, which, in turn, raise complex questions of succession, continuity, and liability. Third, while CAS is willing to afford deference to domestic disciplinary bodies in matters of integrity and anti-corruption, it will intervene where jurisdictional overreach or evidentiary insufficiency is evident. Therefore, the CAS decisions involving Ukrainian football actors underscore the importance of regulatory clarity, procedural rigor, and legal consistency in sports governance. For Ukrainian football institutions, these cases offer both cautionary lessons and potential guidance: the need to align disciplinary procedures with international standards, to document and legally insulate club restructuring processes, and to ensure that any exercise of regulatory authority is both substantively justified and procedurally sound.

A summary of the main legal outcomes and implications discussed above is provided in Table 1.

***Table* 1. A summary of the main legal outcomes and implications discussed above**

Case / Club	Country	Legal Issue Type	Outcome (CAS/SFT)	Key Implications
Valmiera FC v. LFF (CAS 2024/A/10627)	Latvia	Licensing, Procedural Fairness	Appeal dismissed; LFF decision upheld	CAS deference to national federations; importance of procedural compliance
FK Liepāja v. FIFA (SFT 4A_608/2024, etc.)	Latvia	Contractual Non-Compliance	SFT dismissed all appeals	Repeated non-compliance leads to sanctions; SFT limits review to procedural grounds
Tymoshchuk v. UAF (CAS 2023/A/9443)	Ukraine	Federation Sanction, Reputational Grounds	Appeal upheld; sanctions annulled	National federations must act within legal competence; symbolic sanctions scrutinized

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Case / Club	Country	Legal Issue Type	Outcome (CAS/SFT)	Key Implications
Karpaty FC LLC v. FIFA (CAS 2023/A/10091)	Ukraine	Sporting Succession, Financial Liability	Appeal dismissed; successor held liable	Corporate restructuring does not shield from liabilities; FIFA enforcement validated
Durai v. UAF (CAS 2021/A/7866)	Ukraine	Match-Fixing Allegations	Appeal dismissed; 3-year ban upheld	CAS accepts circumstantial evidence under "comfortable satisfaction" standard

5 LANDMARK CAS CASES: BROADER COMPARATIVE CONTEXT

Several landmark cases have significantly influenced CAS jurisprudence and shaped the application of legal principles in international football. By examining these cases within a broader context, one can discern key turning points and the evolving balance between players' rights and contractual stability.

The first case to highlight is the Webster Case (CAS 2007/A/1298 *Webster v. Heart of Midlothian*).[27] In 2006, one year before the end of his contract with Heart of Midlothian, Andy Webster unilaterally terminated his agreement to join Wigan Athletic. He did so by invoking Article 17 of FIFA's Regulations on the Status and Transfer of Players (RSTP), which allows termination after the "protected period," if compensation is paid.

Previously, players required the club's permission to leave before their contracts expired. The *Webster* ruling introduced a limited right of unilateral termination, giving players a mechanism akin to "buying out" their contract balance. CAS held that Webster was entitled to terminate the agreement and set compensation at approximately £150,000, based on his remaining wages.

This case became a landmark, affirming the enforceability of Article 17 and enhancing players' freedom of movement. It also led to the informal term "Webster clause," widely interpreted by clubs, agents, and lawyers as a strategic tool for mid-contract transfers without club consent.

Over time, subsequent rulings clarified and refined the scope of Article 17. Higher compensation obligations were imposed on elite players, helping limit the fear of widespread contract buyouts. Still, *Webster* marked a shift in jurisprudence by empowering players and opening the door to greater contractual autonomy within professional football.

27 CAS 2007/A/1298 (n 11).

Another pivotal case is the Matuzalem Case (CAS 2008/A/1519 *Shakhtar Donetsk v. Matuzalem & Real Zaragoza*).[28] In 2007, Matuzalem unilaterally terminated his contract with Shakhtar Donetsk to join Real Zaragoza, also invoking Article 17 RSTP. Shakhtar demanded €25 million in compensation, citing a buy-out clause, while Zaragoza contended the compensation should be limited. CAS awarded Shakhtar €11.8 million, far exceeding Webster's amount, basing the award on the player's market value, wages, and the club's financial loss. After both Matuzalem and Zaragoza failed to pay, FIFA imposed a global playing ban. Matuzalem appealed to the Swiss Federal Tribunal (SFT), which annulled the ban in Decision 4A_558/2011,[29] ruling that it was disproportionate and contrary to Swiss public policy, as it effectively destroyed his ability to work.

This case refined the interpretation of Article 17 by rejecting a purely salary-based formula and incorporating broader market considerations. Importantly, the SFT set boundaries on the severity of sporting sanctions, emphasising the need to respect fundamental employment rights. The *Matuzalem* ruling also addressed concerns raised post-*Webster*, ensuring that the right to unilateral termination would not destabilise contractual relationships across the football industry.

The final case worth noting within the scope of this article is the Olympique Lyonnais Case (CAS 2015/A/4137 *Olympique Lyonnais v AS Roma*, Arbitration).[30] This dispute centred on FIFA's solidarity mechanism, which mandates that 5% of any international transfer fee be distributed to clubs that trained a player between the ages of 12 and 23. Olympique Lyonnais challenged the regulation, arguing it infringed on their property rights and contractual freedom.

CAS dismissed the appeal on three grounds:

1. The solidarity mechanism was valid under FIFA regulations.
2. It served as a legitimate measure to support grassroots and youth development.
3. It did not violate public policy or interfere with contractual autonomy.

This case confirmed the legality and enforceability of solidarity contributions, which remain a cornerstone of global football financing. By ensuring that training clubs receive a share of transfer fees, the ruling reinforced incentives to invest in youth development and safeguarded financial redistribution within the football ecosystem.

28 CAS 2008/A/1519 (n 12).

29 SFT 4A_558/2011 *Francelino da Silva Matuzalem and Real Saragossa v FIFA* (Swiss Federal Tribunal, March 27, 2012).

30 CAS 2015/A/4137 (n 13).

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6 DISCUSSION

Precedential value and relevance to Eastern European sports law

The cases discussed above serve as important reference points for understanding the persistent legal challenges that Eastern European states encounter in sports governance. Their precedential value lies less in their factual detail, examined in the previous sections, and more in the structural principles they reinforce. For example, the Matuzalem case (CAS 2008/A/1519), long considered a defining interpretation of Article 17 of the FIFA RSTP, underscores that compensation after unilateral termination must reflect the economic reality of the transfer market and the actual loss suffered by the club. This approach remains particularly relevant in Eastern Europe, where clubs frequently operate under financial pressure and depend significantly on transfer-related income to sustain operations. As Antoine Duval notes, the reasoning in Matuzalem helped close several loopholes associated with mid-contract exits, a point that resonates with the needs of smaller and financially vulnerable leagues.[31]

Similarly, issues of overdue payables and inconsistent contractual compliance, illustrated in the Latvian disputes, align with the broader patterns identified in FIFA Annual Reports (2022–2024), which consistently single out the region for high rates of payment defaults. CAS jurisprudence reinforces that financial instability cannot justify departures from established obligations and that predictable enforcement is essential to the functioning of the football economy.

The importance of redistributive mechanisms is clear from jurisprudence on youth development funding. The Olympique Lyonnais case affirmed the legitimacy of solidarity contributions, a principle of particular significance for Eastern European clubs whose academies form the cornerstone of their sporting and financial models. By safeguarding training compensation and solidarity payments, CAS strengthens the financial ecosystem that supports youth development in underfunded contexts.[32]

A further dimension concerns player mobility. The Webster case (CAS 2007/A/1298 *Webster v. Heart of Midlothian*), while often misunderstood, remains an essential precedent for balancing contractual stability with player autonomy. In markets where players are frequently tied to long-term contracts on modest wages, the affirmation of a limited right to terminate, subject to compensation, has meaningful implications for negotiating power and career progression.

31 Antoine Duval and Gianni Marino, 'Quantifying the Court of Arbitration for Sport' (*Asser International Sports Law Blog*, 23 May 2014) <https://www.asser.nl/SportsLaw/Blog/post/quantifying-the-court-of-arbitration-for-sport-by-antoine-duval-and-gianni-marino> accessed 25 September 2025.

32 Jakub Laskowski, 'Solidarity Compensation Framework in Football Revisited' (2019) 18 The International Sports Law Journal 150. doi:10.1007/s40318-018-0134-y.

When these strands are placed in dialogue, several thematic connections emerge. The jurisprudence surrounding contractual termination (Webster), financial obligations (FK Liepāja cases), and licensing disputes (CAS 2024/A/10627 *Valmiera FC v. LFF*) collectively illustrates the overarching principle of contractual stability that runs through FIFA's regulatory architecture. While these cases arise from different factual backgrounds, each reinforces the expectation that clubs must comply with clearly articulated obligations and that deviations must be justified through transparent procedures grounded in the rules.

Likewise, the comparison between Olympique Lyonnais and the Latvian cases highlights a shared emphasis on federations' discretion to enforce FIFA frameworks, especially where financial obligations serve broader redistributive and developmental functions. The FK Liepāja disputes illustrate the consequences of failing to meet these obligations, reinforcing that regulatory discretion operates within a system that prioritises economic fairness.

Finally, the contrasting treatment of appeals to the Swiss Federal Tribunal, annulled in Matuzalem but upheld in the FK Liepāja cases, demonstrates the narrow circumstances in which state courts will intervene. Both lines of jurisprudence affirm the centrality of proportionality, yet they also show that SFT intervention is reserved for exceptional breaches of fundamental rights or procedural standards. In the Liepāja appeals, the Tribunal confirmed that CAS decisions remain authoritative when due process is respected, even if the club's underlying financial situation is difficult.

Taken together, these precedents illuminate how *lex sportiva* interacts with the specific vulnerabilities of Eastern European football, shaping an increasingly coherent framework that reinforces contractual certainty, financial responsibility, and procedural legality across diverse national environments.

Ukrainian football clubs, like many in post-Soviet states, often face CAS disputes over financial fair play, player transfers, and contract breaches. A recurring pattern is clubs like Dynamo Kyiv or Shakhtar Donetsk grappling with unpaid wages or transfer fees, often due to economic instability in Ukraine, especially since the 2014 war with the Russian Federation. For instance, clubs have been sanctioned for failing to honour contracts with players or other clubs, leading to CAS appeals. The legal framework here hinges on FIFA's Regulations on the Status and Transfer of Players and UEFA's Financial Fair Play rules, which Ukrainian clubs struggle to comply with due to fluctuating budgets and currency devaluation. A key challenge is the clubs' limited financial transparency, which complicates proving compliance in CAS hearings. Many cases involve disputes over whether payments were made or whether clubs acted in good faith; CAS often rules against them when the documentation is shaky. Another issue is the jurisdictional overlap clash: Ukrainian law may conflict with FIFA or UEFA regulations, leaving clubs in a bind. For example, Shakhtar's disputes over player contracts post-2014 often cited force majeure due to the war, but CAS tends to uphold strict contractual obligations unless extraordinary evidence is provided. Patterns show that smaller clubs, like Metalist Kharkiv, face liquidation risks after losing

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CAS cases because they lack the legal resources of bigger clubs. The appeal process is costly, and CAS's Swiss-based arbitration can feel inaccessible for Ukrainian entities navigating language and procedural barriers. Corruption allegations in Ukrainian football also muddy the waters, with some clubs accused of leveraging local influence to dodge accountability, only to be exposed in CAS's stricter legal environment. To sum up, Ukrainian clubs face a cycle of financial strain, regulatory non-compliance, and weak legal defences in CAS.

It should be noted that the most high-profile cases considered by the CAS after 2014, and even more so after the full-scale Russian invasion of Ukraine in 2022, are related directly or indirectly to the consequences of such an invasion. In particular, this applies to two of the three cases studied earlier in this research.

Regarding the Tymoshchuk case, CAS 2023/A/9443 (*Anatoliy Tymoshchuk v. Ukrainian Association of Football*), CAS was confronted with the UAF's attempt to extend its disciplinary jurisdiction to the conduct of a retired player, based on non-football-related public actions and statements concerning the Russian aggression against the player's home country that allegedly harmed the image of Ukrainian football. CAS annulled the sanctions, finding that the UAF had exceeded its legal competence and failed to demonstrate that the relevant disciplinary provisions applied to extraneous conduct or to individuals no longer under its regulatory reach. This decision not only clarified the limits of national federations' disciplinary authority but also underscored the need for a clear legal framework when imposing severe sanctions, especially those of a symbolic or reputational nature.

Against this broader backdrop, the case of FC Karpaty provides a concrete illustration of how wartime economic disruption has intensified the legal and organisational challenges facing Ukrainian clubs. Since the onset of Russian aggression in 2022, Ukrainian football has experienced a severe financial crisis: nearly twenty professional clubs have gone bankrupt or ceased operations, multiple stadiums and training facilities have been damaged, sponsorship and broadcasting income have collapsed, and many teams have been forced to reduce budgets, release players, or rely on irregular emergency funding. It is within this environment of systemic instability that the dispute examined in CAS 2023/A/10091 (*Karpaty FC LLC v FIFA & HNK Cibalia Vinkovci & FC Karpaty Halych*) arose. The case centred on issues of legal identity, financial continuity, and the application of the doctrine of sporting succession, as the newly registered Karpaty FC LLC sought to avoid its predecessor debts. CAS rejected this attempt, confirming that a club which continues the sporting identity, infrastructure, and operational functions of a defunct entity may be deemed its successor despite formal corporate restructuring. This ruling not only reflects established CAS jurisprudence but also highlights a recurring challenge for Ukrainian clubs seeking to reorganise amid acute financial distress. Karpaty's deteriorating financial condition is not an isolated incident but a representative example of the systemic pressures affecting Ukrainian football as a whole.

The third case examined in this article, involving a Ukrainian entity, concerns the issue of match-fixing in football. In the Durai case, CAS 2021/A/7866 (*Taras Durai v. Ukrainian Association of Football*), the UAF relied primarily on circumstantial evidence to sanction a player for alleged involvement in match-fixing, invoking the principle of integrity in sport. CAS upheld this approach, confirming that the "comfortable satisfaction" standard allows for a flexible evidentiary threshold when the integrity of the game is at stake. However, this position demands a high degree of procedural fairness, which the CAS found to be met in that instance.

7 CONCLUSION

Eastern European football operates within a fragmented yet evolving legal environment in which lex sportiva interacts with national regulations, with uneven institutional capacities. CAS jurisprudence plays a crucial harmonising role, however, persistent issues of financial instability, inconsistent enforcement, and procedural ambiguity, undermine predictability and fairness. The examined cases demonstrate both convergence with global sports law principles and the persistence of regional vulnerabilities rooted in governance, economics, and geopolitics. Strengthening procedural safeguards, ensuring financial compliance, and aligning domestic frameworks with CAS standards are essential to enhancing legal certainty and institutional credibility in the region's football governance.

To strengthen the legal and institutional coherence of Eastern European football governance, several complementary reforms are necessary. First, greater harmonisation should be pursued by aligning national federation regulations with the procedural standards established by CAS, UEFA, and FIFA, ensuring consistency in dispute resolution. Second, sustained capacity building through investment in legal education and specialised adjudicatory infrastructure is essential to professionalise national dispute resolution bodies. Third, enhanced financial oversight is required, with robust licensing and auditing mechanisms designed to prevent recurring cases of non-payment and insolvency. Transparency must also be prioritised by mandating the publication of disciplinary and licensing decisions, thereby fostering accountability and trust in governance processes. Procedural reform should focus on standardising appeal pathways and clarifying jurisdictional boundaries between domestic authorities and CAS to reduce uncertainty. Furthermore, legal certainty can be improved by codifying clear definitions of "sporting succession"to prevent ambiguity during club restructuring or re-registration. Finally, promoting EU good governance and integrity frameworks would reinforce institutional independence and embed a culture of accountability within the regional football ecosystem.

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REFERENCES

1. Blackshaw I, 'Introductory Remarks' in Wild A (ed), *CAS and Football: Landmark Cases* (ASSER International Sports Law Series, Springer 2011). doi:10.1007/978-90-6704-808-8_2
2. Blackshaw I, *Mediating Sports Disputes: National and International Perspectives* (ASSER International Sports Law Series, Springer 2002)
3. Blackshaw I, 'The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively "Within the Family of Sport"' (2003) 2(2) Entertainment and Sports Law Journal 4. doi:10.16997/eslj.139
4. Diaconu M, Kuwelkar S and Kuhn A, 'The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update' (2021) 21 The International Sports Law Journal 27. doi.org/10.1007/s40318-021-00181-3
5. Duval A and Marino G, 'Quantifying the Court of Arbitration for Sport' (*Asser International Sports Law Blog*, 23 May 2014) <https://www.asser.nl/SportsLaw/Blog/post/quantifying-the-court-of-arbitration-for-sport-by-antoine-duval-and-gianni-marino> accessed 25 September 2025
6. Godin PD, 'Sport Mediation: Mediating High-Performance Sports Disputes' (2017) 33(1) Negotiation Journal 25. doi:10.1111/nejo.12172
7. Goodrum N, 'Mediation in Sports Disputes: Lessons from the UK' (*LS LawInSport*, 4 July 2013) <https://www.lawinsport.com/topics/regulation-a-governance/item/mediation-in-sports-disputes-lessons-from-the-uk> accessed 25 September 2025.
8. Grening JE, 'Arbitration of Olympic Eligibility Disputes: Fair Play and the Right to be Heard' (2001) 12(1) Marquette Sports Law Review 261
9. Hesse V, 'Is Mediation Suitable to Resolve Sports Related Disputes?' (*LS LawInSport*, 5 November 2014) <https://www.lawinsport.com/topics/item/is-mediation-a-suitable-to-resolve-sports-related-disputes> accessed 25 September 2025
10. Kamenecka-Usova M and others, 'Research Patterns in Sports Law and Sports Governance: A Scopus Bibliometric Study' (2025) 7 Frontiers in Sports and Active Living 1590858. doi:10.3389/fspor.2025.1590858
11. Laskowski J, 'Solidarity Compensation Framework in Football Revisited' (2019) 18 The International Sports Law Journal 150. doi:10.1007/s40318-018-0134-y

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Summary: 1. Introduction. – 2. Methodology. – 3. Analysis of Recent CAS and SFT Cases Involving Latvian Clubs. – *3.1. CAS 2024/A/10627 Valmiera FC v. Latvian Football Federation. – 3.2. The FK Liepāja cases SFT 4A_608/2024, SFT 4A_612/2024, and SFT 4A_614/2024. – 3.3. Comparative and Doctrinal Observations.* – 4. Analysis of Recent CAS Cases Involving Ukrainian Clubs and Players. – *4.1. CAS 2023/A/9443 Anatoliy Tymoshchuk v. Ukrainian Association of Football (UAF). – 4.2. CAS 2023/A/10091 Karpaty FC LLC v FIFA & HNK Cibalia Vinkovci & FC Karpaty Halych. – 4.3. CAS 2021/A/7866 Taras Durai v. Ukrainian Association of Football. – 4.4. Comparative and Doctrinal Observations.* – 5. Landmark CAS Cases: Broader Comparative Context. – 6. Discussion. – 7. Conclusion.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Тематичне дослідження

ПРАВОВІ ВИКЛИКИ У СХІДНОЄВРОПЕЙСЬКОМУ ФУТБОЛІ: LEX SPORTIVA ТА ЙОГО РЕГІОНАЛЬНІ ОСОБЛИВОСТІ

Марина Каменецька-Усова*, Максим Ткалич та Еліна Грейн

АНОТАЦІЯ

Вступ. *Східноєвропейський футбол стикається з унікальними правовими викликами, що виникають на перетині міжнародного спортивного права, управління клубами та транскордонних спорів. Незважаючи на те, що важливість регіональних ліг зростає, правова база для вирішення конфліктів, особливо у сфері трансферів, спортивного правонаступництва та забезпечення виконання контрактів, залишається недостатньо вивченою. Це дослідження усуває таку прогалину, системно аналізуючи, як нещодавні рішення Спортивного арбітражного суду (CAS) та правила національних спортивних федерацій формують підходи до вирішення спорів у східноєвропейському футболі, та оцінюючи, наскільки ці структури захищають клуби, гравців та федерації на практиці.*

Методи. *У статті використовується доктринальна і порівняльна правова методологія, з оглядом першоджерел (арбітражних рішень CAS, національного законодавства та законодавства ЄС, а також правил федерацій) та вторинної літератури (наукових статей та звітів). Цілеспрямований кейс-стаді підхід розглядає окремі ключові рішення CAS у регіоні (наприклад, ФК «Карпати» проти ФІФА, ФК «Валмієра» проти ЛФФ) для аналізу судових рішень та правових принципів. Порівняльний аналіз допоміг зіставити правові доктрини різних юрисдикцій, а якісний синтез - визначити повторювані тенденції, прогалини та правові ризики.*

Результати та висновки. *У результаті здійсненого аналізу було зроблено кілька ключових висновків. По-перше, судова практика CAS все частіше застосовує доктрину спортивного правонаступництва таким чином, що це накладає важкі фінансові зобов'язання на клуби-покупці, часто без належних процесуальних гарантій. По-друге,*

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виконання рішень CAS у національних судах неоднакове у різних країнах Східної Європи, з різними тлумаченнями юрисдикції, державної політики та res judicata. По-третє, правилам національних асоціацій часто бракує чіткості щодо шляхів вирішення спорів, що залишає неоднозначності щодо права на апеляцію та механізмів правового захисту. По-четверте, незважаючи на інструменти ЄС (наприклад, Регламент 1215/2012, Рим I), їх використання у спорах щодо спортивних контрактів є незначним через сприйняття автономності спортивного права. Ці висновки вказують на перешкоди у передбачуваності, прозорості та застосуванні механізмів захисту спортивного права.

Ключові слова. *Управління футболом; lex sportiva; спортивне право; Східна Європа; спортивні спори.*

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